JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. No.38 of 2021
Sambu Construction Co. Ltd.
Versus
Laraib Energy Limited and another

Dates of Hearing:	20.05.2021, 31.05.2021 & 03.06.2021
Appellant by:	Barrister Ehsaan Ali Qazi
Respondents by:	Syed Shahab Qutab and M/s Maria Farooq, Usama Jamshaid and Mustafa Khan, Advocates for respondent No.1. Mr. Muhammad Javaid Iqbal Malik, Advocate for respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 104 read with Order XLIII, Rule 1 of the Civil Procedure Code, 1908 **("C.P.C.")**, the appellant, Sambu Construction Co. Ltd., impugns the order dated 13.04.2021 passed by the Court of the learned Additional District Judge, Islamabad, dismissing the appellant's application for interim injunction filed under Order XXXIX, Rules 1 and 2 C.P.C. along with its suit for declaration, perpetual and mandatory injunction. In the said application, the appellant had prayed for the grant of interim injunction to restrain the respondents from encashing the bank guarantee dated 11.09.2018 for an amount of US Dollars 600,000.

2. The facts essential for the disposal of this appeal are that on 19.06.2009, the appellant and respondent No.1, Laraib Energy Limited, entered into a contract for the supply of equipment for the 84 Megawatt New Bong Escape Hydro-Electric Power Complex in Azad Jammu & Kashmir **("the contract")**. The contract price was agreed to be US Dollars 85 million. Clause 1.4 of the contract provides that the contract shall be governed and construed in accordance with the law of England. Under Clause 4.3 of the contract, the appellant was required to furnish security for the performance of its obligations in the amount of 15% of the contract price. This performance security was to be in the form of an unconditional bank guarantee issued by a bank acceptable to respondent No.1. Furthermore, it was to be in the form annexed at Annex-B of the contract. Clause 4.3(f) provides that

respondent No.1 shall return the performance security to the appellant within 21 days after the appellant became entitled to receive the performance certificate. It is an admitted position that till date a performance certificate has not been issued to the appellant, and in the suit the appellant has pleaded *inter alia* that respondent No.1's failure to issue the performance certificate is without any legal justification.

3. In fulfillment of its obligations under Clause 4.3 of the contract, the appellant initially furnished a bank guarantee issued by Korea Eximbank. Subsequently, this bank guarantee was replaced with bank guarantee No.0332PBG001718, dated 11.09.2018, for an amount of US Dollars 600,000 issued by respondent No.2, Faysal Bank Limited. This bank guarantee is valid up to 10.09.2021.

4. Apparently, the appellant has fulfilled its obligations under the contract and respondent No.1 has taken over the project by issuing taking over certificates. It is an admitted position that respondent No.1 commenced its commercial operations on 23.03.2013. For the operation and maintenance of the project, respondent No.1 has engaged the services of a company which has nothing to do with the appellant.

5. On 22.10.2009, respondent No.1 had entered into a Power Purchase Agreement ("PPA") with the Central Power Purchasing Agency (Guarantee) Limited ("CPPA-G"). Under the terms of the PPA, respondent No.1 was allowed a certain number of hours of energy outages for each year. Clause 9.2 read with Schedule 6 of the PPA made respondent No.1 liable to pay Liquidated Damages ("LDs") to CPPA-G for each kilowatt hour ("kWh") of excess outage energy in the amount equal to 100% of the prevailing indexed fixed energy purchase price per kWh for the relevant year, if the forced or partial forced outages exceeded the agreed allowances by 200 hours.

6. Clause 4.2(b)(ii) of the contract sets out the appellant's covenant to ensure that its acts or omissions and those of its personnel, including sub-contractors of any tier, shall cause or contribute to any breach by respondent No.1 or any of respondent No.1's obligations under or pursuant to the Project Documents. "Project Documents" has

been defined in the contract to include the PPA executed between respondent No.1 and CPPA-G. Clause 4.2(b)(iii) of the contract provides *inter alia* that the appellant shall indemnify, defend and hold harmless respondent No.1 from and against all losses suffered or incurred by or brought against respondent No.1 arising out of any breach of the said clause of the contract.

7. Vide letter dated 08.11.2013, respondent No.1 informed the appellant that an amount of Rs.213,817,161/- was payable to CPPA-G under the terms of the PPA as LDs for 514.43 excess forced outage hours up to 31.10.2013. The position taken by respondent No.1 was that the excess outage hours were for reasons entirely attributed to the appellant. Respondent No.1 notified the appellant of its entitlement to recover the said amount from the appellant. Vide letter dated 03.06.2014, respondent No.1 reiterated the position taken in its earlier letter dated 08.11.2013. Vide letter dated 18.06.2014, the appellant disputed respondent No.1's claim for LDs and denied having caused any excess forced outage hours.

8. On 09.01.2015, a settlement agreement was executed between the appellant and respondent No.1. Clause 3.5 of the said agreement is reproduced herein below:-

> ***"Sambu agrees and undertakes to pay to the Employer the liquidated damages for excess Forced or Partial Forced Outages, caused by Sambu, imposed by the Power Purchaser and payable by the Employer, within twenty-one (21) days of receipt by the Employer (as notified to Sambu by the Employer) of the invoice issued by Power Purchaser for such purpose. The commitment to pay liquidated damages for excess Forced or Partial Forced Outages, caused by Sambu, shall remain effective during the Extended DNP Term."***

9. In the said settlement agreement, respondent No.1 also undertook to pay US Dollars 1,824,560 withheld in respect of an interim payment statement dated 26.03.2013 within a period of three days. Furthermore, the Defects Notification Period ("DNP") was extended up to 30.06.2016. It was also agreed that the payment of the amounts specified in Clause 3 of the settlement agreement would be deemed to be full and final settlement of all liabilities, claims and/or dues payable by either party to the other party under the contract.

10. On 06.03.2017, CPPA-G sent an invoice for the payment of LDs aggregating Rs.214,576,249/- due to excess outage energy for the

period between 23.03.2013 and 22.03.2014. On 10.03.2017, respondent No.1 informed the appellant about CPPA-G's invoice for LDs, and requested the appellant to provide an irrevocable and unconditional bank guarantee of Rs.215 million with a validity period until 31.12.2017 to secure respondent No.1's financial exposure. The appellant was also cautioned that if it failed to furnish a bank guarantee for the said amount, respondent No.1 would encash the bank guarantee for US Dollars 600,000 already furnished by the appellant and which is due to expire on 10.09.2021.

11. The appellant, in its letter dated 14.03.2017, took the position that since the appellant and respondent No.1 had agreed to resolve and close all their outstanding claims by executing the settlement agreement, and since CPPA-G's claim for LDs due to excess outage energy pertains to the period prior to the execution of the settlement agreement, respondent No.1 was not justified in requesting the appellant to secure respondent No.1's financial exposure against CPPA-G. Furthermore, the appellant asserted that by executing the settlement agreement, respondent No.1 had relinquished its right to make a claim against the appellant with respect to the excess outage energy.

12. Vide letter dated 12.10.2020, CPPA-G informed respondent No.1 that it had adjusted/recovered LDs amounting to Rs.214,576,249/- plus interest amounting to Rs.61,702,899/- from respondent No.1's pending invoices.

13. Respondent No.1 has invoked the dispute resolution clause in the PPA against CPPA-G and presently arbitration proceedings under the Rules of the International Chamber of Commerce("ICC") are pending between said parties. Respondent No.1 filed its request for arbitration on 19.11.2020. In this dispute resolution process, the expert had given a decision on 12.10.2020 upholding CPPA-G's claim for LDs amounting to Rs.214,576,249/- against respondent No.1. The dispute taken by respondent No.1 to arbitration against CPPA-G primarily relates to the method and formula adopted by CPPA-G for the calculation of LDs. It remains to be seen whether the Arbitral Tribunal upholds the expert's said decision.

14. Vide letter dated 19.01.2021, respondent No.1 informed the appellant that CPPA-G had recovered Rs.276,279,148/- as LDs for excess outage energy, and that it had filed a request for arbitration against CPPA-G with the ICC Secretariat on 19.11.2020 and is confident to get an arbitration award in its favour which should substantially reduce the amount of the LDs. Furthermore, the appellant was requested to enhance the amount of the performance security from US Dollars 600,000 to US Dollars 1 million to secure respondent No.1 against the amount recovered from it by CPPA-G as LDs. The appellant was threatened with the encashment of the bank guarantee in the event it failed to enhance its quantum to US Dollars 1 million.

15. On 15.02.2021, the appellant filed a suit for declaration, perpetual and mandatory injunction before the Court of the learned Additional District Judge, Islamabad praying for a declaration to the effect that the dispute between respondent No.1 and CPPA-G regarding excess outage energy has no nexus with the appellant, and that respondent No.1's demand for LDs against the appellant is without justification and contrary to the terms of the contract. The appellant had also sought a direction to respondent No.1 to return the bank guarantee furnished by the appellant. Along with the said suit, the appellant filed an application for interim injunction to restrain respondent No.1 and the issuing bank/respondent No.2 from encashing the bank guarantee for US Dollars 600,000.

16. Vide order dated 13.04.2021, the learned Trial Court dismissed the appellant's application for interim injunction. The said order has been assailed by the appellant in the instant appeal.

17. Two days after the dismissal of the appellant's application for interim injunction, respondent No.1, vide letter dated 15.04.2021, called upon respondent No.2 to encash the bank guarantee. Vide ad-interim order dated 19.04.2021, this Court restrained the respondents from encashing the bank guarantee.

18. The appellant's suit is still pending adjudication before the learned Civil Court, and respondent No.1 has filed an application under Section 4 of the Recognition and Enforcement (Arbitration

Agreements and Foreign Arbitral Awards) Act, 2011 ("the 2011 Act") praying for the proceedings in the suit to be stayed on the basis of the arbitration clause in the contract. This application has not been decided as yet.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:-

19. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the appellant has fulfilled its obligations under the contract, and as far back as 23.03.2013, respondent No.1 issued taking over certificates and commenced its commercial operations by generating electricity; that from 23.01.2013 onwards respondent No.1 had engaged the services of an operations and management contractor who had no nexus with the appellant; that the excess outage energy was caused due to poor operating methods and/or the negligence of respondent No.1's project contractor; that the period for which CPPA-G imposed LDs on respondent No.1 (i.e. between 23.03.2013 and 22.03.2014), respondent No.1's project operator was responsible for the operations of the power plant; that the LDs had been imposed by CPPA-G on respondent No.1 under the terms of the PPA to which the appellant is not privy; that the terms of the contract between the appellant and respondent No.1 do not envisage an enhancement in the quantum of the bank guarantee to protect respondent No.1's financial exposure to a claim made by a third party; that the demand made by respondent No.1 for the encashment of the bank guarantee due to the appellant's refusal to enhance its quantum is unjustified; that if respondent No.1 is permitted to encash the bank guarantee, it would cause irretrievable injustice to the appellant; that since the arbitration proceedings between respondent No.1 and CPPA-G are still pending, special equities existed in the appellant's favour entitling it to an interim injunction to restrain respondent No.1 from encashing the bank guarantee; and that since the appellant had not committed any default in its obligations under the contract, respondent No.1's demand for the encashment of the bank guarantee must be termed as fraudulent.

20. Furthermore, it was submitted that respondent No.1's claim against the appellant for LDs predates the execution of the settlement agreement dated 09.01.2015 between the appellant and respondent No.1; that with the execution of the said agreement, all matters and disputes between the parties, including the dispute regarding the excess outage energy stood settled; that Clause 3.7 of the said agreement clearly provides that payment of the amounts specified in the said agreement shall be deemed to *be "full and final settlement of all liabilities, claims and/or dues payable by either party to the other party;"* and that all three ingredients for the grant of an injunction in the appellant's favour are present in this case. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned order dated 13.04.2021 to be set-aside.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.1:-

21. On the other hand, learned counsel for respondent No.1 submitted that Clause 4.2(b)(ii) of the contract provides that the appellant shall commit no act or omission which causes or contributes to any breach of respondent No.1's obligations to CPPA-G under or pursuant to the PPA; that CPPA-G had deducted LDs amounting to Rs.214,576,249/- from respondent No.1's invoices pursuant to the provisions of the PPA; that respondent No.1 has disputed the method adopted by the CPPA-G for the calculation of the LDs; that the appellant is under a contractual obligation to pay to respondent No.1 the amount deducted from the latter's invoices as LDs; that respondent No.1 is justified in requiring the appellant to enhance the quantum of the bank guarantee to an amount equivalent to the one deducted from respondent No.1's invoices since the excess outage energy during the DNP were caused by the appellant; that the appellant remains responsible to reimburse the LDs that are imposed on it by CPPA-G due to excess outage energy for reasons attributable to the appellant during the DNP; that it was to address respondent No.1's financial exposure that caused it to request the appellant to enhance the quantum of the bank guarantee from US Dollars 600,000 to US Dollars 1 million; that prior to the institution of the suit, respondent No.1 had not made a call on the guarantee; that it was only

after the appellant had sought the discharge of the guarantee that respondent No.1 made a call on the guarantee and that too after the appellant's application for interim injunction was dismissed by the learned Civil Court; and that the contractual disputes between the appellant and respondent No.1 are to be resolved in accordance with the dispute resolution clause in the contract and, in this regard, respondent No.1 has already filed an application before the learned Civil Court for the proceedings in the suit to be stayed.

22. Furthermore, it was submitted that Clause 3.5 of the settlement agreement dated 09.01.2015 clearly provides that the appellant will pay to respondent No.1 LDs for excess outage energy caused by the appellant and that are imposed by CPPA-G on respondent No.1; that the invoice for LDs was issued to respondent No.1 by CPPA-G on 05.03.2017; that since a demand for payment of LDs had not been made by CPPA-G prior to the execution of the settlement agreement, it was untenable for the appellant to assert that the matter regarding the payment of LDs due to excess outage energy was settled between the appellant and respondent No.1; that the settlement agreement provides a mechanism for the payment of LDs by the appellant to respondent No.1 as and when such damages are imposed by CPPA-G on respondent No.1; that since Clause 3.5 of the settlement agreement envisages the appellant's future obligation to pay LDs, such obligation had not been extinguished by Clause 3.7 of the said agreement; and that the bank guarantee had been renewed from time to time so as to secure the fulfillment of the appellant's obligations, including the obligation to pay LDs.

23. It was further submitted that the bank guarantee furnished by the appellant does not make its encashment contingent on establishing default of the appellant's obligations under the underlying contract; that respondent No.1's demand for the enhancement of the bank guarantee was not solely motivated by the appellant's failure to enhance the quantum of the bank guarantee; that ever since 2013 the appellant had been made aware of respondent No.1's claim for LDs due to excess outage energy caused by the appellant; that respondent No.1 was justified in making this claim under Clause 4.2 of the

contract and Clause 3.5 of the settlement agreement; that even otherwise respondent No.1's demand for the enhancement in the quantum of the bank guarantee cannot be termed as fraud of an egregious nature warranting the issuance of an injunction to restrain its encashment; that respondent No.1's demand for an enhancement in the quantum of the bank guarantee was commercially reasonable; that the appellant had undertaken to indemnify respondent No.1 for all losses incurred *inter alia* on account of LDs imposed or recovered by CPPA-G under the PPA; that the appellant can seek damages against respondent No.1 if it feels that respondent No.1 was not justified in making a call on the bank guarantee; that none of the ingredients for the grant of an interim injunction were present in the case at hand; and that the impugned order passed by the learned Trial Court does not suffer from any legal infirmity. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

24. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 18 above and need not be recapitulated.

25. What is most relevant for the Court while deciding whether or not to issue an injunction to restrain the encashment of a bank guarantee are the terms incorporated therein. Bank guarantees which provide that they are payable by the guarantor on demand are considered to be unconditional. In such cases, the dispute between the beneficiary and the party at whose instance the guarantee is given is immaterial and of no consequence. If a bank furnishes an irrevocable and unconditional bank guarantee, it is not open to the bank to raise objections to pay the amount under the guarantee. Courts ought not to interfere with obligations undertaken by a bank under an irrevocable and unconditional bank guarantee. In other words interim injunction cannot be granted to interfere with the bank's obligation to make payment to a beneficiary who makes a demand for the encashment of an irrevocable and unconditional bank guarantee. This is more so when the bank undertakes an obligation to pay on the

beneficiary demand without any demur and regardless of any dispute between the beneficiary and the principal debtor under a contract pursuant to which the bank guarantee is furnished. Such a bank guarantee has been consistently held to be an independent autonomous contract between the bank and the beneficiary and this autonomy is ordinarily not affected by the underlying contract between the creditor and the principal debtor or the disputes that may arise between them. The only two exceptions where Courts may consider granting an injunction to restrain the encashment of a bank guarantee is (i) where fraud by the beneficiary is proved to the satisfaction of the Court and (ii) where a case of irretrievable injustice is made out by the party which furnished the bank guarantee. With this preface, I shall now decide whether the order passed by the learned Trial Court dismissing the appellant's application for interim injunction is liable to be interfered with.

26. Bank guarantee No.0332PBG001718 for the amount of US Dollars 600,000 issued by respondent No.2 (guarantor) at the instance of the appellant (principal debtor) in favour of respondent No.1 (beneficiary) is in conformity with the requirement of Clause 4.3(b) of the contract which requires the performance security to be in the form annexed at Annex-B of the contract. The said guarantee is irrevocable and unconditional in nature and is valid up to 10.09.2021. It would be apposite to reproduce herein below the third and eleventh unnumbered paragraphs of the bank guarantee since the same are relevant for the purposes of this case:-

> ***"At the request of the Principal, we the undersigned bank, M/s. Faysal Bank Limited, a bank organized under the laws of the Islamic Republic of Pakistan, having its registered Head office at Faysal House, Street No.02, Shahrah-e-Faisal, Karachi through its Branch at 15-West Blue Area, Islamabad. ("the Bank"), by this guarantee (the "Guarantee"), irrevocably and unconditionally undertake to pay you, the Beneficiary, as primary obligor and not as surety, any sum or sums not exceeding the Guaranteed Amount (as defined below), wholly or partially, forthwith upon receipt by us of your (or any person to which you have assigned the benefit of this Guarantee in accordance with this Guarantee) first demand in writing, and pursuant to one or more demands (provided that such demands and any prior demands do not in the aggregate exceed the Guaranteed Amount) substantially in the form of the demand set out in Schedule hereto (the "Demand") without any further proof or documents, and notwithstanding any objection by the Principal or by any other party of whatever capacity and without***

being entitled to enquire whether or not such payment is lawfully due and payable by the Principal. If this Guarantee is partially drawn by the Beneficiary, then the amount of this Guarantee shall be reduced by an amount corresponding to such drawing."

"The Bank shall not in any way be released or discharged from any liability under this Guarantee by any invalidity, illegality or unenforceability of the Contract nor by any alteration, amendment or variation in the terms of the Contract nor by any allowance of time by the Beneficiary under the Contract nor by any forbearance or forgiveness or indulgence in respect of any matter or thing concerning the Contract on the part of the Beneficiary nor by the insolvency, bankruptcy, winding up or reorganisation of the Beneficiary (or any analogous event or the exercise of any power of disclaimer arising or in such circumstances) nor by any dispute or disagreement whatsoever between the Beneficiary and the Principal under or in relation to the Contract."
(Emphasis added)

27. Respondent No.1 vide its letter dated 15.04.2021 called upon respondent No.2 to encash the bank guarantee. In the said letter, respondent No.1 has not alleged any default against the appellant in the fulfillment of its obligations under the contract. Respondent No.1 has made a plain and simple demand for the encashment of the said guarantee.

28. The terms of the bank guarantee furnished by the appellant show that it is irrevocable and unconditional in nature; respondent No.2 is liable to forthwith pay respondent No.1 upon the latter's first demand in writing; the payment is to be made by respondent No.2 without requiring respondent No.1 to provide any other document and notwithstanding any objection by the appellant; respondent No.2 is to make the payment without inquiring as to whether the guaranteed amount is lawfully due and payable by the appellant; and respondent No.2 is not discharged from its liability under the guarantee by any dispute or disagreement between the appellant and respondent No.1 under the contract. These are the terms to which the appellant has agreed.

29. The liability of respondent No.2 to make payment to respondent No.1 under the said guarantee has not been made contingent on the proof of the appellant's default in fulfillment of its obligations under the contract. Therefore, respondent No.1 cannot be prevented by way of an injunction from enforcing the bank guarantee on the pretext that the appellant had not committed any breach of its obligations under

the underlying contract. The mere fact that the bank guarantee refers to the underlying contract between the appellant and respondent No.1 without making the obligation of respondent No.2 to make payment on proof of default in its terms by the appellant would not make the guarantee into a conditional one. To require respondent No.1 to establish that the appellant had committed such default before a demand for the encashment of the guarantee could be made would amount to rewriting the terms of the guarantee or reading into it terms that find no mention therein. This the Courts cannot do.

30. The disputes as to whether the excess outage energy for the period between 23.03.2013 and 22.03.2014 were caused for reasons attributable to the appellant; whether the appellant has committed any default in the fulfillment of its obligations under the contract; whether respondent No.1 is justified in requiring the appellant to enhance the quantum of the bank guarantee from US Dollars 600,000 to US Dollar 1 million to secure itself against the finance exposure caused by the expert's determination under the provisions of the PPA that respondent No.1 is liable to pay LDs amounting to Rs.214,576,249/- to CPPA-G; whether upon the execution of the settlement agreement, respondent No.1's claim to recover LDs from the appellant due to excess outage energy are all to be resolved through an adjudicatory process either by the learned Civil Court or in accordance with the dispute resolution mechanism provided in the contract. As mentioned above, the learned Civil Court is yet to decide the application filed by respondent No.1 for the proceedings in the suit to be stayed. For the present purposes what needs to be determined is whether the learned Civil Court committed any illegality in dismissing the appellant's application for interim injunction.

31. It now needs to be determined whether, in the instant case, any of the two exceptions (i.e. irretrievable injustice and egregious fraud) for interference by the Court in the banks' obligations under documentary credits are satisfied. There is no dispute that presently the suit instituted by the appellant against the respondents is pending before the learned Civil Court. In this suit, the appellant has sought a declaration to the effect that respondent No.1 was not entitled to

encash the bank guarantee. Furthermore, the appellant has sought an injunction to permanently restrain respondent No.1 from encashing the bank guarantee. Since the substantive prayers in the suit relate to the bank guarantee in question, I see no situation of "irretrievable injustice" if, at the present moment, respondent No.1 is allowed to encash the bank guarantee. Irretrievable injustice means a situation where, after the bank guarantee is allowed to be encashed, it would be impossible for the principal debtor (i.e. the party at whose instance the guarantor bank furnishes the bank guarantee) to recover from the beneficiary the amount under the guarantee if it is finally held that the beneficiary was not entitled to the amount. In the case of Montage Design Build Vs. The Republic of Tajikistan (2015 CLD 8), this Court held as follows:-

> ***"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 irretrievable injury or injustice."***

32. In the case at hand, justice can be rendered to the appellant if it finally succeeds in the suit. If the learned Civil Court comes to the conclusion that respondent No.1 was not justified in making a call on the guarantee, or that its encashment was not lawful, it can issue a mandatory injunction directing respondent No.1 to repay the amount encashed to the appellant with all concomitant benefits that it may deem appropriate. This would be in consonance with Clause 4.3(e) of the contract which provides that respondent No.1 shall indemnify and hold harmless the appellant against and from all losses resulting from a claim under the performance security to the extent to which respondent No.1 was not entitled to make a claim. Learned counsel for respondent No.1 had also submitted that the appellant could sue respondent No.1 for damages if it considered that encashment of the bank guarantee was unjustified. Therefore, there cannot be any basis for the appellant's apprehension that injustice of irretrievable nature

would be caused to the appellant if the bank guarantee is allowed to be encashed.

33. Courts can restrain the encashment of irrevocable and unconditional bank guarantees in cases where fraud of an egregious nature has been played on the principal debtor of which the guarantor bank has prior notice. Fraud is required to be pleaded and established when it is put forth as a ground for seeking a restraint order against the encashment of a bank guarantee. In the case of Montage Design Build Vs. The Republic of Tajikistan (*supra*), this Court held that in order to seek an injunction on the ground of fraud *"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."*

34. Order VI, Rule 4 C.P.C. mandates that where in a suit fraud is alleged, the party alleging fraud must furnish all material particulars constituting such fraud. In paragraph 24 of the suit, it has been pleaded that respondent No.1's failure to issue a performance certificate and its demand to enhance the quantum of the bank guarantee is for a "fraudulent purpose" whereas in paragraph 26 it has been pleaded that respondent No.1's demand to renew the bank guarantee and to enhance the guarantee amount is "fraudulent." It ought to be borne in mind that an isolated or stray allegation of fraud without material particulars is not enough for the Courts to restrain the performance of obligations under documentary credits such as an unconditional bank guarantee or letter of credit. In the case at hand, the plaint does not disclose material particulars in support of the so-called plea of fraud as required under Order VI, Rule 4 C.P.C. There is nothing on the record to show that the appellant had given notice to respondent No.2 as to any fraud having been committed by respondent No.1. On the contrary, the appellant had from time to time acceded to respondent No.1's request by extending the validity of the bank guarantee which is still valid and due to expire on 10.09.2021.

35. The non-issuance of a performance certificate by respondent No.1 is a contractual dispute and would, at best, constitute a contractual breach by respondent No.1. But this is yet to be

determined in the adjudicatory process. This would also be the case as regards respondent No.1's demand for enhancement in the quantum of the bank guarantee. For the present purposes, the appellant's contention that respondent No.1 could not have demanded an enhancement in the quantum of the bank guarantee and should have issued a performance certificate in the appellant's favour would not qualify as *prima facie* fraud on respondent No.1's part warranting the issuance of an injunction qua the encashment of the bank guarantee. The existence of contractual disputes between the parties is not a ground for issuing an order of injunction to restrain the enforcement of an irrevocable and unconditional bank guarantee like the one in this case.

36. Clause 1.4 of the contract provides that the contract shall be governed and construed in accordance with the law of England. English law on the subject is to the effect that an unconditional bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the question whether any of the parties to the underlying contract had failed in their contractual obligations or not; and that the bank must pay according to the tenor of its guarantee, on demand, and without proof or condition. Reference in this regard may be made to the following case law:-

(i) In the case of Solo Industries UK Ltd. Vs. Canara Bank [2001] 1 W.L.R. 1800, Mance L.J. held that *"if instruments such as letters of credit and performance bonds are to be treated as cash, they must be paid as cash by banks to beneficiaries."*

(ii) In the case of Bolivinter Oil SA Vs. Chase Manhattan Bank [1984] 1 All E.R. 351, Sir John Donaldson, Master of Rolls, held as follows:-

> ***"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."***

(iii) In the case of UCM (Investment) Vs. Royal Bank of Canada [1982] 2 All E.R. 720, Lord Diplock held as follows:-

> ***"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of the any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment. To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue."***

(iv) In the case of Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd. [1978] 1 All E.R. 976 = [1977] 3 W.L.R. 764, Lord Denning held as follows:-

> ***"A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with question whether the supplier has performed his contractual obligation or not; nor with the question whether supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."***

(v) In the case of R.D. Harbottle (Mercantile) Ltd. Vs. National Westminster Bank Ltd. [1977] 2 All E.R. 862 = [1977] 3 W.L.R. 752, Kerr J. expressed the following views:-

> ***"It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."***

(vi) In the case of Howe Richardson Scale Co. Ltd. Vs. Polimex-Cekop and National Westminster Bank Ltd. (June 23, 1977: Bar Library Transcript No.270), Roskill L.J., held as follows:-

> ***"Whether the obligation arises under a letter of credit or under a***

guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event as happened upon which its obligation to pay has arisen."

(vii) In the case of Elian and Rabbath (Trading as Elian & Rabbath) Vs. Matsas and Matsas [1966] 2 Lloyd's Law Reports 495 = [1966] 2 L.R. 495, Lord Denning, M.R., while refusing to grant an injunction, stated:-

"...a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation."

(viii) In the case of Hamzeh Malass & Sons Vs. British Imex Industries Ltd. [1958] 1 All ER 262 = [1958] 2 Q/B. 127, Junkins L.J. held as follows:-

"... it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to the contract or not. An elaborate commercial system has been built up the footing that bankers' confirmed credits are that of character, and in my judgment, it would be wrong for this court in the present case to interfere with the established practice."

37. Applying the ratio of these decisions to the facts that have unfolded in the present case, it appears to me that the inescapable conclusion is to hold that the learned Civil Court did not commit any illegality in dismissing the appellant's application for interim injunction. Consequently, the instant appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26.07.2021.

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING