JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.225 of 2019
Pakistan Real Estate Investment & Management Company (Pvt.) Limited
Versus
M/s Sky Blue Builders and another

Dates of Hearing:	09.09.2020, 16.09.2020 & 30.09.2020
Petitioner by:	Barrister Ummar Zaiuddin
Respondents by:	Barrister Bilal Akbar Tarar, for respondent No.1 Mr. Sadaqat Ali Jehangir, Advocate for respondent No.2

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Pakistan Real Estate Investment & Management Company (Pvt.) Limited, impugns the order dated 17.05.2019 to the extent whereby the learned Civil Court allowed respondent No.1's application for interim injunction under Order XXXIX, Rules 1 and 2 read with Section 151 C.P.C. and directed the contesting parties to *"maintain status quo at the project site till the conclusion of the arbitration proceedings."* Furthermore, the petitioner was restrained from encashing the performance guarantee furnished by respondent No.1.

2. The facts essential for the disposal of this revision petition are that the tender bidding process initiated through advertisement dated 23.08.2011 culminated in the execution of the contract dated 24.01.2012 for the construction of a commercial complex/apartments on Plot No.63A, M.A. Johar Town, Block 25, Trade Centre, Phase-II, Lahore between the petitioner and respondent No.1's predecessor-in-interest, M/s Bhalli Constructors. For ease of reference, respondent No.1's ansits predecessor-in-interest shall also be referred to as **"respondent No.1."** Letter to commence works was issued to respondent No.1 on 16.02.2012. The contract period was 20 calendar months (i.e. 04 months for the design, and 16 months for the construction). In this way, the contract completion date came to be 15.10.2013.

3. On 23.05.2012, the Lahore Development Authority (“L.D.A.”) cancelled the allotment of Plot No.63A on the ground that it was falling in the Right of Way of the road proposed to be constructed from the Expo Centre to Khayaban-e-Jinnah. The cancellation of the allotment caused respondent No.1 to suspend the works on 24.05.2012. In lieu of Plot No.63A, the L.D.A., vide letter dated 09.06.2012, allotted Plot No.66 to the Employees’ Old-age Benefit Institution of which the petitioner is a wholly owned subsidiary. The allotment of Plot No.66, which has a different acreage to Plot No.63A, did not result in the cancellation of the contract dated 24.01.2012 or the initiation of a process for re-procurement. The building designs for the project on Plot No.66 were approved by the petitioner vide letter dated 26.06.2012, and the letter to commence the works was issued to respondent No.1.

4. Clause 33 of the contract dated 24.01.2012 provided for any disputes between the parties to the said contract to be resolved by making efforts to settle such disputes. The said clause also provided that respondent No.1 should make a request in writing to the Engineer-in-Charge for the settlement of disputes within 28 days of arising of the cause of dispute, failing which no dispute raised by respondent No.1 shall be entertained by the petitioner. Furthermore, it was provided that if the disputes between the said parties still persist, the settlement of the disputes may be sought through arbitration proceedings in accordance with the provisions of the Arbitration Act, 1940 (**"the 1940 Act"**).

5. Clause 32.1 of the contract dated 24.01.2012 required the successful bidder to furnish a performance security within a period of fourteen days of the issuance of the letter of acceptance. The performance security had to be furnished in the form and the amount stipulated in the Bidding Data and the Conditions of Contract. Pursuant to the said provision, performance guarantee for an amount of Rs.51,864,749/- was furnished on 10.01.2012 by respondent No.2 (Jubilee General Insurance Company Ltd.) on the instructions of respondent No.1.

6. Vide letter dated 29.12.2017, respondent No.2 informed respondent No.1 that the petitioner had made a demand for the

encashment of the performance guarantee for the entire amount of Rs.51,864,749/-. The petitioner's call for the encashment of the performance guarantee prompted respondent No.1 to file an application under Section 20 of the 1940 Act on 08.01.2018 before the learned Civil Court against the petitioner and respondent No.2, praying for the disputes and differences between the parties to the contract dated 24.01.2012 to be referred to arbitration. Along with the said application, respondent No.1 also filed an application for interim injunction seeking a restraint against the petitioner and respondent No.2 from encashing the performance guarantee. Furthermore, in the said application, respondent No.1 also sought an injunction to restrain the petitioner from taking adverse action against respondent No.1.

7. Vide ad-interim order dated 08.01.2018, the learned Civil Court restrained the petitioner from encashing the performance guarantee and from taking any adverse action against respondent No.1.

8. The disputes and differences between the petitioner and respondent No.1 with respect to the progress of work caused the petitioner to call upon respondent No.1, vide letter dated 17.07.2018, to vacate the project site. Apparently, respondent No.1 had applied for an extension in time which had not been acceded to by the petitioner. Subsequently, vide letter dated 13.08.2018, the petitioner called upon respondent No.1 to handover the project site within a period of 07 days along with the project documents and drawings. This caused respondent No.1 to file another application under Section 20 of the 1940 Act on 18.08.2018 praying for the contractual disputes between the parties to the said contract to be referred to arbitration. Along with the said application, respondent No.1 filed an application for interim injunction, praying for a restraint against the petitioner from dispossessing respondent No.1 from the project site. Vide ad-interim order dated 18.08.2018, the learned Civil Court restrained the petitioner from dispossessing respondent No.1 from the project site. For the purposes of this petition, it is unnecessary to discuss any further the proceedings pursuant to

the second application under Section 20 of the 1940 Act filed by respondent No.1.

9. Be that as it may, after an *inter parte* hearing on respondent No.1's application for interim injunction filed along with its first application under Section 20 of the 1940 Act, the learned Civil Court vide order dated 17.05.2019 restrained the petitioner from encashing the performance guarantee, and also directed the parties to maintain *status quo* at the project site till the conclusion of the arbitration proceedings. It may also be mentioned that vide the said order dated 17.05.2019, the learned Civil Court had also allowed respondent No.1's application under Section 20 of the 1940 Act and referred the matters in dispute between the parties to the said contract to arbitration. Presently, the arbitration proceedings between the said parties are pending.

10. Through the instant civil revision petition, the petitioner has assailed the order dated 17.05.2019 passed by the learned Civil Court to the extent of allowing respondent No.1's application for interim injunction.

11. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant civil revision petition, submitted that the performance guarantee dated 10.01.2012 furnished by respondent No.2 at the instance of respondent No.1 for 5% of the contract price; that the said guarantee was irrevocable and independent in nature; that it is well settled that a contract of guarantee has to be treated independently from the underlying contract; that such a guarantee has to be encashed in accordance with its own terms and conditions without reference to the terms of the underlying contract; that in the performance guarantee dated 10.01.2012, the guarantor/respondent No.2 waived all objections and defences under the underlying contract, and agreed to irrevocably and independently pay to the petitioner without any delay upon the petitioner's first written demand without any cavil or arguments against the petitioner's written declaration that respondent No.1 has refused or failed to perform its obligations under the contract; that the said guarantee also provided that the petitioner shall be the sole and final judge for

deciding whether respondent No.1 has duly performed its obligations under the contract or has defaulted in fulfilling its obligations; and that the order passed by the learned Civil Court to restrain the encashment of the performance guarantee is contrary to the law laid down by the superior Courts.

12. Learned counsel for the petitioner further submitted that the contract dated 24.01.2012 is essentially a contract for the provision of services; that such a contract was not specifically enforceable in terms of Section 21 of the Specific Relief Act, 1877; that Section 56(f) of the said Act provides that an injunction could not be granted to prevent the breach of a contract which was not specifically enforceable; that the learned Civil Court erred by directing the parties to maintain *status quo* at the project site till the conclusion of the arbitration proceedings; and that such an injunction also runs contrary to the law laid down by the superior Courts. Learned counsel for the petitioner prayed for the revision petition to be allowed in terms of the relief sought therein.

13. On the other hand, learned counsel for respondent No.1 submitted that respondent No.1 had already carried out the excavation works when the allotment of plot No.63A was cancelled by the L.D.A.; that after alternative plot No.66 was allotted, the project site was changed; that payment against the Interim Payments Certificates (**"IPCs"**) submitted by respondent No.1 were substantially delayed; that this delay necessitated respondent No.1 to apply for an extension of time; that payment against IPC No.9 had been unlawfully adjusted whereas payment against IPC No.10 was partially released and that too with a delay of 432 days; that malicious criminal complaints have been lodged by the petitioner against respondent No.1; that IPC No.15 submitted by respondent No.1 has not been cleared as yet; that the learned Civil Court erred by not appreciating that respondent No.1 had a right to remain in possession of the project site due to its easement rights under Section 60 of the Easement Act, 1882; that under Section 16 of the Specific Relief Act, 1877 the Court can direct a contract to be partially performed; that even though an amount of Rs.34,998,889/- against IPC No.15 has been

certified, the petitioner has, till date, not made the payment against the same; that the advance paid by the petitioner had been fully utilized by respondent No.1 in furtherance of its obligations under the contract; and that since the equities weigh heavily in favour of respondent No.1, the learned Civil Court did not commit any jurisdictional error by allowing respondent No.1's application for interim injunction. Learned counsel for respondent No.1 prayed for the revision petition to be dismissed.

14. 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 civil revision petition have been set out in sufficient detail in paragraphs 2 to 10 above and need not be recapitulated.

15. I first propose to deal with the question whether it was lawful for the learned Civil Court to have granted an injunction to restrain the encashment of the performance guarantee furnished by respondent No.2 at the instance of respondent No.1. As mentioned above, the said guarantee was furnished pursuant to the requirement in clause 32.1 of the Invitation for Bids which forms an integral part of the contract dated 24.01.2012. The said guarantee is for an amount of Rs.51,864,749/- and was issued on 10.01.2012. In the said guarantee, it is provided that it was to remain in full force until respondent No.1 performed its obligations under the contract and the works under the contract are taken over. It is also provided that the claim for payment under the guarantee is to be made in writing within the validity period of the guarantee. The following two clauses of the guarantee are of crucial importance and are therefore reproduced herein below:-

> ***"We, Jubilee General Insurance Company Ltd (the Guarantor), waiving all objections and defences under the Contract, do hereby Irrevocably and Independently guarantee to pay to the Employer without delay upon the Employer's first written demand without cavil or arguments any sum or sums up to the amount stated above, against the Employer's written declaration that the Principal has refused, or failed to perform the obligations under the Contract, for which payment will be effected by the Guarantor to Employer's designated Bank & Account Number.***
>
> ***PROVIDED ALSO THAT the Employer shall be the sole and final judge for deciding whether the Principal has duly performed his obligations under the Contract or has defaulted in fulfilling said obligations and the Guarantor shall pay without objection any sum or sums up to the amount stated above upon first written demand from the Employer***

forthwith and without any reference to the Principal or any other person."
(Emphasis added)

16. Generally performance guarantees are required to be furnished so as to ensure that the contractor fulfills his obligations under the underlying contract. Calls for the encashment of such guarantees are made by employers when the contractor commits a default in the fulfillment of his obligations under such a contract. Performance guarantees fall under the rubric of documentary credits, and interference with obligations of the guarantors under such guarantees is on limited grounds. These grounds include egregious fraud of which the guarantor has prior notice or irretrievable injustice that would be caused to the contractor/principal debtor in case of encashment. Such guarantees are considered to be independent of the underlying contract, and interference by Courts with obligations of the guarantors primarily depend on the words employed in such guarantees. In the case of Shipyard K. Damen International Vs. Karachi Shipyard and Engineering Works Ltd. (PLD 2003 SC 191), it was held *inter alia* that the rights and liabilities of the parties are to be determined with reference to the terms and conditions of the guarantees.

17. The contractual disputes between the petitioner and respondent No.1 are presently the subject matter of arbitration proceedings, and it will be in such proceedings that the arbitral Tribunal would give a finding as to whether respondent No.1 had committed a default in the fulfillment of its obligations under the contract. However, the terms of the performance guarantee dated 10.01.2012 do not make its encashment contingent on the finding of the arbitral tribunal that respondent No.1 had committed a default. The contention of the learned counsel for respondent No.1, that since the question as to whether respondent No.1 had committed a default in the fulfillment of its obligations under the contract is yet to be determined by the arbitral tribunal, the petitioner's demand for the encashment of the guarantee is premature and irreconcilable with the terms of the performance guarantee dated 10.01.2012. The said performance guarantee requires the petitioner to make a declaration that respondent No.1 had refused or failed to perform its obligations

under the contract. For the purposes of making a demand for the encashment of the said guarantee, it is explicitly provided that the petitioner shall be *"the sole and final judge"* for deciding whether respondent No.1 has duly performed his obligations under the contract or has defaulted in fulfilling the said obligations. If this Court were to ignore the said provision in the performance guarantee and make the encashment of the guarantee contingent on the finding by the arbitral Tribunal that respondent No.1 had committed a default in the fulfillment of its contractual obligations, it would amount to this Court re-writing the terms of the guarantee. This a Court cannot do. None of the terms of the said guarantee are such as to be termed as uncontainable, absurd, inconsistent, or vague. In the cases of Braganza Vs. BP Shipping Limited (2015 SCMR 742), System Company Vs. MTU Middle East FZE (PLD 2019 Sindh 382), Green Group of Hotels Vs. Municipal Corporation, Peshawar (2017 MLD 257) and Pakistan Industrial Credit and Investment Corporation Ltd. Vs. Khairpur Sugar Mills Ltd. (2012 CLD 1192), it was held *inter alia* that Courts cannot rewrite contracts executed by parties with their own free consent. In the case of Montage Design Build Vs. The Republic of Tajikistan (PLD 2015 Islamabad 13), this Court held as follows:-

> ***"31. Before parting with this judgment, it is pertinent to observe that an irrevocable and unconditional guarantee is like any other contract, standing on the foundation of entering into binding contractual obligations voluntarily and the principle of freedom to contract. Once the parties have executed binding commitments, they are expected to observe certain standards of behavior. It has been observed that the Insurance companies promptly issue unconditional Guarantees and when the demand is made, many avoid fulfilling their absolute commitments and undertakings. They delay payment of the guaranteed amount and allow the parties an opportunity to seek the intervention of the Courts in the hope that they might obtain an injunction. Similarly, contractors in their exuberance for the release of advance payments under a contract, cause unconditional guarantees to be furnished as security, but when a demand is raised, expect that the Courts would come to their rescue, despite the unambiguous language of the guarantee. It may be understood that Courts have no power to interfere with, alter, vary or in any other manner change the intention of the parties who voluntarily enter into binding contractual commitments. Nor can the Courts rewrite or defeat the terms agreed and explicitly stipulated in a contract. Granting an injunction and restraining the encashment of an irrevocable and unconditional guarantee, except in the exceptional circumstances as discussed above, would amount to changing the nature of the agreed terms and conditions of the guarantee, and frustrating the intention of the parties. It is for this reason that the Courts are slow and exercise restraint in granting injunctions. It is for***

> ***the parties, particularly the Banks and Insurance companies, to exercise care and caution when issuing unconditional and irrevocable guarantees. It is expected that they take sufficient care in securing their interests at the time of issuing irrevocable and unconditional guarantees, instead of avoiding their absolute obligations by delaying payments."***

18. Clause 32.1 of the Invitation for Bids, which forms part and parcel of the contract documents, provides *inter alia* that the performance security was to be furnished in the form set out in the conditions of the contract. The performance guarantee dated 10.01.2012 furnished by respondent No.2 at the instance of respondent No.1 in fulfillment of its obligations under clause 32.1 ibid conforms to the form of the guarantee in the conditions of the contract. Therefore, right from the stage of the execution of the contract, respondent No.1 was or ought to have been aware of the terms on which the performance guarantee could be encashed.

19. True, it is within the realm of possibilities that after the performance guarantee is encashed by the petitioner, the arbitral tribunal may hold that respondent No.1 had not committed any default of its obligations under the Contract or that default committed by respondent No.1 did not result in any monetary loss to the petitioner. In such a scenario, respondent No.1 would be entitled to be repaid the amount encashed by the petitioner. The petitioner's declaration that respondent No.1 has committed a default of its obligations under the Contract has been made conclusive only for the purpose of making a demand for the encashment of the performance guarantee. Such a declaration is not binding on the arbitral tribunal which may, on the basis of the evidence on the record, come to a different conclusion.

20. Letter dated 29.12.2017 from respondent No.2 to respondent No.1 informing the latter as to the demand made by the petitioner for the encashment of the guarantee mentions that the petitioner had declared that respondent No.1 had failed to fulfill its contractual obligations. Since respondent No.1, as the principal debtor, was well aware that the performance guarantee dated 10.01.2012 could be encashed on the basis of a declaration made by the petitioner to the effect that respondent No.1 had defaulted in fulfilling its obligations under the contract, and that the petitioner had been made the sole

and final judge for deciding whether respondent No.1 had committed such default, I am of the view that the learned Civil Court erred by issuing an injunction to restrain the encashment of the said performance guarantee. In holding so, I derive guidance from the following case law:-

(i) In the case of Standard Construction Company (Pvt.) Limited Vs. Pakistan through Secretary M/o Communications (2010 SCMR 524), it was held as follows:-

> ***"5. ... The bank guarantees, generally, contain in their contents whereby the guarantor undertakes to agree irrevocably and unconditionally to the payment to the beneficiary/employer the amount mentioned therein and the demand of the beneficiary is deemed to be a conclusive evidence and who is considered as the sole judge to do so regarding the failure of the principle to have not complied with or fulfilled the requirements of the brief/agreement. However, there are certain guarantees, which in their contents without mentioning the demand as the conclusive evidence or the beneficiary to be the sole judge, prescribe certain eventualities on the happening whereof the beneficiary is entitled to the demand of the encashment of the guarantee. While going through the aforesaid three bank guarantees we find that the first bank guarantee amounting to Rs.18 million regarding the pre-bid in addition to the terms "it is hereby guaranteed irrevocably and unconditionally to pay to you forthwith, without prior course to the Bidder" it further prescribes "It is agreed that any such demand made hereunder by you shall be conclusive evidence of the Bidder's failure to comply with or fulfil the requirements of the Brief as set out above." Such averments, as contained in the above guarantee, made the beneficiary as the sole judge and its mere demand would be sufficient to entitle it to the encashment of the bank guarantee without any reservation on the part of the guarantor."***

(ii) Recently in the case of Husein Industries Ltd. Vs. Sui Southern Gas Company Ltd. (PLD 2020 Sindh 551), the Hon'ble High Court of Sindh held as follows:-

> ***"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 favour of the plaintiff."

(iii) In the case of Atlas Cable (Pvt.) Limited Vs. Islamabad Electric Supply Company Limited (2016 CLC 1677), I had the occasion to hold as follows:-

"48. Irrevocable and unconditional bank guarantees are normally couched in a language whereby the bank undertakes to give money to the beneficiary on demand, without demur or protest. If a bank guarantee is unconditional stipulating that the bank should pay, on demand, without demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but with respect to the amount of loss or damage, the obligation of the bank has to be discharged in the manner provided in the bank guarantee. When such a demand is made, the bank is not permitted to probe into the disputes between the parties. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged."

(iv) In the case of Global Energy & Commodity Exchange Group Italy SPA (GECX GROUP) Vs. Trading Corporation of Pakistan (2013 CLD 681), the Hon'ble High Court of Sindh held as follows:-

"19. In the case in hand I have carefully examined the terms and conditions of bank guarantee and also reproduced the relevant clauses in which it was clearly agreed that the guarantee was unconditional and buyer was the sole judge to decide whether the seller has performed the contract and fulfilled the terms and conditions of the contract. The guarantor also agreed to honour the guarantee as, directed by the buyer on the date of receipt of demand in writing without any question whatsoever and without oral or written reference to the seller. Keeping in view the dictum laid down by the Hon'ble Supreme Court, it is clear beyond any shadow of doubt that unqualified terms of guarantee cannot be interfered with irrespective of existence of dispute nor interim of injunction restraining payment thereunder can be granted. The commitment of banks must be honoured free from interference of the court. As a result thereof, I have no hesitation in my mind to hold that no case is made out for passing or confirming the restraining order against the encashment of performance guarantee."

(v) In the case of Mahatma Gandhi Sahakara Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. (AIR 2007 SC 2176), the Supreme Court of India, after referring to the provisions of a bank guarantee which provided that the purchasers shall be the

sole judge of and as to whether the amount of the bank guarantee had become recoverable from the sellers or whether the sellers had committed any default in the terms and conditions of the agreement, held as follows:-

> ***"18. ... The sole discretion is conferred on the purchasers as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach of the terms and conditions of the said agreement. The right of the purchaser to recover from the guarantor the guaranteed amount shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any tribunal or court with regard thereto or in connection therewith.***
> ***19. ... The respondent cannot be allowed to contend that there is a dispute as to whether it had failed to conduct the trial test of the sugar plant by 24th July, 2003 and therefore bank guarantee cannot be invoked. The acceptance of the argument would make Clause 2 of the bank guarantee totally meaningless and inoperative. The guarantor essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of bank guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. The dispute, if any, between the parties with regard to the liability in any proceedings either before the arbitral tribunal or court in no manner affects the right of the purchaser to invoke the bank guarantee and realize the guaranteed sum from the guarantor."***

(vi) **In the case of Hindustan Steelworks Construction Ltd. Vs. Tarapore & Co. (AIR 1996 SC 2268), it was held as follows:-**

> ***"Whether the bank guarantee is towards security deposit or mobilization advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee."***

(vii) **In the case of Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal & Co. (Engineers) (Pvt.) Ltd. (AIR 1996 SC 131), it was held as follows:-**

> ***"6. On a perusal of the relevant clauses of the Guarantees, it is evident that the Bank has unconditionally and irrevocably agreed and undertaken to pay to the appellant on demand the sums specified therein. It is further seen that the amount should be paid without demur and without requiring the creditor (the appellant) to invoke any legal remedy and it is***

> ***further specifically provided that the appellant shall be the sole judge of and as to whether the respondent, a party to the contract, has committed any breach and the extent of the loss and damages etc. caused to the appellant. It is stated that the decision of the appellant as to the outstanding amount due will be final and binding. ... We are of the view that the Guarantees furnished by the Bank to the appellant are unconditional and the appellant is the sole judge regarding the question as to whether any breach of contract has occurred and, if so, the amount of loss to be recovered by the appellant from the respondent. The entire dispute is pending before the Arbitrator. Whether and if so, what is the amount due to the appellant is to be adjudicated in the arbitration proceeding."***

21. Vide order dated 17.05.2019, the learned Civil Court had also directed the contesting parties to maintain *status quo* at the project site till the conclusion of the arbitration proceedings. The contract executed between the petitioner and respondent No.1 was for the *"Engineering, Procurement and Construction of Mix Used Development."* Essentially the said contract was for the provision of services. Respondent No.1's entry onto the project site was only on the basis of the said contract. Section 21(a) of the Specific Relief Act, 1877 provides that a contract for non-performance of which compensation is an adequate relief cannot be specifically enforced. Furthermore, Section 56(f) of the said Act provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Before a construction contract can be ordered to be enforced, it has to be held that compensation in money is not the adequate relief. It cannot be disputed that a contract, which cannot be enforced by a decree for specific performance, cannot be negatively enforced by issuance of an injunction. In the face of the petitioner's demand for respondent No.1 to vacate the project site, the latter could not seek an injunction which would have the effect to remain on the project site and proceed with the balance works as this would amount to specifically enforcing a contract of construction which is impermissible in law. Therefore, the learned Civil Court erred by directing the maintenance of *status quo* at the project site till the conclusion of the arbitration proceedings. In holding so, I derive guidance from the following case law:-

(i) In the case of Lahore Stock Exchange Ltd. Vs Hassan Associates (2010 MLD 800), the Hon'ble Lahore High Court held that a contract for the designing and supervision of construction of a building proposed to be raised and constructed was not a contract which could be specifically enforced since the entitlement of the plaintiffs/respondents could be measured in pecuniary terms. Furthermore, it was held that in view of Section 56(f) of the Specific Relief Act, 1877, no injunction could be granted to restrain the breach of such a contract. For the purposes of clarity, paragraph 4 of the said report is reproduced herein below:-

> *"4. Counsel for the parties have been heard and record appended with these petitions perused. It is an admitted fact on record that the original agreement executed inter se the parties pertained to the hiring of the services of the respondents as Architects for designing and supervision of proposed constructions. There was a settled consideration payable to the respondents under the said agreement, dated 3-5-1997 which was modified vide the supplementary agreement, dated 11-10-2001 on the face of it such an agreement was not specifically enforceable as the only entitlement of the respondents qua consideration was mentioned, thus, stood measured in pecuniary terms. The agreement pertained to and was dependent upon the personal professional qualification of the respondents and ran into minute and numerous details qua designing and planning, which could never be over seen by any Court of law. Such elemental principle in this behalf is enunciated in section 21 of the Specific Relief Act, 1877 and, therefore, in view of section 56(f) of the Specific Relief Act no injunction could be granted to restrain the breach thereof. It has been noticed with great dismay that the impugned judgment has been passed in violation of the clear unequivocal, ancient and settled elemental principle of law. In this view of the matter the impugned judgment for grant of injunction is not sustainable in law."*

(ii) In the case of District Council, Gujrat Vs. Iftikhar Ahmad (1998 MLD 1461), a contract for the collection of cattle fee was held to be a contract the specific performance whereof could be refused under Section 21 of the Specific Relief Act, 1877. Furthermore, it was held that the relief of injunction could also not be granted in the event of a breach of such a contract. A suit for damages was held to be the appropriate remedy in case of where such a contract is terminated.

(iii) In the case of Qasimabad Enterprises Vs. Province of Sindh (1998 CLC 441), a contract for a joint venture scheme for the

construction of shops, flats and bungalows in the Qasimabad Housing Scheme was held by the Hon'ble High Court of Sindh to be a contract which could not be specifically enforced. In the said judgment, it was also held that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.

22. The aforementioned judgments were authored by Hon'ble Judges who rose to grace the Hon'ble Supreme Court, therefore the ratio in the said cases deserve reverence and respect. Law to the said effect was also laid down in the cases of Universal Trading Corporation (Pvt.) Ltd. Vs. Beechem Group PLC (1994 CLC 726), Hussain Naseer Vs. Shamim Yaqoob (1989 CLC 2125), and PIA Corporation Vs. Hazir (Pvt.) Ltd. (PLD 1993 Karachi 190).

23. Having gone through the impugned order dated 17.05.2019, I have noticed that before granting an interim injunction, the learned Civil Court did not determine as to whether the three essential ingredients for the grant of an interim injunction had been satisfied in the case at hand. This is another jurisdictional irregularity which warrants interference with the said order. Had the learned Civil Court bothered to determine whether the ingredient regarding irreparable loss had been satisfied in the case at hand, it would have seen that the loss which respondent No.1 was alleged to have suffered at the hands of the petitioner was monetary loss, which cannot be termed as an irreparable loss. In the case of Dewan Petroleum (Pvt.) Ltd. Vs. Oil and Gas Investment Limited (2019 CLC 1486), the learned Civil Court had granted an interim injunction without giving any finding regarding the existence of the pre-conditions necessary for the grant of such an injunction. In the said case, I had the occasion to hold as follows:-

> *"27. It is well settled that temporary injunction cannot be granted in cases where applicant did not have a good prima-facie case; the balance of convenience was not in his favour; and that the loss he would suffer if the injunction was not granted was not irreparable and could be measured in terms of money. It appears that the learned Civil Court did not apply its judicious mind to the principles on which an interim injunction can be granted. There is, for instance, no mention in the said order as to the three ingredients for the grant of an interim injunction having been satisfied.*

28. Under Section 41(b) read with the Second Schedule to the 1940 Act, the Court has the power to issue interim injunctions for the purpose and in relation to arbitration proceedings. The principles for the grant of an interim injunction under Section 41(b) read with the Second Schedule of the 1940 Act are the same as the ones applicable to interim injunctions granted under Order XXXIX, Rules 1 and 2, C.P.C. In the case of Pakistan Railways Vs. Four Brothers International (Pvt.) Ltd. (PLD 2016 SC 199), it has been held that an injunctive order against the recovery of amounts passed under Section 41(b) of the 1940 Act without examining the three ingredients for the grant of injunction i.e. prima-facie arguable case, balance of convenience and irreparable loss, is not sustainable in law. In the said case, the matters in dispute between the parties were referred to arbitration, but the interim injunction passed by the learned Civil Court as well as the learned Revisional Court were vacated.

29. It will be for the respondent to prove in the arbitration proceedings that the appellant had breached the provisions of the JOA by making unjustified cash calls or that the amounts paid by the respondent in response to such cash calls had not been used in furtherance of the obligations of the working interest owners in the Safed Koh project. In the event the respondent is able to prove this, it would have a case for the recovery for an ascertained amount against the appellant. In this view of the matter, it cannot be held that if the interim injunction was not granted to the petitioner, it would suffer irreparable loss. In the cases of Tauseef Corporation (Pvt.) Ltd. Vs. Lahore Development Authority (2002 SCMR 1269), Al-Tamash Medical Society Vs. Dr. Anwar Ye Bin Ju (2019 CLC 1), and Maxim Advertising Company (Pvt.) Ltd. Vs. Province of Sindh (2007 MLD 2019), the Superior Courts have held that where loss was ascertainable in terms of money, then it could not be treated as a case of irreparable loss. In the case of Haji Khan Vs. Government of Sindh (1990 MLD 155), the Hon'ble Mr. Justice Wajihuddin Ahmad (as he then was) had the occasion to hold as follows:-

> ***"The crucial point in the case was the question of irreparable loss. Since money was involved and loss, if any, to the plaintiffs could have been assessed in terms of money, question of irreparable loss hardly arose but all that the learned Judge said on the subject was that "valuable right has been created in favour of the plaintiffs, by the said contract, therefore, in my humble opinion breach of the said contract cannot be adequately compensated in terms of money". Manifestly, contracts involving collection of monetary benefits, which themselves have been obtained on specific monetary considerations, on principle, cannot involve irreparable loss because such loss, inherently, means and implies only such loss as is incapable of being calculated on the yardstick of money. Unless all the required ingredients of prima facie case, balance of convenience and irreparable loss to the aggrieved party are found to subsist, no Injunction under Order 39, Rules, 1 and 2, C.P.C. can issue."***

30. It is well settled that all the three ingredients for the grant of an injunction must co-exist and if any one of such ingredients is missing in the case, the litigant would not be entitled to the grant of a temporary injunction. Reference in this regard may be made to the law laid down in the cases of Puri Terminal Ltd. Vs. Government of Pakistan (2004 SCMR 1092), Imtiaz Ahmad Vs. Muhammad Shoaib Shah (2015 CLC 1121), Mst. Azra Parvez Vs. Sheikh Ashfaq Hussain (2015 CLC 1695), M.Y. Corporation (Private) Ltd. Vs. Erum Developers (PLD 2003 Karachi 222), Managing Committee, Revenue Employees Cooperative Housing Society Vs. Secretary, Cooperative Societies,

Government of Punjab (2001 CLC 838), Zakaria Dada Vs. Maneck Byramji Javat (1992 CLC 345) and Haji Khan Vs. Government of Sindh (1990 MLD 155)."

24. In view of the above, the instant revision petition is allowed. Consequently, the impugned order 17.05.2019 to the extent of allowing respondent No.1's application under Order XXXIX, Rules 1 and 2 C.P.C. is set-aside and the said application is dismissed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**