HCJD/C-121

JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

F.A.O No.77/2014

MONTAGE DESIGN BUILD

VERSUS

THE REPUBLIC OF TAJIKISTAN, ETC.

Appellant by	:	**Barrister Suleman Khan.**
Respondents by	:	**Barrister Afzal Hussain, Advocate for the respondent No.1.** **Mr Altaf Ellahi Sheikh, Advocate for the respondent No.2.** **Mr Muhammad Anwar Darr, Advocate for the respondent No.3**
Date of Hearing	:	**12-11-2014.**

Athar Minallah, J:- Through this judgment, I intend to dispose of F.A.O. No. 77 of 2014.

2. The present appeal, under Section 104, read with Order XLIII Rule 1 of the Civil Procedure Code, 1908 (hereinafter referred to as the "CPC"), assails the order dated 25-09-2014, passed by the learned Civil Judge, Islamabad, whereby the application of the appellant under Order XXXIX Rule 1 & 2 of the CPC, for restraining the respondent No.2, from encashing the Mobilization Advance Guarantee (hereinafter referred as the "Guarantee") was dismissed.

3. The appellant is a *registered partnership firm*, inter alia, engaged in rendering professional services as designers & architects. The agreement dated 24-04-2014 (hereinafter referred to as the "Agreement") was executed to design the proposed Embassy complex of the respondent No.2, on a plot located in the Diplomatic Enclave, Islamabad. The scope of work was agreed, as described in Clause 1.1 of the Agreement. Under Clause 1.2, the total consideration for the services has been stipulated as U.S. $123,000/-. It was further agreed that out of the said total amount, U.S. $97,000/- will be paid to the appellant as advance, and the remaining on satisfactory completion of the services / provisions, as described

in the Agreement. It was the contractual obligation of the appellant to provide, in favour of the respondent No. 2, a Mobilization Advance Guarantee from an Insurance Company, having at least AA rating from PACRA / JAC. The scope of work, as described in the Agreement, was in the nature of rendering of services and was to be completed within two months. Following the execution of the Agreement and pursuant to clause 1.2 thereof, the appellant provided the Guarantee for an amount of Rs.9.506 million.

4. It is the case of the appellant that after completing the conceptual, schematic and detailed designs, the same were submitted and approved by his Excellency, the Ambassador of respondent No.1. A request was made to the respondent No.1 for executing the construction of the contract, claimed to have been verbally promised. However, it is alleged that in breach of the verbal assurance, the construction work was awarded to a third party on 15-07-2014. It is further alleged that for this reason the designs and plans could not be submitted in the Capital Development Authority, as the latter did not allow the petitioner on the sole ground that it had no role vis-a-vis the supervision of the project. The correspondence between the parties regarding the dispute, and awarding the construction work to a third party, has been placed on record. The respondent No.1, through a letter dated 24-07-2014, i.e. a day before the expiry of the Guarantee, demanded the encashment thereof. The appellant filed a suit for declaration, specific performance and injunction, inter-alia, praying therein to restrain the defendants No.1 & 2 / respondents from encashing the Guarantee. An application under Order XXXIX Rule 1 & 2 of the CPC was also filed and the same was dismissed through the impugned order.

5. Barrister Suleman Khan, the learned counsel for the appellant contends that the learned Civil Judge had failed to appreciate that a prima facie case was made out; the balance of convenience was in favour of the appellant, and in case of refusal to grant an injunctive order, the appellant would suffer an irreparable loss. It was contended that the appellant has performed substantial work, as specified in the scope of work under Clause 1.1 of the Agreement, while

the remaining work was being delayed on account of the failure of the respondent to cooperate. The learned counsel further contends that the work performed covers more than 90% of the work specified in the Agreement. It is also contended that the respondent No.1 had committed a breach by awarding the construction work to a third party. It is stressed that the terms of the Guarantee are conditional and it does not contain any clause, which would make the guarantee irrevocable and unconditional. The respondent No.2 filed a written statement in the Court of the learned Civil Judge, and has admitted the guarantee to be conditional. It is argued that there is no evidence whatsoever of a breach on the part of the appellant. It is also contended that the construction work, which has been awarded to a third party for consideration of U.S. Dollars 2.4 million, is based on the work performed by the appellant. It is urged that in case an injunctive order is refused, the appellant will suffer an irreparable loss by crippling it financially, ruining its repute and loss of business within the diplomatic community. The losses which the appellant will suffer cannot be compensated. Referring to Sections 74, 126 and 128 of the Contract Act, 1872 (hereinafter referred to as the "Act of 1872"), the learned counsel has argued that the liability of a surety cannot exceed that of the principal debtor. It has also been contended that the respondent / defendant No.1, has to prove a default or loss before demanding encashment of the Guarantee. The learned counsel has placed reliance on various judgments of the superior Courts in support of his arguments i.e. "Standard Construction Company (Pvt) Limited vs Pakistan through Secretary M/o Communication and others", *2010 SCMR 524*, "Anwarul Haq vs Federation of Pakistan through Secretary, Establishment Division, Islamabad and 13 others", *1995 SCMR 1505*, "Messrs Continental Cable (Pvt) Ltd. Vs Messrs China Harbor Engineering Co. Ltd and another", *2011 CLD 1625*, "Sandoz Limited and another vs Federation of Pakistan and others", *1995 SCMR 1431*, "Province of West Pakistan vs Messrs Mistri Patel & Co. and another", *PLD 1969 S.C. 80*, "Messrs Jamia Industries Ltd vs Messrs Pakistan Refinery Ltd", *PLD 1976 Karachi 644*, "Saudi-Pak Industrial and Agricultural Investment Company (Pvt). Ltd, Islamabad vs Messrs Allied Bank of Pakistan and another", *2003 CLD 596*,

"Messrs Strong Built Enterprises (Pvt) Ltd, Lahore vs Fauji Fertilizer Company Ltd. Through Resident Manager, Sadiqabad", *1998 MLD 1628*, "Hyundai-Hidco-Hakas Joint Venture vs Water and Power Development Authority", *PLD 2003 Lahore 714*."

6. On the other hand, Barrister Afzal Hussain, learned counsel for the respondent No.1 has argued that the Guarantee is unconditional, and the respondent No.2 is under an obligation to pay the amount of the Guarantee without re-course to the appellant. It is further contended that substantial amount was paid as advance to the appellant, and it failed to perform the work as was agreed in the agreement. On the default and breach of the agreement on the part of the appellant, the respondent No.1, sent a notice to the respondent No.3, for the encashment of the Guarantee. It has been stressed that by now it is settled law that in the case of an unconditional guarantee, injunctive orders restraining the encashment, are passed only in exceptional circumstances. No ground has been raised by the appellant to bring the case within the exceptions and, therefore, the impugned order has been passed in accordance with law. The learned counsel has placed reliance on "Messrs Syed Bhais (Pvt) Ltd. Through Director vs Government of Punjab through Secretary Local Government and 3 others", *2012 CLD 298* and "Shipyard K. Damen International vs Karachi Shipyard and Engineering Works Ltd", *PLD 2003 S.C. 191"*.

7. After hearing the leaned counsels and perusing the record with their able assistance, the opinion of this Court is as follows.

8. There are two questions which need to be considered in the present case. Firstly, whether the Guarantee is unconditional and secondly, whether an injunctive order, restraining the encashment of an unconditional guarantee can be passed, and if so, under what circumstances?

9. Before proceeding further, it is necessary to discuss the nature of a Mobilization Advance Guarantee, and the distinction between a conditional and unconditional guarantee. In construction or service contracts, the advance paid is

known as "Mobilization Advance". Normally, as a pre condition for the release of the advance to the contractor, the latter is required to furnish a guarantee, either from a Bank or an Insurance company. There are, therefore, two separate and distinct agreements/contracts, the underlying agreement and the Bank or Insurance Guarantee. On completion of the agreed work the Guarantee is released, or may be enforced if a default is committed. Depending on the intention of the parties, a Bank or Insurance guarantee may be either 'conditional' or 'unconditional'. A conditional Guarantee can only be invoked on fulfillment of the condition(s) stipulated therein e.g. proof of a breach or default. On the other hand, in case of an 'unconditional' guarantee, the guarantor i.e. the Bank or an Insurance Company is under an obligation to honor its commitment by making the payment on demand, regardless of a dispute between the parties arising out of or connected with the underlying agreement/contract.

10. The Mobilization Guarantee is an independent contract, and the terms and conditions stipulated therein determine its nature and the consequent effect. Like any other contract, a Guarantee comes into existence as a legally binding agreement between two or more willing parties. It, therefore, has to be read and interpreted independent of any other agreement, or the underlying agreement pursuant to which it has been furnished.

11. It is necessary to examine the case law interpreting and laying down the law and principles relating to an injunctive order in relation to the encashment of an unconditional Bank/Insurance guarantee. It is discussed as follows;

12. In the case of "Messrs National Construction Ltd vs Aiwan-e-Iqbal Authority", *PLD 1994 SC 311*, the Supreme Court, referring to the Mobilization advance guarantee, observed;

> *"Those guarantees are independent contracts and the bank authorities must construe them, independent of the primary contracts. They should encash them notwithstanding any dispute*

arising out of the original contract between the parties. In the instant case, therefore, the encashment of the bank guarantees cannot be postponed pending decision of the arbitration proceedings, which may take years to conclude."

13. The above rule was reiterated in case of "Pak Consulting & Engineering (Pvt) Ltd. Vs Pakistan Steel Mills and another", *2002 SCMR 1781*, as follows:

"Undoubtedly, at present prevailing view concerning encashment of the Bank-Guarantee in terms of section 126 of the Contract Act is that a Bank-Guarantee is an independent contract between the Bank and the party in whose favour guarantee has been furnished, therefore, encashment of irrevocable Bank Guarantee cannot be declined by the bank on the pretext that the original parties to the main contract are litigating with each other, as it has been held in the case of M/s. National Construction Co. Ltd. (ibid)."

14. It was further held in the above case that departure from the rule can be made if it could be demonstrated from the contents of the guarantee that there is an in built condition which is a pre condition for the obligation of encashment.

15. In the case of "Shipyard K. Damen International vs Karachi Shipyard and Engineering Works Ltd", *PLD 2003 SC 191*, while elaborating the distinguishing features of a conditional and unconditional guarantee, the Supreme Court has summarized the judicial consensus emerging from the precedents as follows:-

"(i). The performance of guarantee stands on the footing similar to an irrevocable letter of credit of Bank, which gives performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with

the relations between the supplier has performed his contracted obligation or not, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee all demand if so stipulated without proof or conditions. Only exception is when there is a clear fraud of which Bank has notice.

(ii). There is an absolute obligation upon the banker to comply with the terms and conditions as enumerated in the guarantee and to pay the amount stipulated therein irrespective of any disputes there may be between buyer and seller as to whether goods are up to contract or not.

(iii). The bank guarantee should be enforced on its own terms and realization against the bank guarantee would not affect or prejudice the case of contractor, if ultimately the dispute is referred to arbitration for the reason, once the terms and conditions of the guarantee were fulfilled, the bank's liability under the guarantee was absolute and it was wholly independent of the dispute proposed to be raised.

(iv). The contract of bank guarantee is an independent contract between the bank and the party concerned and is to be worked out independently of the dispute arising out of the work agreement between the parties concerned to such work agreement and, therefore, the extent of the dispute and claims or counter-claims were matters extraneous to the consideration of the question of enforcement of the bank and were to be investigated by the arbitrator.

(v). Where the bank had undertaken to pay the stipulated sum to respondent, at any time, without demur, reservation, recourse, contest or protest, and without any reference to

the contractor, no interim injunction restraining payment under the guarantee could be granted.

(vi). The Bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee become enforceable.

(vii). When one bank guarantee is discharged, the obligation of the bank ends and there is no question of going behind such discharge bank guarantee. Courts should refrain from probing into the nature of the transaction between the bank and customer, which led to the furnishing of the bank guarantee.

(viii). In the absence of any special equities and the absence of any clear fraud, the bank must pay on demand, if so stipulated and whether the terms are such must be have to found out from the performance guarantee as such.

(ix). The unqualified terms of guarantee could not be interfered with by Courts irrespective of the existence of dispute."

16. Further, the Court has quoted a passage with approval, from the case of "U.P. Cooperative Federation Ltd. V. Singh Consultants and Engineers *(P) Ltd. (JT 1987 (4) SC 406)",* as follows:

"Held further that an irrevocable commitment either in the form of confirmed Bank-guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out."

The above principles and law was followed in 2010 SCMR 524.

17. The Supreme Court of India has also dealt with the issue in various judgments, and it would be beneficial to discuss the view taken regarding granting injunctive orders relating to encashment of guarantees. In "U.P. Cooperative Federation Ltd vs. Singh Consultants and Engineers (P) Ltd", *(1988) 1 Supreme Court Cases 174*, the Court observed:

> *"On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere."*

18. In "U.P State Sugar Corporation vs Sumac International Ltd", *(1997) 1 SCC 568*, the Supreme Court of India affirmed the rule that the Courts are reluctant in granting an injunction to restrain the realization of an unconditional guarantee, except under very exceptional circumstances i.e. a fraud in connection with the guarantee, and where allowing encashment would result in "irretrievable harm and injustice". It was also held that these two exceptions are not necessarily connected, though both may coexist. The scope of "irretrievable injustice" was explained as being of such an exceptional nature which would "over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. It was further elaborated that "irretrievable injury" must be of the kind which was demonstrated from the facts in the case of "Itek Corporation v First National Bank of Boston", *566 Fed Supp 1210(1983)*.

19. In the Itek Corporation case, the District Court of Massachusetts, United States of America, granted an injunction on the ground that irreparable loss or harm will be suffered because adequate remedy to compensate for injuries was not available to the plaintiff in that case. The facts were peculiar, in the sense that the situation arose after the 1979 Iranian Revolution in Iran and the taking over of the US Embassy in Tehran and 54 US nationals as hostages. The United

States had cancelled the export license. Through an executive order the President of the US blocked all Iranian assets within the jurisdiction of the United States. The importer in Iran invoked the encashment of the Bank Guarantee. The court was of the view that in such circumstances there was no alternate remedy available to the plaintiff as even if the Court in United States had decreed the suit for damages, the decree would not be executable in Iran. The Court, therefore, found that the plaintiff had no adequate remedy in law and the allegations of irreparable harm were not 'speculative, but genuine and immediate.'

20. It would be pertinent to refer to two other cases where the Supreme Court of India considered the plea of 'irretrievable injury or injustice'. In the case of "Svenska Handelsbanken vs M/s. Indian Charge Chrome and others", *AIR 1994 SC 626*, an injunction was declined as the Court was satisfied that on the facts of the case, irretrievable injustice or injury of the type seen in the case of Itek Corporation was not made out, on the grounds that there was no difficulty in judgments passed by the courts in India being executed in Sweden. Similarly, in another case titled "M/s Tarapore and Co., Madras, vs M/s V/o Tractoroexport Moscow and another", *AIR 1970 SC 891*, the main contention of the plaintiff was that the other party, a Russian Firm, had no assets in India and in case the latter was allowed to take out money from India, irretrievable injury will be caused as any decree obtained in India would not be executable. The Court was not persuaded with the argument and did not find it relevant.

21. The above has remained a consistent view of the Supreme Court Of India and reference may be made to the cases of "United Commercial Bank vs Bank of India & others", *AIR 1981 SC 1426*, "M/s. BSES Ltd. (now Reliance Energy Ltd.) vs. M/s. Fenner India Ltd. & Anr.", *AIR 2006 SC 1148*, "M/s Alcove Industries Ltd vs M/s Oriental Structural Engineers Limited", *AIR 2005 Delhi 173*, "Hindustan Construction Co. Ltd. Vs State of Bihar and others", *(1999) 8 SCC 436*, "Vinitec Electronics Private Ltd vs HCL Infosystems Ltd", *(2008) 1*

SCC 544, "Hindustan Steel Works Construction Ltd vs Tarapore & Co. And Another", (1996) 5 SCC 34.

22. On the question of the test for the plea of fraud, in the context of granting an injunction, it has been aptly articulated in the opinion of Sir John Donaldson, M.R. in "Bolivinter Oil SA v. Chase Manhattan Bank and anothers", (1984) 1 All ER 351, 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 on 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."*

23. It is, therefore, obvious that a Bank or Insurance Guarantee is an independent contract and its autonomy is to be protected. As a rule courts do not interfere with the autonomy of an unconditional and irrevocable guarantee, except in certain exceptional circumstances. The two exceptional circumstances are, fraud and irretrievable injustice or injury. 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. 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. Another example given in this regard is when an irrevocable and unconditional guarantee is furnished, while the primary or underlying contract has never come into existence. Such a case is illustrated by the facts in "Kirloskar Pneumatice Company Ltd., vs National Thermal Power Corporation Ltd. And another", *AIR 1987 Bombay 308.* The irretrievable injury or injustice, therefore, must be of the type illustrated in the Itek Corporation case, as discussed above. The plea must be genuine and immediate and not speculative 'A mere apprehension that the other party will not be able to pay is not enough'. There must be certainty and the impossibility to recover be 'decisively established'. Moreover, relying on the principle that a guarantee is independent and its autonomy ought to be protected, a court will not be influenced by the dispute arising out of the primary or underlying agreement, and whether or not in the suit a prima facie case is made out. The rule, as discussed above, has inevitably been laid down to ensure certainty of binding contractual commitments, keeping the sanctity and autonomy of a guarantee as a paramount consideration, so as to ensure confidence in the commercial and mercantile spheres. It may, therefore, be summed up that Courts are slow and show restraint in interfering in the encashment of an unconditional guarantee, except in very exceptional cases as highlighted above.

24. Having discussed the law and principles relating to the encashment of an irrevocable and unconditional Bank or Insurance guarantee, I now proceed to examine the contents of the Guarantee in the light of what has been discussed above. The relevant clauses of the Guarantee are reproduced as follows:

> 1. *WHEREAS,* ***M/s. Embassy of Tajikistan, Islamabad-Pakistan*** *(hereinafter called the 'Employer') has entered into a Contract* ***For the Design for the Embassy of the Republic of Tajikistan, Islamabad*** *(hereinafter called the 'Contract') with* ***M/s, Montage***

Design ***Build, House# 3A, Street # 70, Sector F-8/3, Islamabad*** *(hereinafter called the "Architect").*

2. *AND WHEREAS, the Employer has agreed to advance to the Architect, at the Architect's request, an amount of* ***Rs.9,506,000.00 (Rupees Nine Million Five Hundred Six Thousand only)*** *which amount shall be advanced to the Architect as per provisions of the Contract.*

3. *AND WHEREAS, the Employer has asked the Architect to furnish guarantee to secure the Mobilization Advance for the performance of his obligations under the said Contract.*

4. *AND WHEREAS* ***M/s United Insurance Company, Century Tower, 2nd Floor, The Mall Rawalpindi (Head Office UIG House 6-D Upper Mall Lahore)*** *(hereinafter called the 'Guarantor') at the request of the Architect and in consideration of the Employer agreeing to make the above advance to the Contractor, has agreed to furnish the said Guarantee.*

5. *NOW, THEREFORE, the Guarantor hereby guarantees that the Architect shall use the advance for the purpose of above mentioned Contract and if he fails and commits default in fulfillment of any of his obligations for which the advance payment is made, the Guarantor shall be liable to the Employer for payment not exceeding the aforementioned amount.*

6. *NOTICE in writing of any default, of which the Employer shall be the sole and final judge, on the part of the Contractor, shall be given by the Employer to the Guarantor and on such first written demand, payment shall be made by the Guarantor of all sums then due under this Guarantee without any reference to the Contractor and without any objection.*

25. There is no cavil to the proposition that in constructing a document, the contents have to be read as a whole. The initial four clauses describe the parties, the purpose and the amount of the Guarantee. The fifth and sixth clauses are the most relevant for the adjudication of the present petition. The fifth clause makes it obligatory on part of the appellant to use the advance for the purpose of the agreement and, in case of a default of any of the obligations, the respondent No.2 has committed itself to be liable to the respondent No.1 for payment not exceeding the amount mentioned in clause-2. There is no doubt that the language of clause-6, when read with the other clauses, makes the guarantee irrevocable and unconditional. The clause unequivocally stipulates that the respondent no. 1 shall give notice, in writing, of any default, and shall be the "sole and final judge" of such a default on the part of the appellant. It further clarifies that the respondent No.2 is under absolute obligation to make the payment to the respondent No.1 on the first written demand, without any "reference" to the appellant and "without any objection". The emphasis of the learned counsel for the respondent No.1 has been on the words *"all sums then due"*. This Court is not impressed with the argument, as the clause has to be read as a whole. The language is unambiguous and clear. The appellant is neither required to be informed, nor does it have the right to raise an objection. It may be emphasized that the appellant, a firm of qualified professionals, was aware of the language of the Guarantee, and it was this instrument which formed the basis for the release of the advance of a substantial amount. The appellant, as well as the respondent no. 2, an Insurance company, were aware of the consequences. It is also noted that the scope of the work relates to rendering of services, rather than purchase of goods, equipment or any material. The obligation of the respondent No.2 under the Guarantee is absolute i.e. to make the payment to the respondent No.1, without recourse to the appellant, and treating the respondent No.1 as the sole and final judge for the default.

26. Neither the appellant nor the respondent No.2 has raised the plea of fraud; rather the existence of the agreement dated 24-04-2014, is admitted. The case of the appellant rests on an alleged breach on the part of the respondent No.1,

for giving the construction work to a third party, in violation of a verbal commitment made to the appellant. The alleged oral commitment is yet to be established before the trial Court. As noted above, the Guarantee is an independent contract, manifestly unconditional and irrevocable. Its encashment, therefore, is an absolute obligation of the respondent No.2, regardless of any dispute between the appellant and the respondent No.1.

27. This Court deprecates the delay on the part of the respondent No.2 in fulfilling its part of the obligation, which amounts to avoiding its absolute commitment under the Guarantee. An unconditional guarantee is an absolute undertaking to pay the amount whenever demanded, as is the case under the terms and conditions of the Guarantee.

28. The learned counsel for the appellant, despite his able assistance, impressive advocacy skills and hard work, has not been able to persuade this Court that a case is made out for the granting of an injunction, restraining the encashment of the irrevocable and unconditional Guarantee. The appellant had voluntarily provided the Guarantee to the respondent No. 1 for the release of the advance, otherwise the respondent No. 1 would not have parted with a substantial amount. It was known to the appellant firm that the respondent No.1 was to be the 'sole and final' judge of the default for the purposes of the encashment of the Guarantee, and the respondent No. 2 will make the payment on receiving the first written notice of default. The appellant had accepted the absolute obligation of the respondent No.2 to pay the amount of the Guarantee, without reference to, or any objection by the appellant. The respondent No.1 released a substantial amount to the appellant as advance on the basis of the unconditional Guarantee. There is nothing on record for making out a case for granting an injunctive order to restrain the encashment of the unconditional Guarantee.

29. The appellant could have raised an argument that the respondent no. 1, having diplomatic status, may avoid the execution of a money decree if granted by the trial court, so as to make out a case of irretrievable injury. However, in the present case such an argument would have been without force.

The respondent no. 1 has joined the proceedings before the trial court, thus submitting to its jurisdiction. There is nothing on record, or otherwise, to suggest that the circumstances exist so as to satisfy the test of 'irretrievable harm or injustice', as discussed above. Any apprehension regarding a decree passed by the trial court as not executable is misplaced.

30. Based on the above discussion, this appeal fails and is accordingly dismissed.

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.

32. In the present case, respondent No. 2 has violated the unequivocal absolute obligations under the Guarantee by delaying the payment there under. It is also noted that it appears from the record, and the conduct of the respondent No. 2, and in many other such cases, that the Security Exchange Commission of Pakistan has probably failed in its duty as a Regulator to regulate the affairs of the Insurance Companies. Office is directed to send a copy of this order to the Security Exchange Commission of Pakistan. The Commission shall submit a report to the Registrar of this Court regarding regulatory measures undertaken to ensure that Insurance Companies comply with their absolute commitments arising out of irrevocable and unconditional guarantees, issued by such companies.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on___ December, 2014.

JUDGE

Approved for reporting.

Asif Mughal/*