SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Amin-Ud-Din Khan

Civil Petition Nos. 3209 and 3359 of 2020
(Against the judgment dated 22.10.2020 passed by the Islamabad High Court in FAO.No.7 of 2020 and C.R.No.402 of 2019.)

Atif Mehmood Kiyani and another ...*Petitioners*

Versus

M/s Sukh Chayn Private Limited, Royal Plaza, Blue Area Islamabad and another ...*Respondents*

For the Petitioners: Syed Mujtaba Haider Sherazi, ASC.
Syed Rifaqat Hussain Shah, AOR.

For the Respondents: Mr. Muhammad Mansoor Usman, ASC.
Mr. Ahmad Nawaz Ch., AOR.

Date of Hearing: 16.02.2021

ORDER

Amin-ud-Din Khan, J.- Through this order we intend to decide CPLA.No.3209 of 2020 as well as CPLA.No.3359 of 2020 through which leave has been sought against the consolidated judgment dated 22.10.2020 of the Islamabad High Court whereby FAO.No.7 of 2020 as well as Civil Revision No. 402 of 2019 filed by respondent No.1 were allowed.

2. A suit for declaration and specific performance was filed on the basis of a land purchase agreement dated 29.04.2016 by the petitioners in the year 2016. A counter suit was also filed by the respondent No.1 against the petitioners in the year 2018 for declaration as to commission of breach of the said agreement by the petitioners, return of advance amount of PKR.50,000,000/- and damages PKR.50,000,000/- for breach of the agreement. In the suit filed by the petitioners plaintiff, an application for grant of temporary injunction restraining respondent No. 1 from encashment of insurance

guarantee was moved and the learned trial court Civil Judge, Islamabad by allowing the said application on 13.12.2019 passed the restraining order. The said order was challenged through FAO No.7 of 2020 by the respondent No.1, which was allowed by the High Court vide the consolidated judgment dated 22.10.2020 impugned before us by the petitioners through CPLA No.3209 of 2020. In the suit of the respondent No.1, the petitioners filed an application under section 10 of the CPC for stay of proceedings of that suit, and the same was allowed by the learned trial court vide order dated 19.9.2019 and the proceedings of that suit were stayed, against which the respondent No.1 filed Civil Revision No. 402 of 2019. The civil revision was also allowed by the learned High Court vide the consolidated judgment dated 22.10.2020, which has been challenged before us through CPLA No.3359 of 2020.

3. We have heard the learned counsel for the parties and gone through the record.

CPLA No.3209 of 2020

4. The well-settled considerations for the grant or refusal of temporary injunction, as stated by a four-member larger Bench of this Court in "*Muhammad Umar v. Sultan Mahmood*" **(PLD 1970 SC 139)**, are to see: firstly, whether the plaintiff has a *prima facie* good case; secondly, whether the balance of convenience lies in favour of the grant of injunction; and thirdly, whether the plaintiff would suffer irreparable loss if the injunction is refused. The parties, in the present case, have blamed each other for committing breach of the terms of the land purchase agreement dated 29.04.2016. Although it would be determined by the trial court after recording evidence of the parties that which one is really at fault, yet the assertion of the petitioners that the insurance guarantee provided by them against receiving the

advance mobilization amount PKR.50,000,000/- can be enchased by respondent No.1 only once it is established that they have failed to perform their part of the agreement, is *prima facie* negated by clause No.5.1.3 of the agreement which states that "the insurance company shall en-cash the guarantee at the first written demand of the Purchaser [respondent No.1], unconditionally and without any delay or requirement of confirmation from the Sellers [petitioners] whether or not the Agreement has been breached". Likewise, the Insurance Guarantee provides that "the Guarantor shall pay without objection any sum or sums up to the amount stated above upon first written demand from the employer [respondent No.1] forthwith and without any reference to the Principal [petitioners] or any other person. The said terms of both the agreement between the parties and of the insurance guarantee state that the insurance company (guarantor) is to encash the guarantee at the first written demand of the respondent No.1 unconditionally without any delay and without requiring confirmation from the petitioners whether or not the agreement has been breached. The petitioners, therefore, do not have a good *prima facie* case for restraining the respondent No.1 from encashing the insurance guarantee till decision of the dispute as to who has committed breach of the terms of the agreement.

5. A bank or insurance guarantee that contains a categorical undertaking and impose absolute obligation on the guarantor, i.e., the bank or the insurance company, to pay the guaranteed amount, irrespective of any dispute which may arise between the parties regarding breach of the contract for which performance that one party furnishes the guarantee to the other, is an independent contract; therefore, the guarantor must discharge its obligations under the contract of guarantee as per the terms thereof, independent of the

dispute as to performance of the primary contract between the parties. In a similar case of "*National Construction Ltd. v. Aiwan-e-Iqbal Authority*" **(PLD 1994 SC 311)**, this Court, while maintaining the orders of the High court and the trial court refusing to grant temporary injunction for restraining the respondent therein from encasing the bank guarantee, observed:

> 4. .....The contents of para.3 of mobilization advance guarantee, clearly visualized that the respondent can get encashed guarantee without any question or without any reference of any nature, whatsoever to the contractor (appellants) and irrespective of any dispute between the parties or before any arbitrator or any Court of law..... In the instant case, therefore, the bank guarantees furnished by the appellants contain categorical undertaking and impose absolute obligations on the banks to pay the amount, irrespective of any dispute which may arise between the parties regarding the breach of contract. In our view the Courts must given effect to the convenants of the bank guarantees, the performance guarantees, for the smooth performance of the contracts. 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.

Likewise, in the case of "*Shipyard K. Damen v. Karachi Shipyard*" **(PLD 2003 SC 191)** this Court maintained the orders passed by the High Court refusing the prayer for interim orders to restrain the respondents from encashment of Performance Bank Guarantees, and observed:

> 23. The law is thus settled that extraneous claims and counter-claims do not bar the enforcement of the bank guarantee. The enforcement depends upon its terms and conditions. If bank guarantees are unconditional, there is no other option for the bank and moreso, the bank would have no defence, when its guarantee is sought to be enforced.....
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> 24. .....encashment of bank guarantee has no nexus with the spirit of the contract executed between the parties being an independent contract containing its own terms and conditions to be performed by the

> concerned parties. The encashment of the bank guarantee had nothing to do with the alleged dispute between the petitioners and the respondent, which must be decided independently on the basis of terms of that contract without involving the contract of bank guarantee. It must be noted that bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfil the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

In view of this legal position, we find that the judgment of the High Court setting aside the order of the trial court and dismissing the application of the petitioners for temporary injunction to restrain the respondent No.1 from encashment of the insurance guarantee till decision of the suit is in accordance with the law declared by this Court in the above cases, and thus do not call for any interference. CPLA No.3209 of 2020 is, therefore, dismissed and leave refused.

CPLA No.3359 of 2020

6. For attracting the application of the provisions of Section 10 of the Code of Civil Procedure 1980 ("CPC"), the matter in issue or all the matters in issue, if there are more than one, must be directly and substantially the same. It is true that the matter as to determining which party is at fault for the alleged breach of the land purchase agreement is in issue between the petitioners and respondent No.1 in both the suits; but in the second suit filed by respondent No.1 an additional matter as to entitlement of respondent No.1 to receive damages from the petitioners for the alleged breach of the contract, loss of profits and opportunity costs has also been raised, which is not in issue, and cannot be decided, in the suit filed by the petitioners. Where some of the matters in issue in the subsequent suits are same and some are not, then proceedings of that suit cannot be stayed under Section 10, CPC; however, in order to avoid any conflicting finding on the issues that are common in both the suits, the proceedings of both the suits may be consolidated by the

court in exercise of its inherent power under Section 151 CPC, for securing ends of justice and preventing abuse of the process of the court. In "*Muhammad Yaqoob v. Behram Khan*" **(2006 SCMR 1262)**, this Court, while maintaining the impugned judgment whereby the High Court had directed for consolidation of both the suits by setting aside order of the trial court staying proceedings of the subsequent suit, observed:

> 3. .....It is a settled principle of law that where a common subject of claim is in dispute in counter-suits, both the suits are consolidated and decided together. This rule is imperative in order to avoid conflicting decisions. The rule was completely ignored by the trial Court as it failed to decide the issue in question and committed error to stay the proceeding of the respondent's suit which was rightly rectified by the learned High Court with cogent reasons in the impugned judgment. It is pertinent to mention here that parties in both the suits are the same and subject-matter/property is the same. It is well-settled by a long chain of authorities that the consolidation of the suits can be ordered by the Court in exercise of its inherent powers. The consent of the parties is not the condition precedent for exercise of such powers. The purpose of consolidation is to avoid multiplicity of litigation to eliminate award of contradictory judgments and to prevent the abuse of the process of the Court.

Therefore, we find the High Court has adopted the right approach by setting aside the order of the trial court staying proceedings of the suit of respondent No.1 but directing for consolidation of proceedings of both the suits. There is no merit in CPLA No.3359 of 2020 also; it is dismissed and leave refused.

Judge

Islamabad, the
16th of February, 2021
(Mazhar Javed Bhatti)

Judge

Approved for reporting