IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE JAMAL KHAN MANDOKHAIL

CIVIL APPEAL NO.196-P OF 2014
(Against the judgment of the Peshawar High Court, Peshawar dated 22.09.2010 passed in Writ Petition No.2064/2010)

Allied Bank Limited

...Appellant

VERSUS

Federation of Pakistan thr. Collectorate of Customs, Peshawar & others

...Respondent(s)

For the Appellant: *Mr. Muhammad Ajmal Khan, AOR/ASC*
(via video link from Peshawar)

Respondents 1-4: *Mr. Abdul Rauf Rohaila, ASC*
(via video link from Peshawar)

Respondent No.5: *Nemo*

On Court Notice: *Raja Muhammad Shafqat Abbasi, DAG*

Date of Hearing: 30.05.2023

JUDGMENT

IJAZ UL AHSAN, J-. Through the instant Appeal by leave of this Court, the Appellant has challenged the judgment of the Peshawar High Court, Peshawar dated 22.09.2010 (*hereinafter the "**Impugned Judgment**"*) whereby the constitutional petition of the Respondent was dismissed.

2. Leave to appeal was granted by this Court *vide* this Court's order dated 20.10.2014 which is reproduced below for ease of reference:

> *"Respondent No.5 filed a writ petition challenging withdrawal of certain tax exemption on the import of raw material and the learned High Court seemingly passed an order directing the release of goods to the writ petitioner on furnishing a bank guarantee. Pursuant thereto, the petitioner/bank furnished bank guarantee in the following terms:-*
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> > *"Now the condition of this Bank Guarantee is that this Bank Guarantee can be enforced at any time after the release of the goods, at the expiry of the validity period of the stay order/temporary injunction in terms of clause 4(A) of Article 199, of the constitution of Islamic Republic of Pakistan or the decision of the Court whichever is earlier …*
> >
> > *This Guarantee is valid up to 14.04.1994 by which dated claim, if any in writing by registered post should be received by period, we shall stand absolved and released from all liabilities."*
>
> *This writ petition was, however, dismissed vide judgement dated 15.05.1994. Thereafter, the department never approached the petitioner for encashment of the bank guarantee and by that time the period of guarantee had expired not only in terms of the first part of the order, but also even by virtue of second part of the same, reproduced above, and on 04.05.2009 a notice for the above purpose was served upon the petitioner when the ordinary period of limitation; for recovery of amount through enforcement of the guarantee as well as on the basis of reasonableness of time had expired and the petitioner under the law stood discharged from its liability to pay. Whether such guarantee had been validly held to be enforceable by the learned High Court when the action of the respondent demanding enforcement of the guarantee was challenged in the constitutional petition through the impugned judgement especially when the guarantee was not even a continuous guarantee for an unlimited period of time. Leave is granted to consider the above."*

3. The factual matrix and the arguments raised by the learned counsel for the Appellant have already been summed up and reproduced in the leave-granting order. The same therefore requires no repetition. We would however like

to clarify that the Appellant's petition before the High Court sought to prohibit the Customs Department/Respondents 1-4 from encashing five bank guarantees issued in favour of the said Respondents as surety for the liability of Respondent No.5. These guarantees were numbered 96/29, 93/65, 93/62, 93/05 and 93/06. Their respective expiry dates were 10.02.1995, 14.04.1995, 26.04.1995, 08.01.1995 and 08.01.1995.

4. The learned counsel for the Appellant has argued that the guarantees that are the subject matter of this *lis* were issued at the request of Respondent No.5 and that the first time any formal demand was made by Respondents 1-4 for their encashment was on 14.05.1998 which was three years after the guarantees in question had expired. Subsequently, and after a period of over ten years, Respondents 1-4 submitted another demand notice dated 04.05.2009 for encashment of the said guarantees which was well-beyond the period for encashing the same. The Appellant subsequently approached the High Court seeking a writ for prohibition which was dismissed *vide* the impugned judgement. The learned counsel prays that the instant Appeal be allowed and the petition of the Appellant before the High Court be accepted as prayed for.

5. The learned counsel for Respondents 1-4, on the other hand, has defended the impugned judgement. He contends that government dues that had been pending since 1993 were being sought to be recovered by way of the

encashment of the guarantees in question. Further maintains that in light of Section 202 of the Customs Act, 1969 (*the "**Customs Act**"*), there was no fetter on Respondents 1-4 from encashing the guarantees in question at any point in time since the said Section does not stipulate a period of limitation for the recovery of government dues under the said Act. In support of his contentions, the learned counsel for Respondents 1-4 has relied on *Bara Ghee Mills (Pvt.) Ltd. vs. Assistant Collector Customs* (**PLD 2017 SC 738**), *Universal Insurance Co. Ltd. vs. Collector Customs, Central Excise & Sales Tax, Peshawar* (**2005 PTD 2355**), and *Atif Mehmood Kiyani vs. Messrs Sukh Chayn Private Limited, Royal Plaza, Blue Area, Islamabad* (**2021 SCMR 1446**). He has prayed that the instant Appeal be dismissed.

6. The learned Deputy Attorney General who has appeared pursuant to this Court's notice has also supported the arguments raised by the learned counsel for Respondents 1-4. He has argued that the guarantees in question were standalone contracts between the Appellant and Respondents 1-4 and it was inconsequential how the litigation between Respondents 1-4 and Respondent No.5 concluded. Once Respondents 1-4 demanded encashment of the bank guarantees, the Appellant was duty-bound to encash the same under the terms of the said guarantees.

7. We have heard the learned counsel for the parties and gone through the record. The single point of law that needs to be determined by this Court is:-

i. *Could the High Court have, by disregarding the express terms of the guarantee, dismissed the petition of the Appellant seeking a writ of prohibition against Respondents 1-4?*

8. In its very essence, a bank guarantee is an undertaking given by a bank to pay a beneficiary a sum on behalf of a principal debtor.

9. Guarantees are regulated in Pakistan under Chapter VIII of the Contract Act of 1872 ("**Contract Act**"). Guarantees are defined under Section 126 of the said Act. The same is reproduced for ease of reference:-

> "*A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.*"

10. Since a guarantee is, for the purposes of the Contract Act, a contract under the law, the parties to the guarantee are deemed to be regulated by the terms of the guarantee which they have mutually agreed upon keeping in view the legal principle of *consensus ad idem* (*meeting of the minds*) when it comes to construction of contracts. Once a guarantee is executed between the parties (*i.e. between a guarantor/surety and a creditor*), they would be bound by the terms and conditions of the guarantee irrespective of any independent obligation of the principal debtor towards the

creditor. That rule is firmly entrenched in our as well as common law jurisprudence.

11. This Court has, in the case of *EFU General Insurance Ltd. vs. Zhongxhing Telecom Pakistan (Private) Limited* (**2022 SCMR 1994**) expressed its view on demand guarantees. The relevant portion of the said judgement is reproduced for ease of reference:-

> "*6. … It is clear that the guarantee in question was in the nature of a demand guarantee. The law relating to performance bonds and demand guarantees, and the conceptual framework regarding the same, especially as to the enforcement (or otherwise) of such instruments, is now well settled in common law jurisdictions. In our country one of the leading decisions is of this Court, reported as Shipyard K. Damen International v Karachi Shipyard and Engineering Works Ltd. PLD 2003 SC 191, 2003 CLD 1 ("Karachi Shipyard"). It is a leave refusing order of a learned three member Bench. Reference was made therein to a large number of authorities, including English and Indian cases, and many were considered in detail. The principles deducible were set out in para 7 (pp. 201-3), with which (subject to what is stated below) we are in agreement …*
>
> *7. It will be seen that demand guarantees are regarded as being in nature similar to letters of credit, and the guarantee constitutes an autonomous contract between the issuer and the beneficiary. Now, one aspect of the law relating to letters of credit is the rule of strict compliance. The documents presented by the beneficiary to the issuing (or, if such be the case, confirming) bank must comply strictly with the terms thereof. If so, the bank is (subject to exceptions and conditions not presently relevant) bound to pay. If not, the bank is bound to refuse payment …*"

12. In the UK, the England & Wales Court of Appeal in *Edward Owens Engineering Ltd. vs. Barclays Bank International Ltd.* (**[1977] 3 W.L.R. 764**) while dealing with the encashment of a performance bond (*which are a sub-set of demand guarantees*) noted that:-

> "*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 the question whether 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, 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.*"
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> (**Underlining is ours**)

Similarly, in Sri Lanka, the Supreme Court in *Commercial Bank of Ceylon PLC vs. Ace Containers (Pvt) Ltd.* (**[2015] 1 S.L.R. 223**) relied heavily on Paget's Law of Banking when describing a demand guarantee. The said para is reproduced for ease of reference:-

> "*Paget's Law of Banking 12th edition Chapter 34.2 at page 730 describes the characteristics of Demand Guarantees as follows "The essential difference between a guarantee in the strict sense (i.e, a contract of suretyship) and a demand guarantee is that liability of a surety is secondary, whereas the liability of the issuer of a demand guarantee is primary. A surety's liability is co-extensive with that of the principal debtor and, if default by the principal debtor is disputed by the surety, it must be proved by the creditor Neither proposition applies to a demand guarantee. The principle which underlies demand*

guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by disputes under the underlining contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter-guarantor) and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party.""

The conduct of parties to a bank guarantee has also been the subject of discussion by the Indian Supreme Court in *U.P. State Sugar Corporation vs. Sumac International Ltd.* (**[1997] 1 SCC 568**) wherein it was of the view that:-

"*The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee.*"

(**Underlining is ours**)

Reference may also be helpfully made to the judgement of the High Court of England & Wales in *Simon Carves Ltd. vs. Ensus UK Limited* (**[2011] EWHC 657 (TCC)**). Reflecting the

everchanging need to keep up with contemporary commercial practices, Mr. Justice Akenhead opined that:-

> "*12. I am very reluctant on the basis of an argument that has run for no more than about 45 or 50 minutes from both parties to make any final findings of law about this. … It is certainly the case, and the law and practice establishes this over many years, that a bank or surety which has provided an on demand bond, sometimes called an unconditional bond, cannot be enjoined against paying against a valid demand unless there is the clearest at least prima facie evidence of fraud, either fraud at the bank or fraud by the giver of the demand. …*"
>
> (**Underlining is ours**)

13. It would therefore appear that once a bank issues a guarantee, it is duty-bound to pay the beneficiary of a guarantee *in terms of the guarantee itself*.

14. *Ex facie*, the guarantees issued by the Appellant in favour of Respondents 1-4, although issued on behalf of Respondent No.5, were independent standalone obligations between the Appellant and Respondents 1-4 which were liable to be paid on demand by the Appellant without reference to Respondent No.5. But the said obligation was limited by time and amount with time being the expiry date mentioned in the guarantee document itself. It was for this reason that we insisted that the learned counsel for Respondents 1-4 satisfy this Court that a valid demand had been made for the encashment of the guarantees within the period stipulated in the terms of the guarantees itself. The learned counsel has taken us to the relevant demand notices addressed to the Appellant but we note that all such demand notices were

issued after the expiry of the encashment period stipulated in the relevant guarantees.

15. When confronted with the said situation, the learned counsel has tried to raise an argument to the effect that in terms of Section 202 of the Customs Act, no limitation ran for the recovery of government dues and therefore the guarantees in question could be encashed by Respondents 1-4 at any time the said Respondents chose to demand payment since the guarantees could not operate as estoppel against the express provisions of the Customs Act and the said guarantees had been issued as a surety against the liability of Respondent No.5. We note that this is the line of reasoning that has found favour with and subsequently been adopted by the High Court in the impugned judgement. We must, however, respectfully disagree with the submissions of the learned counsel for Respondents 1-4 as well as the view taken by the High Court. The obligation of the Appellant to pay was anchored in the contract of guarantee and not in the Customs Act. Therefore, the obligation of the Appellant to pay under the guarantee does not make the "*guaranteed amount*" "*government dues*" in the sense used in Section 202 of the Customs Act. Further, for avoidance of any doubt, the right of Respondents 1-4 to recover any government dues from Respondent No.5 had already been expressly protected in the terms of the guarantees itself. For ease of reference, the relevant portion of the guarantee is reproduced:-

> "*… This would, however be without prejudice to the Power of the Collector of customs to recover the amount … involved in the release of the captioned consignment shall be recoverable under Section 202 of the Customs Act 1969 specially by way attachment and sale of any moveable or immoveable property of the defaulter and appointment of receiver from the Management of the moveable or immoveable property of the defaulter as in envisaged in clause a & b of Sub Section (3) of Section 202 ibid.*"

Respondents 1-4 could not have sought to recover Respondent No.5's liability in the manner that is now before us. By seeking to encash the said guarantees, Respondents 1-4 had, in essence, treated the Appellant as if it was an extension of Respondent No.5 which is, with all due respect, incorrect. The Appellant is a separate entity in the eyes of the law and cannot be saddled with the liability of making good any government dues that were to be recovered from Respondent No.5 (*and Respondent No.5 alone*) once the guarantees in question expired. We therefore have no hesitation in arriving at the conclusion that while Respondents 1-4 had the benefit of no period of limitation running against the recovery of government dues, such benefit was only available against Respondent No.5 and the High Court could not have held that by virtue of Section 202 of the Customs Act, the Appellant had also become subject to the said provisions because the Appellant is not subject to the Custom Act and the guarantee had been issued as a standalone contract for a limited period and for a limited purpose namely payment to the Government certain amounts

on its first call, unconditionally, provided the demand/call was made within the time specified and mutually agreed in the contract itself. Therefore, the guarantees issued by the Appellant could not have been encashed by Respondents 1-4 at any point in time regardless of their expiration dates. It may be emphasized that a contract of guarantee is a standalone and independent contract between the guarantor (*in this case, the Appellant*) and the beneficiary (*in this case, Respondents 1-4/Federation*) for a limited period (*unless the guarantee contract specifically states that it is a continuing guarantee or language to that effect and no date or event of expiry thereof is specified*) and for a limited purpose (*that is, to pay the amount mentioned therein on a call being made within the time specified*) without reference to any third party or the underlying transaction that constituted the basis for issuance of the guarantee. The parties to the guarantee contract are bound by the terms and conditions of the guarantee including its date of expiry. Unless a valid call is received by the Guarantor within the time specified in the guarantee, the Guarantor is released of any and all obligations under the contract and the contract itself expires. The Guarantor, by reason of issuing the guarantee, does not become subject to Section 202 of the Customs Act in the sense understood by the High Court by reason of guaranteeing payment of certain sums. The Guarantor does not become liable to pay "*government dues*" referenced to in Section 202 of the Customs Act because such liability continues to be attached to the person who owes such dues to the Customs

Department. The Department can, therefore, rely on Section 202 to recover the said dues from the person/company (*in this case, Respondent No.5*).

16. We have also examined the judgements sought to be relied upon by the learned counsel for Respondents 1-4. Two of the said judgements are leave-refusing orders of this Court and the third judgement was passed by a division bench of the Peshawar High Court. The said orders do not address the specific question before us and proceed on a different set of facts and circumstances and do not lay down the law on the subject. Even otherwise, none of the relied-upon judgements deal with the issue of encashment of guarantees past their expiration date. The same are therefore distinguishable and are of no help to the case of Respondents 1-4.

17. To answer the issue framed by this Court, the High Court could not have disregarded the express terms of the guarantees and allowed encashment of the same by dismissing the Appellant's petition on the ground that no limitation ran against the recovery of government dues by the Customs Department/Respondents 1-4 in terms of Section 202 of the Customs Act.

18. For the aforenoted reasons, we find that the impugned judgement suffers from misapplication of the applicable law on the subject and is therefore unsustainable. Consequently, the impugned judgement is set aside and the

petition of Appellant filed before the High Court is allowed as prayed for. This appeal allowed. There shall be no order as to costs.

19. These are the detailed reasons for our short order of even date. For ease of reference, the said short order is reproduced:-

> "*For detailed reasons to be recorded later, this appeal is allowed.*"

Judge

Judge

Judge

ISLAMABAD, THE
30th of May, 2023
Khalil Sahibzada, LC/-*

NOT APPROVED FOR REPORTING*/-