PDS # 1832 **2013 CLD 1110**

Suit No.1107 of 2011, decided on 10th December, 2012. Date of hearing: 29th November, 2012.

SINDH

Before Nadeem Akhtar, J

Chaudhry Atif for Plaintiff
Siddique Shahzad for Defendant No.1
Gazain Magsi for Defendant No.2

Messrs CRESCENT STEEL AND ALLIED PRODUCTS LIMITED---Plaintiff

Messrs SUI NORTHERN GAS PIPELINE LIMITED and another---Respondents

[Arbitration Act (X of 1940)].....Section 20---Appreciation for filing of arbitration agreement in court---Duty of court---Court in such case would have to examine existence or non-existence of arbitration agreement and dispute(s) between the parties---Denial of assertions made by either side would prove existence of dispute---Arbitrator appointed by parties would be only an independent and impartial forum in case of such agreement---Principles.

Messrs Friends Trading Co. v. Messrs Muhammad Usman-Moula Bux PLD 954 Sindh 56; Ghulam Ishaq Khan Institute of Engineering, Science and Technology and another v. Messrs Hassan Construction Co. (Pvt.) Ltd. Engineer and Consultants 1998 CLC 485; Muhammad Umar v. Yar Muhammad through his Legal Heirs and others 2009 CLC 348 and Muhammad Azam Muhammad Fazil and Co., Karachi v. Messrs N. A. Industries, Karachi PLD 1977 Kar. 21 rel.

(b) Administration of justice---

----No party could be judge of his own cause.

(c) Arbitration Act (X of 1940)---

----S. 2(a)---"Contract" and "arbitration agreement"---Distinction.

Where the parties enter into a contract, which incorporates an arbitration clause, it constitutes an arbitration agreement. However, the arbitration clause and the contract which incorporates it are two distinct contracts. The arbitration clause provides an agreement by the parties to resolve present and future disputes by arbitration, whereas the contract which incorporates the arbitration clause by reference is the underlying contract. Dispute between the parties arises from the underlying contract and not from the arbitration agreement.

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(d) Arbitration Act (X of 1940)---

----S. 20---Civil Procedure Code (V of 1908), O. XXXIX, Rr.1 & 2---Arbitration agreement with intervention of court---Dispute between parties regarding non-performance of contract---Application for restraining first defendant from encashing performance guarantee and also second defendant from making payment thereunder to first defendant till decision of such dispute by arbitrator---Applicant's plea was that quantum of liquidated damages, if any, required decision on basis of evidence; and that question yet requiring decision was as to whether or not first defendant was entitled to such damages---Validity---Plaintiff as tentative measure had submitted such guarantee equivalent to quantum of such damages claimed by first defendant---Determination of quantum of such damages and fulfilment of conditions for encashment of such guarantee being a dispute between parties would be decided by arbitrators to be appointed in terms of arbitration agreement---First defendant had yet to prove losses suffered by him in order to become entitled to such damages, thus, he could not be allowed to encash such guarantee before conclusion of arbitration proceedings---High Court accepted such application of plaintiff in circumstances.

Messrs Jamia Industries Limited v. Messrs Pakistan Refinery Limited PLD 1976 Kar. 644; Messrs Petrosin Products (Pvt.) Limited and others v. Government of Pakistan through Secretary, Privatization Commission of Pakistan, Ministry of Finance, Government of Pakistan, Islamabad and 3 others 2000 MLD 785; Messrs Zeenat Brother (Pvt.) Ltd. v. Aiwan-e-Iqbal Authority through Chairman, Aiwane Iqbal Complex, Lahore and 3 others PLD 1996 Kar. 183; Standard Construction Company (Pvt.) Ltd. v. Pakistan through Secretary, Ministry of Communication, Islamabad and 5 others 2010 CLD 360 and Standard Construction Company (Pvt.) Ltd. v. Pakistan through Secretary, M/o Communications and others 2010 CLD 196 rel.

JUDGMENT

NADEEM AKHTAR, J.---This is an application under section 20 of the Arbitration Act, 1940, whereby the applicant/plaintiff has prayed that the dispute between the plaintiff and defendant No. 1 arising out of the Contract/purchase order No. HOP/M/022/08 dated 9-7-2008 (the Contract) be referred for resolution to the Arbitrators and the Umpire in terms of Clause 13.1 of the 'General Terms' of 'Instructions to Bidders' annexed to the 'Invitation to Bid'/'Tender Enquiry No.SN-2463/08' issued by defendant No.1, all forming an integral part of the Contract. Along with the main application, the plaintiff has also filed an application bearing C.M.A. No. 9092 of 2011 for the grant of temporary injunction, which was also heard with the main application and would be disposed of through this judgment.

2. Defendant No.1 has filed objections in opposition to the application. Before discussing the submissions made by the learned counsel for the parties and expressing my views thereon, I would like to highlight that defendant No.1 has not disputed the execution of the Contract and the agreement therein with regard to the reference of any dispute arising therefrom to the Arbitrators and the Umpire. The objections raised by defendant No.1 are that there was/is no dispute between the parties, and that the dispute alleged by the plaintiff is not a dispute, as the same is not covered by the arbitration agreement. In view of the above, this judgment will be confined only to the question as to whether or not there is any dispute between the parties arising out of the Contract.

3. Defendant No.1 invited bids by issuing 'Invitation to Bid' dated 11-3-2008 for Tender Enquiry No. SN-2463/08 for the supply of Steel Line-pipe with a diameter of 22 inches. The plaintiff participated in the bidding and submitted its bid, which was accepted by defendant No.1 through its letter dated 9-7-2008. Admittedly, the contract became a binding one upon acceptance of the plaintiff's bid by defendant No.1. The

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total value of the contract, excluding sales tax and special excise duty, was agreed at Rs.507,014,065.00. As per the terms and conditions of the contract, the delivery was to commence 90 days after opening of the Letter of Credit by defendant No.1, and was to be completed within 140 days thereafter. Defendant No.1 opened the Letter of Credit on 18-7-2008. The delivery was commenced by the plaintiff on 24-12-2008, and was completed on 28-1-2009.

4. As required by defendant No.1, the plaintiff arranged a Performance Guarantee in the sum of Rs.45,583,109.00 and provided the same to defendant No.1. The Guarantee was extended from time to time, and was finally substituted by a Performance Guarantee No.63/31 dated 18-6-2010 issued by defendant No.2 in the sum of Rs.11,593,934.00.

5. It is the case of the plaintiff that, while submitting its bid, it was made clear to defendant No.1 by the plaintiff that the raw material for manufacturing the line-pipe shall have to be procured by the plaintiff from the sources abroad. The plaintiff has pointed out in the present application that the approved foreign sources were mentioned in the Contract itself. After succeeding in the bidding and entering into the Contract with defendant No. 1, the plaintiff placed an order with Daewoo International of Korea for the purchase of HR Coil of TISCO of Chinese origin, which is the essential raw material for manufacturing line-pipe. Daewoo International shipped the cargo aboard the vessel M.V. Gold at Qingdao Port, China, on 25-9-2008. The plaintiff has stated that the normal duration of a voyage from the Port of Qingdao to Karachi is 30 days, but the vessel M.V. Gold, instead of sailing to Karachi, sailed to Colombo and thereafter returned to Qingdao Port, China, without delivering the cargo at Karachi. The plaintiff, vide its letter dated 29-10-2008,, duly notified defendant No.1 of the delay in the arrival of HR Coil due to the above reason. The HR Coils were then finally reshipped from the same port on 14-11-2008 aboard the vessel Eastern Fortis, which arrived at Karachi on 17-12-2008.

6. It has been specifically highlighted by the plaintiff that defendant No.1 accepted the delivery, of the entire consignment on 28-1-2009 beyond the agreed date without any protest, or without informing the plaintiff that the delivery was being accepted by defendant No.1 reserving its right to claim liquidated damages from the plaintiff for the late delivery. After delivering the entire consignment to defendant No.1, when the plaintiff requested for the return of the Performance Guarantee, defendant No.1 refused to return the same and insisted that the plaintiff is liable to pay liquidated damages to defendant No.1 for the late delivery. In this context, the case of the plaintiff is that the plaintiff was not responsible for the delay which was beyond its control on account of force majeure, and that the plaintiff was legally entitled to an extension of time without imposition of liquidated damages.

7. As defendant No.1 was not prepared to let go of the liquidated damages despite the explanation given and requests made by the plaintiff, a demand of Rs.11,593,934.00 was raised by defendant No.1 towards liquidated damages. After some negotiations, the parties agreed that a fresh Performance Guarantee for the like amount would be submitted by the plaintiff as a tentative measure, whereafter defendant No.1 would once again review its claim for liquidated damages. Accordingly, a fresh Performance Guarantee No.63/31 dated 18-6-2010 in the sum of Rs.11,593,934.00 was issued by defendant No.2 at the request of the plaintiff, which in turn was provided to defendant No.1. The negotiations between the parties failed, whereafter defendant No.1 kept on pressing its claim for liquidated damages against the plaintiff and threatened to encash the Performance Guarantee in order to recover the same. The plaintiff has submitted that it is not liable to pay liquidated damages on account of force majeure, and that there was no breach of the Contract on its part.

8. In the above background, this application has been filed by the plaintiff invoking Clause 13.1 of the Contract which provides resolution of disputes between the parties through arbitration. The arbitration clause is reproduced below for ready reference:--

"13.1 Any difference of dispute arising out of or in connection with the contract between the purchaser and the supplier which cannot be amicably resolved shall be referred to Arbitration in Lahore, Pakistan of two Arbitrators one to be appointed by each party of such

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difference/dispute and to an Umpire to be appointed by the Arbitrators. The Umpire shall be retired judge of a High Court or the Supreme Court of Pakistan. Such Arbitrators and Umpire shall together proceed to adjudicate the dispute in accordance with the Pakistan Arbitration Act, 1940 as amended from time to time."

9. Chaudhry Atif, the learned counsel for the plaintiff, reiterated the submissions made by the plaintiff in its application. He submitted that Clause 9 of the purchase order/Contract dated 9-7-2008 specifically provided that all the terms and conditions of the Tender Enquiry No.SN-2463/08 and those mutually agreed upon through correspondence were to form part of the said purchase order/Contract. He further submitted that the said Tender Enquiry No. SN--2463/08 was issued by defendant No.1 with detailed 'Instructions to Bidders' containing the above quoted Clause 13.1 for reference to arbitration.' According to the learned counsel, the Tender Enquiry No.SN-2463/08 along with the 'instructions to Bidders' is an integral part of the purchase order/Contract as provided therein, and as such the arbitration clause is fully enforceable and binding upon both the parties. This position has not been disputed by defendant No.1. As observed earlier, defendant No.1 has not disputed the execution of the Contract and the agreement therein with regard to the reference of any dispute arising therefrom to the Arbitrators and the Umpire. Finally, it was contended by the learned counsel for the plaintiff that the dispute between the parties cannot be resolved without reference to arbitration.

10. On the other hand, Mr. Siddique Shahzad, the learned counsel for defendant No.1, strongly opposed the application on the ground that the assertion, which has been alleged by the plaintiff as a dispute, is neither a dispute between the parties, nor does the same fall within the scope of the Contract or the arbitration clause. He submitted that, by not delivering the consignment within the agreed time period, the plaintiff committed breach of the Contract entitling defendant No.1 to claim liquidated damages. He invited my attention to Clause 8 of the purchaser order/Contract dated 9-7-2008 containing provisions with regard to the claim of liquidated damages. The learned counsel submitted that the plea of force majeure urged by the plaintiff is misconceived as the benefit of force majeure can be claimed only in cases of acts of God, natural disasters or unavoidable catastrophes. He further submitted that the late arrival of the vessel cannot be termed as a force majeure, as the plaintiff was solely responsible to deliver the consignment within the stipulated time period. The learned counsel insisted that, because of the breach committed by the plaintiff, defendant No.1 is legally entitled under the Contract to claim liquidated damages, and as such no case has been made out by the plaintiff for referring the matter to arbitration.

11. I have considered the submissions made by both the learned counsel and have also examined the record and the relevant provisions of law relied upon by them. It would not be appropriate at this stage to discuss the documents referred to by the parties, the contents and/or the effect thereof, or to express my opinion as to whether or not the plaintiff committed breach of the Contract, or whether or not the plaintiff was/is entitled to extension of time on account of force majeure, or whether the late arrival of the vessel falls within the definition of force majeure, or whether the liquidated damages have been claimed by defendant, No.1 rightfully or illegally. Any finding given or opinion expressed by me regarding any of the above at this stage would affect or influence the arbitration proceedings, in case the matter is referred to arbitration. In any case, while considering an application under section 20 of the Arbitration Act, 1940, the court has to examine only the existence or non--existence of an arbitration agreement between the parties, and in case of such an agreement, then the existence or non-existence of dispute(s) between the parties. As the arbitration agreement is not disputed, I will, therefore, confine myself at this stage to the question as to whether or not there is any dispute between the parties arising out of the Contract.

12. It appears that the plaintiff and defendant No.1 have not been able to resolve any of the following differences:--

Whether the plaintiff performed his agreed part of the Contract, or was there any breach on its part?

Whether or not the plaintiff was responsible for the late arrival of the vessel?

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Whether the late arrival of the vessel falls within the definition of force majeure, and whether or not the plaintiff was/is entitled to extension of time on account of force majeure?

Whether or not defendant No.1 had any right to claim the liquidated damages; if so, to what extent?

In my humble opinion, the very facts that the parties are unable to resolve any of the above, and that the assertions made by both the parties have been repudiated by the other, prove that there is an obvious dispute between them. Moreover, none of the above disputes can be decided by the parties themselves, but can be decided only by an independent and impartial person/forum in a fair and proper manner. It is a well established principle of law that a party cannot be the judge of its own cause. In case of an arbitration agreement, the only independent and impartial forum is the Arbitrator appointed by the parties.

13. It was held by this Court in the case of Messrs Friends Trading Co. v. Messrs Muhammad Usman-Moula Bux, PLD 1954 Sindh 56, that an existing dispute is an essential condition for reference to an arbitration. In the case of Ghulam Ishaq Khan Institute of Engineering, Science and Technology and another v. Messrs Hassan Construction Co. (Pvt.) Ltd. Engineer and Consultants, 1998 CLC 485, it was held by the Lahore High Court that assertion of a claim by one party and repudiation thereof by the other party, would constitute a dispute to warrant recourse to section 20 of the Arbitration Act. Similarly, in the case of Muhammad Umar v. Yar Muhammad through his legal heirs and others, 2009 CLC 348, it was held by this Court that, before referring the matter to arbitration, three conditions are necessary; (1) existence of an arbitration agreement, (2) existence of a dispute under the agreement, and (3) proceedings under Chapter-II of the Arbitration Act, 1940, not having been commenced. Lastly, I refer to the case of Muhammad Azam Muhammad Fazil & Co., Karachi v. Messrs N. A. Industries, Karachi, PLD 1977 Karachi 21, wherein it was held by this Court that if the challenge to the arbitration clause is founded on disputed question of interpretation of other terms of the contract, the decision of such a question would amount to usurping the jurisdiction of the domestic forum which the parties have chosen for adjudication of their disputes, and that on authority and principle both, it is proper to leave such question to be adjudicated and decided by the Arbitrator.

14. Where the parties enter into a contract, which incorporates an arbitration clause, it constitutes an arbitration agreement. However, the arbitration clause and the contract which incorporates it are two distinct contracts. The arbitration clause provides an agreement by the parties to resolve present and future disputes by arbitration, whereas the contract which incorporates the arbitration clause by reference, is the underlying contract. It must be kept in mind that the dispute between the parties arises from the underlying contract, and not from the arbitration agreement. In the present case, the dispute between the plaintiff and defendant No.1 has arisen from the underlying contract, as the Contract I purchase order No.HOP/M/022/08 dated 9-7-2008 along with all its general terms, instructions, etc., is the underlying contract.

15. Defendant No.1 has not disputed the execution of the Contract and the agreement therein with regard to the reference of any dispute arising therefrom to two Arbitrators, one to be appointed by each side, and to the Umpire to be appointed by the two arbitrators. I have already held that there is an obvious dispute between the parties. Defendant No.1 is, therefore, directed to file in Court the original Contract; namely, the contract/purchase order No.HOP/M/022/08 dated 9-7-2008. In terms of the admitted arbitration agreement, the plaintiff and defendant No.1 are directed to appoint their respective Arbitrators and to convey the name of their Arbitrator to the other side, within fifteen (15) days from the date of announcement of this judgment. From the date of their appointment, the two Arbitrators shall appoint an Umpire within fifteen (15) days. The Arbitrators and the Umpire shall commence the arbitration proceedings within fifteen clays (15) of the appointment of the Umpire.

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The Application filed by the plaintiff under section 20 of the Arbitration Act, 1940, is allowed in the above terms.

C.M.A. No. 9092 of 2011:

16. This application has been filed by the plaintiff praying that defendant No.1 be restrained from making any demand against Performance Guarantee No.63/31 dated 18-6-2010 in the sum of Rs.11,593,934.00 issued by defendant No.2, and defendant No.2 be restrained from making any payment under the said Performance Guarantee to defendant No.1. In support of this application, the submissions made in respect of the main application were reiterated by the learned counsel for the plaintiff. He further submitted that the quantum of liquidated damages, if any, cannot be decided without evidence, and that it is yet to be decided as to whether or not defendant No.1 is entitled to the liquidated damages on account of the plaintiff's alleged breach of the Contract. The learned counsel argued that in such a situation, in case the Performance Guarantee submitted by the plaintiff is encashed by defendant No.1, the plaintiff shall not only be seriously prejudiced, but shall also suffer irreparable loss. He further contended that the 'plaintiff has a strong prima facie case for the grant of injunction and the balance of convenience is also in its favour.

17. In support of his submissions, the learned counsel cited and relied upon the following reported cases, which are discussed below in brief:--

A. In the case of Messrs Jamia Industries Limited v. Messrs Pakistan Refinery Limited, PLD 1976 Karachi 644; it was held by this Court that "the matter as to what amount, if at all is due to the defendants, is subject to adjudication by the arbitrator; it follows that the rights of the plaintiffs be preserved in status quo." After allowing the application under section 20 of the Arbitration Act, 1940, the application for injunction was also granted restraining encashment of the guarantee.

B. In the case of Messrs Petrosin Products (Pvt.) Limited and others v. Government of Pakistan through Secretary, Privatization Commission of Pakistan, Ministry of Finance, Government of Pakistan, Islamabad and 3 others, 2000 MLD 785, one of the parties to the arbitration agreement filed an application under section 20 of the Arbitration Act, 1940, for referring the matter to the sole arbitrator in terms of the agreement. An application was also filed for the grant of an interim injunction praying that the respondent be restrained till the disposal of the petition and completion of arbitration process, from encashing the bank guarantee furnished by the petitioner. The Civil Judge allowed the application under section 20 of the Arbitration Act, but rejected the application for grant of the interim injunction. In Civil Revision, the Lahore High Court held that acceptance of plea of the petitioner for referring the matter to the Arbitrator prima facie proved that a dispute had arisen between the parties which required determination through arbitration. It was further held that it was not justified to deny the relief of temporary injunction after referring the dispute between the parties to the Arbitrator for determination.

C. In the case of Messrs Zeenat Brother (Pvt.) Ltd. v. Aiwan-e-Iqbal Authority, through Chairman, Aiwane Iqbal Complex, Lahore and 3 others PLD 1996 Karachi 183, the defendants were restrained from encashing the Performance Guarantee till the disposal of the suit.

Some other cases were also cited by the learned counsel for the plaintiff, which in my humble opinion are not relevant to the facts and circumstances of this case.

18. In addition to the aforementioned three cases cited by the learned counsel for the plaintiff, I would like to refer to a very recent authority of the Hon'ble Supreme Court. A construction company/contractor filed an application under section 20 of the Arbitration Act, 1940, before this Court along with an application praying for restraining the defendants from encashing three (3) bank guarantees. With the consent of the parties, the main application was allowed by this Court and the matter was referred to the Sole Arbitrator. The application for temporary

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injunction was strongly pressed by the contractor, but the same was dismissed and the defendants were allowed to encash all the three bank guarantees. The judgment of this Court is reported as Standard Construction Company (Pvt.) Ltd. v. Pakistan through Secretary, Ministry of Communication, Islamabad, and 5 others, 2010 CLD 360. The said judgment was assailed by the contractor before the Hon'ble Supreme Court, which was decided and has been reported as Standard Construction Company (Pvt.) Ltd. v. Pakistan through Secretary, M/o Communications and others, 2010 CLD 196. The Hon'ble Supreme Court modified the judgment of this Court by allowing encashment of the pre-bid bank guarantee, but restraining the defendants/respondents from encashment of the other two bank guarantees till the findings given by the Arbitrator. The Hon'ble Supreme Court left the conclusion to be decided by the Arbitrator, as to whether the conditions as required for the encashment of the bank guarantees have been fulfilled or not.

19. In the present case, the Performance Guarantee, equivalent to the amount of the liquidated damages claimed by defendant No.1, was submitted by the plaintiff as a tentative measure. I have already held that the question as to whether defendant No.1 is entitled to the liquidated damages or not, is a dispute, and after such conclusion, the dispute has been referred to the Arbitrators and the Umpire in terms of the arbitration agreement. It is yet to be decided as to whether the conditions required for the encashment of the Performance Guarantee have been fulfilled or not. This dispute shall be decided by the Arbitrators and the Umpire. This view taken by me is supported by all the three aforementioned cases cited by the learned counsel for the plaintiff, and especially by the law laid down by the Hon'ble Supreme Court in the recent case of Standard Construction Company (Pvt.) Ltd. (supra). In my humble opinion, it would be unjust if defendant No.1 is allowed to encash the Performance Guarantee before the conclusion of the arbitration proceedings. Even otherwise, defendant No.1 shall have to prove in the arbitration proceedings the losses suffered by it in order to become entitled to the liquidated damages.

20. As a result of the above discussion, this application is allowed. Defendant No.1 is restrained from encashment of the Performance Guarantee No.63/31 dated 18-6-2010 in the sum of Rs.11,593,934.00 issued by defendant No.2, and defendant No.2 is restrained from making any payment under the said Performance Guarantee to defendant No.1.

Order accordingly

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