

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 2046 of 2019

Date	Order with Signature(s) of Judge(s)
1. For hearing of CMA No. 16861/2019. 2. For hearing of CMA No. 17187/2019. 3. For hearing of CMA No. 11417/2020. ----- <u>04.11.2020</u> Mr. Khawaja Shams-ul-Islam, Advocate for plaintiffs. Mr. Salman Mansoor, Advocate for defendants No. 1 & 2 alongwith Mr. Shahzad Asif, Director (Legal) WAPDA. ----- 3. By means of this order, I intend to dispose of C.M.A. No. 11417 of 2020, filed on behalf of the plaintiffs seeking an injunctive order suspending the operation of "Invitation for Bids", Bid Reference No. KC-04(R) published in "Daily Dunya" Karachi dated 03.10.2020 as well as available at PPRA Website: www.ppra.org.pk in respect of the Contract No. KC-04(R) ("the Contract") for the alleged outstanding and remedial works of Main Canal and Structures from RD 106+-000 to RD 530+400 (earthwork, Canal lining and structures from RD 106+000 to RD 530+400 and part of structures from RD 40+000 to RD 106+000). Learned counsel for the plaintiffs contends that the matter is already subjudice before this Court in the suit in respect of the Contract, whereby the plaintiffs claim an amount of Rs. 6,240,310,179.00; that the plaintiffs have already completed Floor Protection Bund and also 94% work of the said Project and time and again they intimated to the Project Manager about such position and requested the defendants No. 1 & 2 to carry out the Joint Conditional Survey to ascertain the work done at site but they mala fidley refrained from conducting the said survey; that in view of the above facts and circumstances, the defendants No. 1 & 2 become defaulter by not paying the balance amount of the plaintiffs and they are liable to pay to the	

plaintiffs Rs. 6240 million; that after handing over the Project by the Plaintiffs to defendants No.1 and 2, the same was inaugurated by the then Prime Minister of Pakistan and the quality of Project was also appreciated and applauded by him as the water was properly flowing; that after filing of the suit, this Court was pleased to grant stay on 13.12.2019 and restrained the defendants from encashing the bank guarantee of the plaintiffs; however, on 20.12.2019, the defendants moved an application under Section 34 of the Arbitration Act (CMA No. 17187/2019) in the meantime, different correspondence were exchanged between the plaintiffs and defendants more particularly letter dated 20.12.2019 written by the plaintiffs to the counsel for the defendant and reply of the defendants dated 4.1.2020 followed by reply of the plaintiff's counsel dated 18.1.2020 as well as letter dated 05.10.2020 of the plaintiff followed by letter dated 13.10.2020 which was never replied; that during pendency of the suit in order to frustrate the suit an attempt has been made to swallow the payment of the plaintiffs as in the impugned advertisement (Invitation for Bids) the defendants have mentioned the words " they have already received funds from the Govt. of Pakistan in Pak Rupees towards the cost of Kachhi Canal Project and it is intended that part of the proceed of the funds will be applied to eligible payments under the Contract for the outstanding and remedial Works of Main Canal and Structures from RD 106+000 to RD 530+400 as the bidding is open to all eligible bidders. The construction of the following major works is included but not limited to under the Contract; that the aforesaid amount has to be paid by the defendants to the plaintiffs; therefore, invitation for bids in "daily Dunya" shall amount to make the entire suit infructuous and the proceedings of the application under Section 34 of the Arbitration Act; that the defendants cannot invoke Clause 49.4 of the Contract as the Contract stands terminated under clause 69.1(a) and

since the defendants have committed default by not making payment of Certified IPCs even after handing over the Project to the defendants on 14.09.2017, instant suit has been filed; that the defendant as admitted in the alleged “Invitation For Bids” has received funds from Government of Pakistan for the Project under Contract; therefore, they are under obligation to pay off plaintiffs’ dues; hence, this application has been filed; that the plaintiffs have made out a prima facie case and balance of convenience lies in their favour and unless the instant application is granted, the plaintiffs shall suffer irreparable loss and injury.

On the other hand, learned counsel for defendants No. 1 & 2 maintains that the invitation for bids, bid Reference No. KC-04(R) dated 30.10.2020 is neither subjudice nor under challenge in this suit and it is settled principle of law that no interim relief can be claimed with respect to the controversy not part of the relief sought in the main suit; that the instant application is barred under section 21 clause (a) & (d) and section 56 clause (f) of the Specific Relief Act; that the alleged Project belongs to Government of Pakistan/WAPDA while the plaintiffs were only the services providers on the Project of the WAPDA under the Contract and; therefore, they cannot seek resurrection of the Contract that has already come to its end; that the Contract executed between the plaintiffs and defendants was terminated on 19.05.2016 on account of default of plaintiffs/contractors under sub-clause 63.1 of the Contract; however, after amicable settlement supplementary agreement No. 1 was signed between the parties on 22.11.2016 and works were again started by the plaintiffs but they failed to complete the outstanding works and remedying defect during the defect liability period and requested for the extension of the defect liability period up to 14.12.2019 vide letters dated 20.06.2019 and 04.09.2019 and under letter dated 28.09.2019 they undertook to complete

balance work within extended defect liability period up to 11.12.2019 failing which action might be taken as per clause 49.4 of the Contract and the defendants/WAPDA granted extension of defect liability period under the Contract from 14.09.2019 to 11.12.2019 but even then the plaintiffs failed to complete the outstanding works and to remove the defects in the works; hence, the defendants/- WAPDA decided to get the construction of outstanding works and restoration of damages works done through interested party by issuing invitation of bids, which cannot be challenged by the plaintiffs; that the Court cannot enforce specific performance of the works for the reasons that the building or the engineering contract for executing work upon the land of another are mere licence to enter upon the site or the land necessary to execute the work and such licence can be revoked by the employer at any time; that the defendants have already taken over the Contract from the plaintiffs and under the law continuation of Contract is not possible and so far and monetary claim of the plaintiffs is concerned, if they succeed in their claim raised in the instant suit, the same may be paid from government exchequer; however, the required construction work, which is necessary in the general welfare of the public being a government project cannot be put under suspension; that the plaintiffs have failed to make out a prima facie case for the grant of ad-interim relief sought for and the balance of convenience does not lie in their favour but in favour of the defendants and in case ad-interim injunction is granted it will cause inconvenience to the defendants to complete the requisite work on the Project and it is the defendants who shall suffer irreparable loss if the ad-interim injunction is granted, as they shall not be able to complete the Project within the stipulated period.

I have heard learned counsel for the parties and perused the material available on record.

The plaintiffs have filed this suit for declaration, injunction, specific performance and recovery of Rs.9269 million with the following prayers:-

- a) Grant money decree in favour of the Plaintiffs and against Defendants No.1 and 2 for Rs.9269 Million (Rupees Nine thousand two hundred and sixty nine Million) in view of the break up as mentioned in paragraph No.17 pursuant to contract agreement dated 14.6.2005.*
- (b) Grant money decree of recovery of outstanding payment i.e. Rs.7151 Million and pursuant to the IPCs No.119, 120 and 121 amount of Rs.2118 Million total amounting to Rs.9269 Million (Rupees Nine thousand two hundred and Sixty nine million) pursuant to contract agreement dated 14.6.2005.*
- (c) Specific performance directing the Defendants No.1 and 2 to pay amount of Rs.2118 Million (Rupees six thousand one hundred fifty eight million) pursuant to the IPCs No.119, 120 and 121 as the Plaintiffs have fulfilled their part of contract.*
- (d) Declare that the Plaintiffs have successfully performed their part of contract dated 14.6.2005 without any default and handed over the project to Defendants No.1 and 2, who are using the same to their best advantage.*
- (e) Declare that the letter dated 12.12.2019 issued by Defendants No.1 and 2 to the Defendant No.3 is illegal, void ab-initio, liable to declare as such.*
- (f) Direct the Defendants No.1 and 2 to return the Bank Guarantee No.000036/2006 dated 06.09.2006 to the Plaintiff.*
- (g) Grant mandatory injunction, suspend the operation of the impugned letter dated 12.12.2019 through which Defendants No.1 and 2 have asked Defendant No.3 to encash Bank Guarantee No.000036/2006 dated 06.09.2006.*
- (h) Grant permanent injunction, restrain the Defendants specially Defendants No.1 and 2, its employees, agencies, subordinates, agents, representatives, attorneys, successors or any one claiming on their behalf from encashing the performance Bank Guarantee No.000036/2006 dated 06.09.2006.*
- (i) Grant any other relief (s), which this Honourable Court deems fit and proper under the circumstances of the case.*

As per the pleadings, the plaintiff No. 1 is a Private Limited Company and Government's approved contractor, carrying on construction of mega projects, while plaintiffs No.2 & 3 are the sister

concern of plaintiff No. 1, who have formed a joint venture viz. plaintiff No. 4 for the purpose of executing Kachhi Canal-Earthwork, Canal Lining and Structures from RD106 to RD 530+400 and part of structures from RD 40 to RD 106 under the Contract and through instant suit, the plaintiffs have impugned a letter dated 12th December, 2019 addressed by the defendant No. 2 to defendant No. 3 to encash the Performance Security/Bank Guarantee No. 000036/2006 dated 6th September, 2006 amounting to Rs.486,850,646/-. It is claim of the plaintiffs that in the year 2005 through various newspapers the defendant No. 1 invited tender for the construction of aforementioned Project and pursuant thereof the plaintiffs also participated in the open tender and after qualifying the same entered into a written Contract Agreement with defendant No. 1 & 2 on 14th June, 2005 for amounting to Rs. 9837 Million and as per requisition of the Contract, the plaintiffs furnished aforesaid Performance Security/Bank Guarantee, which was extended on behalf of the plaintiffs in favour defendant No. 1 by the defendant No. 3/Bank time to time; however, due to force majeure conditions the completion period of the execution of the Contract extended resulting escalation of cost of the Project, which was foisted upon the plaintiffs; however, plaintiffs completed the Contract on 17th September, 2017 and such handing over and taking over certificate was issued by the defendant No. 2 vide letter dated 15th November, 2017 but during execution of Contract the defendant No. 1 signed supplementary agreement dated 22nd November, 2016, whereby the Contract was to be completed at Rs. 2.6 Billion and plaintiffs' claims were to be settled by the Arbitrator and subsequently the consultant issued Punch List of minor items to complete the work during defect liability period of two years and later the plaintiffs issued letter to Project Engineer to grant extension up to 14th December, 2019; on that three

months extension was recommended by the Consultant and then further three months extension to complete the Project was granted up to 11th December, 2019; however, by imposing three conditions, which were not acceptable to the plaintiffs; therefore, they issued fourteen (14) days' notice for termination of the Contract under Clause 69 of Contract and return of Bank Guarantee due to default of Employer in making payment vide letter dated 17th October, 2019 and at present an amount of Rs. 6158 Million is outstanding against various works/accounts but instead of releasing the balance amount and releasing interim payment certificate (IPC), the defendant No. 2 illegally wrote the impugned letter to defendant No. 3. It is also claim of the plaintiffs that the impugned letter is in violation of Clause 10.3 of the Contract, which provides that prior to making a claim under the Performance Security/Bank Guarantee the Employer shall in every case notify the contractor stating the nature of the default in respect of each claim; hence, this suit has been maintained. Vide order dated 13th December, 2019, this Court passed an ad-interim order restraining the defendants from encashing the aforementioned Performance Security/Bank Guarantee, till the next date of hearing and it was thereafter the C.M.A. under reference was filed by the plaintiffs.

The plaintiffs have maintained the instant suit against the defendants primarily for the recovery of Rs.9269 million. It is an admitted position between the parties that the plaintiffs have already handed over the subject Project to the defendants and now through C.M.A. under reference they sought suspension of the operation of the invitation of bids issued by the defendants for the outstanding remedial works of Main Canal and Structures from RD 106+-000 to RD 530+400 (earthwork, Canal lining and structures from RD 106+000 to RD 530+400 and part. of structures from RD 40+000 to RD 106+000). There are more than one

good reasons why prima facie interim relief sought by the plaintiffs in this C.M.A cannot be granted. The interim relief sought by the plaintiffs through C.M.A. under reference does not come out from the main relief sought in the suit by the plaintiffs. The Contract between the parties has already come to an end and the plaintiffs have already maintained suit for recovery and in case the suit is decreed or the plaintiffs succeed in their claim, they shall be entitled to execute money decree through the process of the Court in case the same is not satisfied by the defendants. Hence, I am of the view that the plaintiffs have failed to make out prima facie case for the grant of ad-interim relief as prayed for. The balance of convenience, which is infact balance of inconvenience is not in favour of the plaintiffs but in favour of the defendants as if the interim relief is granted, inconvenience shall be caused to the defendants in completing their Project/Construction Work, which is ultimately for the welfare of the general public and it is the defendants, who shall suffer irreparable loss in case interim injunction is granted, as they shall not be able to complete the Project within time under the estimated costs. The plaintiffs shall not suffer any irreparable loss as their suit for monetary claim is already pending before this Court. Accordingly, C.M.A. No. 11417 of 2020 is dismissed with no order as to costs.

1&2. Adjourned to a date in office.

Athar Zai

JUDGE