

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1314 of 2009

Associated Builders (Pvt) Limited-----Plaintiff.

Versus

New Jubilee Insurance Company Limited-----Defendant.

Dates of hearing: 29.09.2016

Date of Judgment: 26.10.2016

Plaintiff: Through Mr. Muhammad Arif Khan, Advocate.

Defendant: Through Mr. Mazhar Imtiaz Lari, Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J:- This is a Suit for encashment of Mobilization Advance Bond and Liquidated Damages in the sum of Rs.10,321,717/- (Rs. 86,01,431/- as principal and Rs. 17,20,286/- as 20% liquidated damages) with interest thereon, furnished by the defendant to the plaintiff on behalf of the Contractor.

2. Precisely the facts as stated are that on 01.09.2005, the plaintiff had issued a Letter of Intent to M/s. Pure Water Technologies (Pvt.) Ltd. (The Contractor) for a Desalination plant at the Golden Palms Project, Gwadar, and thereafter the contractor entered into an Agreement dated 07.09.2005 in this regard. It is further stated that pursuant to the Said Agreement, the defendant executed a Performance Bond dated 15.09.2005 and a Mobilization Advance Bond also dated 15.09.2005 in favour of the plaintiff. It is the case of the plaintiff that soon after the commencement of work under the Said Agreement, the Contractor began defaulting and notwithstanding the fact that the plaintiff gave the contractor ample opportunities to complete the works by extending deadlines repeatedly for two years, upon the contractor's default on one pretext or the other, on 03.03.2008 the plaintiff was compelled to enforce Mobilization Advance

Bond and thus the defendant was asked to make payment of Rs.8,601,431/-. It is further stated that clause-5 of the Mobilization Advance Bond provided that in case the guarantee is invoked by the plaintiff, payment in terms thereof was required to be made within two days and after having failed in its effort to recover the amount from the defendant, instant Suit has been filed in respect of encashment of Mobilization Advance Bond for Rs.8,601,431/- along with 20% liquidated damages.

3. Pursuant to issuance of summons, the defendant filed its written statement, whereafter, vide Order dated 14.02.2011, the following Issues were settled and evidence was recorded through commission:-

1. Whether the defendant is liable to make payment of liquidated damages in the sum of Rs.1,720,286/- under clause-5 of the Mobilization Advance Bond dated 15.09.2005?
2. Whether the suit is pre-mature and liable to be dismissed on this ground alone?
3. Whether the plaintiff deducted from the running bills of the contractors any amount in lieu of mobilization advance and whether the said amount is liable to be reduced from the mobilization advance bond issued by the defendant?
4. Whether the defendants are liable to pay the plaintiffs to entire amount mentioned in the mobilization advance bond issued by it, inspite of the fact that the plaintiff had already recovered a sum of Rs.59,00,000/- against mobilization advance paid to contractor?
5. Whether in the circumstances, the plaintiffs are entitled to interest on the balance amount?
6. What should the decree be?

4. The plaintiff led its evidence through Mustansir Zakir, the Chief Executive, who produced his Affidavit-in-Evidence as Ex.P1/2 and various documents as P1/3 to P1/24. The defendant led its evidence through Muhammad Ishtiaq Ahmed, Joint Senior Vice President of the defendant, who produced his Affidavit-in-Evidence as Ex.D-1/1 and certain documents, which were marked as X-1 to X-4 and through DW-2 Mr. Syed Aftab Ahmed, consultant's director.

5. Learned Counsel for the plaintiff has referred to Mobilization Advance Bond and has read over Condition Nos. 1, 3 & 7 of the Bond and has contended that it provides that the guarantor (defendant) hereby binds itself unconditionally and irrevocably to pay the guaranteed amount on first

demand of the beneficiary in the event of default by the contractor without protest and even without reference, notice or recourse to the contractor. He has further contended that the said bond was for an amount of Rs.8,601,431/-, which the plaintiff had released to the contractor as Mobilization Advance, whereas, the bond also provided the payment of guaranteed amount alongwith liquidated damages and therefore, upon default of the contractor, the plaintiff was entitled for receiving back the Mobilization Advance given to the contractor along with liquidated damages. He has also read over the cross-examination of the plaintiff as well as defendant's witness. In support of his contention he has relied upon the cases reported as **PLD 2003 SC 295 (Heavy Mechanical Complex (Pvt.) Ltd., Taxila v. Attock Industrial Products Ltd Rawalpindi)**, **PLD 1985 SC 69 (Messrs Aslam Saeed & Co. versus Messrs Trading Corporation of Pakistan Ltd)**.

6. On the other hand, Learned Counsel for the defendant has contended that insofar as issuance of Mobilization Advance Bond is concerned, the same is not denied, however, he has referred to Ex. P/1/24 and contended that the defendant was willing to pay and settle the amount to the plaintiff, subject to furnishing details of the amount adjusted by the plaintiff while paying the running bills in respect of Mobilization Advance. He has also referred to Annexure X-1 and has argued that the plaintiff was adjusting an amount equivalent to 30% of the running bills while making payments to the Contractor in respect of Mobilization Advance, and therefore, per learned Counsel if the plaintiff had provided the said details, the matter would have resolved much earlier. Learned Counsel has also referred to the evidence of D.W-2 Syed Aftab Ahmed, the Director of the Consultant of the Project to substantiate his submissions in respect of deduction of 30% as Mobilization Advance from the running bills. Learned Counsel has further submitted that it is a settled proposition of law that no one should be allowed unjust profits in such circumstances and once it has come on record that certain portion of the Mobilization Advance was deducted/adjusted in the running bills, the plaintiff at the most and without prejudice, is only entitled for the remaining amount of the Mobilization Advance. He has also made his submissions that plaintiff in the circumstances, is not entitled for liquidated damages as no evidence has been led in this regard. He has relied upon the cases reported as **2001 YLR 2191 (China International Water And Electric Corporation And Another Versus Pakistan Water And Power Development Authority**

And Other), PLD 1996 Karachi 183 (Messrs Zeenat Brother (Pvt.) Ltd. Versus Aiwan-E-Iqbal Authority And Three Others), 1993 CLC 1926 (Pakistan Engineering Consultants Versus Pakistan International Airlines Corporation And Others), PLD 1994 SC 311 (Messrs National Construction Ltd. Versus Aiwan-E-Iqbal Authority), 2015 CLD 8 (Montage Desing Build Through Partner Versus The Republic Of Tajiskistan And 2 Others), PLD 1969 SC 80 (Province Of West Pakistan Versus Messrs Mistri Patel & Co. And Another) and PLD 2003 SC 191 (Shipyrad K. Damen International Versus Karachi Shipyard And Engineering Works Ltd).

7. I have heard both the learned Counsel and perused the record as well as the evidence led by the parties. Insofar as the award of work to the contractor and issuance of Performance and Mobilization Advance Bond(s) are concerned, they have not been disputed and for the sake of brevity the facts are not discussed to avoid repetition, as there is no dispute to the effect that a Mobilization Advance Bond was issued by defendant on behalf of the contractor who had defaulted and a claim was accordingly lodged by the plaintiff in time. The only case as pleaded on behalf of the defendant is that since certain portion of the Mobilization Advance was deducted while making payment(s) of the running bills of the contractor, hence the plaintiff is not entitled to the entire amount of the Bond, whereas, no liquidated damages are to be paid in the given facts and circumstances of the case. The issues settled in this matter are not in a chronological order as they should have been, and further are also interlinked. Therefore, I intend to decide issue No. 2, first, then Issue Nos. 3 & 4 together and thereafter Issue No.1 & 5 together and then the last issue. After appreciating the record including the evidence led by the parties, my issue wise findings are as under.

ISSUE No.2: Whether the suit is pre-mature and liable to be dismissed on this ground alone?

8. Both the learned Counsel have neither made any arguments in respect of this issue nor any evidence has been led, therefore, Issue No.2 is answered in negative by holding that the Suit is not pre-mature and is not liable to be dismissed on this ground.

ISSUES No.3: Whether the plaintiff deducted from the running bills of the contractors any amount in lieu of mobilization advance and whether the said amount is liable to be reduced from the mobilization advance bond issued by the defendant?

ISSUES No.4: Whether the defendants are liable to pay the plaintiffs to entire amount mentioned in the mobilization advance bond issued by it, inspite of the fact that the plaintiff had already recovered a sum of Rs.59,00,000/- against mobilization advance paid to contractor?

9. The relevant clauses of the Mobilization Advance Bond dated 15.9.2005 (Exh P/1/6) in respect of its enforcement and payment of liquidated damages are as under:-

- i. That the Guarantor hereby binds itself unconditionally and irrevocably undertakes and guarantees to pay the Guaranteed Amount on First demand of the Beneficiary in the event of default by the Contractor without protest or demur and without reference, notice or recourse to the Contractor or any other person and hereby expressly waives all rights to deny its obligations to the Beneficiary irrespective of the any dispute, different or disagreement between the Contractor and Beneficiary or contestation by any other person/party.
- iii. The Guarantor's liability under this Guarantee is restricted to Rs.8,601,431/- (rupees Eight Millions Six Hundred One Thousand four Hundred Thirty One only) and shall remain in full force until the Contract has been fully performed by the Contractor to the entire satisfaction of the Beneficiary.
- v. That the Guarantor hereby engages with Beneficiary that demand made by the Beneficiary in compliance with the terms of the Guarantee shall be met with due honor upon demand. If this Guarantee is invoked by the Beneficiary, the Guarantor undertakes to make full payment in terms thereof within 2 (two) days of receiving the demand.
- vii. If the Beneficiary calls upon the Guarantor demanding payment of any money in terms of this Guarantee and, the Guarantor fails to make payment within 2 (two) days of the receiving the Beneficiary's demand, the Guarantor shall pay to the Beneficiary, in the addition to the Guaranteed Amount, liquidated damages in an amount equalling to twenty per-cent (20%) of the sum demanded by the Beneficiary to be paid by the Guarantor together with all cost and expenses incurred by the Beneficiary in effecting recovery. The Guarantor's liability under this condition is in addition to and not restricted by the amount due from the Contractor to the Beneficiary.

Perusal of the aforesaid clauses including Clause 5 & 7 reflects that the defendant had undertaken to honour the bond upon demand and if it is invoked by the plaintiff, the defendant undertakes to make full payment in two days of receiving of the claim. Clause-7 further provides that when the beneficiary calls upon the guarantor, demanding payment of any money in terms of this guarantee, and if the guarantor fails to make payment within two days of the demand, the guarantor shall pay to the beneficiary in addition to the guaranteed amount, liquidated damages equivalent to 20% of the same demanded by the beneficiary and the guarantor's liability under this condition is in addition to and not restricted by the amount due from the contractor to the beneficiary. It is not in dispute that the contractor had failed to complete the project and therefore, the plaintiff had invoked the guarantee for payment of Mobilization Advance paid to the contractor. The aforesaid condition reflects that such guarantee was unconditional and

specifically provided for its enforcement without reference to or recourse to the contractor on whose behalf the same was issued by the defendant. It in fact does not provide for any mechanism or details to be provided in respect of adjustment of any Mobilization Advance. It is settled proposition of law that in cases of Mobilization Advance, the guarantor cannot raise objections nor can have any recourse to the Contractor for seeking instructions. Once the Mobilization Advance Bond is issued and there is a default on the part of the contractor, the same has to be honoured. The Hon'ble Supreme Court in the case of ***National Construction Limited v. Aiwan-e-Iqbal Authority (PLD 1994 SC 311)*** though dealing with an injunction case against encashment of bank guarantee, has been pleased to observe that ***once bank guarantee furnished contained 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, the Courts must give effect to the covenants of the bank guarantee, the performance guarantee, for smooth performance of 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.***

A learned Single Judge of this Court in the case of ***Zeenat Brothers (Private) Limited v. Aiwan-e-Iqbal Authority*** (PLD 1996 Karachi 183), again an injunction case, following the aforesaid judgment of the Hon'ble Supreme Court (incidentally in respect of the same project but of the main contractor), has been pleased to hold as under;

12. The need or requirement for executing a mobilization bond is quite different from the need and circumstances leading to the execution of performance bond. A mobilization bond is generally executed by a contractor (principal debtor) after he had received certain advance amount from the owner (creditor) against some agreement, while the performance bond are executed by a surety at the instance of principal debtor guaranteeing satisfactory fulfilment of the terms and conditions of the contract or completion of the assignment within a particular period. Therefore, in my humble view, encashment of performance bond is dependent on the determination of a question as to who has committed default in fulfilment of its obligations or in completion of an assignment within a given period but this question is not relevant as far as encashment of a mobilization bond or guarantee is concerned as in such cases the principal debtor had received consideration from the owner or the main contractor (creditor) which he is liable to return or refund as a result of any revocation, termination or completion of the contract. In such cases, the burden is upon the principal debtor at whose instance such mobilization bond was executed or on the surety, as the case may be, to show that either no amount was advanced to them as mobilization or advance amount or such amount if received then it has been duly incurred or that he is entitled for appropriation of certain outstanding amount against the amount of mobilization bond. In absence of these conditions, the Courts will always be reluctant to grant interim injunction restraining encashment of a bank guarantee executed against receipt of advance or mobilization fund.

In the instant matter, the defendant has not led any evidence nor has called upon any independent witness including the witness from the contractor so as to suggest that there was no default on the part of the contractor as alleged by the plaintiff. In the circumstances, the defendant was required to honour the claim of plaintiff be encashment of the performance bond. Coming to the Issue in hand it appears that the defendant has called upon a witness from the consultant of the Project, who has come in the witness box and has produced one running bill submitted to them by the contractor as D-1, which was approved by the consultant, wherein an amount of Rs.920,374/- was deducted as Mobilization Advance. The plaintiff's Counsel has not cross-examined this witness in respect of such production of the copy of the running Bill, its approval by consultant and payment by the plaintiff after deduction of Rs.920,374/- as Mobilization Advance. This piece of evidence has not been dislodged to any degree of satisfaction by the plaintiff; therefore, it leads to the presumption that insofar as first running bill is concerned, the said amount was deducted against Mobilization Advance. Insofar as the balance amount of Rs.59,00,000/- claimed to have been allegedly deducted by the plaintiff against Mobilization Advance as stated by the defendant in the written statement as well as affidavit-in-evidence is concerned, no supporting documents have been placed on record nor any evidence has been led in this regard. Therefore this Court cannot accept such assertion of the defendant that any further amount was deducted as above. Though the learned Counsel for the plaintiff has argued that the plaintiff is entitled to receive the entire amount of the Mobilization Advance Bond, as it nowhere provides for any adjustments as alleged by the defendant, however, I am not inclined to agree with such line of arguments raised on behalf of the plaintiff for the simple reason that after having deducted the amount of Mobilization Advance from the running bills, the plaintiff cannot claim the same amount through encashment of the Bond. This would be permitting "unjust enrichment" to the plaintiff which is not permissible, whereas, even otherwise it would amount to gross injustice. It has been the consistent view of the Courts that in such circumstances, encashment of the full amount of the Bond or guarantee as the case may be, is not permissible. [see ***Pakistan Engineering Consultants v. Pakistan International Airlines Corporation***-(1993 CLC 1926-DB-SHC), ***Pakistan Water and Power Development Authority V. Shaukat & Raza (Private) Limited*** (2007 CLC 817-DB-SHC)]. In view of hereinabove facts and circumstances of the case,

Issue No.3 is answered by holding that the plaintiff deducted an amount Rs.920,374/- from the first running bill of the contractor in lieu of Mobilization Advance, and therefore, the same is to be reduced from the total amount of Mobilization Advance Bond issued by the defendant. Issues No.3 & 4 are answered accordingly.

ISSUE No.1: Whether the defendant is liable to make payment of liquidated damages in the sum of Rs.1,720,286/- under clause-5 of the Mobilization Advance Bond dated 15.09.2005?

ISSUE No.5: Whether in the circumstances, the plaintiffs are entitled to interest on the balance amount?

10. Insofar as the issue regarding liquidated damages is concerned it would suffice to observe that the plaintiff neither in its plaint nor in the affidavit-in-evidence or through any other material has been able to prove that it was entitled for liquidated damages. Though in the Mobilization Advance Bond, it has been stipulated that in case of default, the liquidated damages at the rate of 20% would also be payable, however, nothing has been brought on record as to sustaining actual damages on the ground of default. It is needless to observe that for claiming liquidated damages as a rule, it is required that some positive evidence be led to show that certain actual losses were suffered by the party claiming damages and even fixed amount stipulated in liquidated damages could not be recovered if the quantum of actual loss was not proved with any positive evidence. The Honourable Supreme Court in the case of **Saudi Pak Industrial and Agricultural Investment Company (Pvt) Ltd., Islamabad versus Messrs Allied Bank of Pakistan and another** reported as **2003 CLD 596** had the occasion to examine a somewhat similar clause of liquidated damages stipulated in the Bank Guarantee furnished by the Respondent-Bank before the Hon'ble Supreme Court, which read as under:-

Bank Guarantee No.90/002,
Dated 18-3-1990,
Amount Rs. 40,000,000,
Validity until 18-3-1991.

1.....

2.....

3.....

4. This Guarantee is irrevocable and shall continue remain in force as long as the FINANCE outstanding against the Customer subject validity of the Guarantee, we shall be from all liabilities under this

Guarantee only the entire finance of Rs.45,600,000 (Rupees forty-five million and 'six hundred thousand only) is paid to SAPICO.

We further agree and undertake that any payment due to SAPICO from us hereunder shall be paid to SAPICO by us on demand and in the event of our failure to make such payment within, seven days of such demand we shall be liable to pay SAPICO as and by way of liquidated damages, a further sum of 20% of the amount so demanded by SAPICO.

Our total liability under this Guarantee is restricted to a sum of Rs.45,600,000 (Rupees forty-five million and six hundred thousand only). All claims under this Guarantee must be lodged .in writing with, Allied Bank of Pakistan Limited, Civic Centie Branch, Islamabad on or before 10th March, 1991, failing which we shall be discharged of all our liabilities under this Guarantee.

The Hon'ble Supreme Court after going through the aforesaid condition agreed with the decision of the learned High Court in this matter, whereby, the claim in respect of liquidated damages was disallowed and went on to hold as under:-

“10. Above-referred provisions speak about granting interest to the creditors. Suffice it to say that above provisions are not attracted to this case, which is exclusively governed by the law relating to guarantee. In such cases, the guarantee rights and liabilities of the parties, are determined with reference to the terms and conditions of the guarantee and a contract of guarantee is to be strictly construed in terms of the guarantee. The guarantee referred to above unequivocally postulates that the total responsibility of the respondent No. 1 was restricted to Rs.45,600,000. The Bank/respondent No. 1 irrevocably and unconditionally undertook to pay said amount to the plaintiff on demand. As regards the damages, learned trial Court refused the same on the ground that nothing was brought on record to show that the plaintiff had sustained damages on the ground of default.

11. We asked learned counsel for the plaintiff as to what evidence was brought on record to substantiate the claim of damages; he frankly conceded that no such evidence was available. Liquidated damages, as a rule, require the positive evidence to show the actual loss was suffered by the party claiming the damages. Even fixed amount stipulated for liquidated damages cannot be recovered if the quantum of actual loss is not proved. Under the circumstances, the plaintiff is neither entitled to any interest nor to any amount as liquidated damages.”

Similar view has been taken by a Division Bench of this Court in the case of **Habib Bank Ltd. versus M/s. Farooq Compost Fertilizer Corporation Ltd. and 4 others** reported as **1993 MLD 1571**, in the following manner:-

“As to the next contention of the learned counsel that liquidated damages at 20% have been disallowed, even though expressly contracted, from the date of demand to the date of payment, all that we need to say is that liquidated damages themselves, under section 74 of the Contract Act, 1872, call for proof and proof was wanting before the learned Tribunal. In addition, the statutory dispensation itself under section 11(4) of the Banking Tribunals

Ordinance envisages liquidated damages only as a follow-up measure pursuant to passing of a decree, if any, when the decretal amount remains unsatisfied beyond a period of 30 days from the date of the decree and the Tribunal, on an application of the Decree-holder, imposes a penalty in the nature of liquidated damages, the quantum being discretionary. The statute thus remaining specific as regards the liquidated damages, both with reference to the points of time and discretion, impliedly, precludes liquidated damages in any other context except subject to what follows below perhaps where, pursuant to an agreement, proof is tendered of any loss upon non-payment, relief for which may be prayed for. But as we have said, no such proof was tendered before the Tribunal. The same aspect additionally is also covered by the cushion period of 210 days, above referred. Such provision, clearly, covers the period between demand and default as well as that likely to be consumed in the institution and conduct of proceedings for recovery. A claim for agreed liquidated damages, always subject to actual loss in terms of section 74 of the Contract Act, 1872, thus could be a plausible equivalent of mark-up for the cushion period and any so-called liquidated damages, therefore, may hardly arise in the face of the cushion period, aforesaid.”

Another Division Bench of this Court has also expressed the same view in the case of ***United Bank Limited v. M Esmail and Company and Others*** (SBLR 2006 Sindh 1354).

Insofar as issue No.4 is concerned, after having reached to the conclusion that the plaintiff is not entitled to any liquidated damages, answer to this issue is not difficult to discern that yes the plaintiff is entitled to mark up for the relevant period. And the reason is obvious and has already been discussed hereinabove, that insofar as default of the defendant is concerned it stands proved and the defendant had all along retained the amount in question and must have earned profits by utilising the said amount either in any business or profit bearing instruments and no further discussion is needed on such aspect of the matter. The amount was with the defendant all along this period and no effort was made by the defendant at any stage of the proceedings either to pay it directly to the plaintiff (at least the amount which according to them was payable), nor with this Court as a security till finalisation of the proceedings. In arriving at such conclusion I am fortified with the view laid down by the Baluchistan High Court in the case of ***HITEC Metal Plast (Pvt) Ltd., v Habib Bank Limited*** (PLD 1997 Quetta 87), wherein the Court after disallowing the claim of liquidated damages had granted mark-up in the following terms;

9. Adverting to other aspects it is not disputed, that mark-up calculated until filing of suit, was also claimed. Now analysing legal position, emerging from above factors apparently damages could be assessed either on the basis of expected profits under section 73 of Contract Act or actual loss where liquidated damages could be extended to maximum amount mutually agreed between the parties

within the purview of section 74 of Contract Act. It is obvious that appellants could not simultaneously claim 'liquidated damages' as well as mark up for committing breach of stipulation subject matter of contract. Therefore, we unhesitatingly observe that amount of mark-up having been separately claimed, by respondent Bank; its demand concerning damages specially without formally providing the same is not warranted. Trial Court has cursorily, without specifying any reasoning's has allowed benefit of mark up for entire period besides 'liquidated damages' to respondent 'Bank'. Thus, we are persuaded to hold that, benefit of mark up for entire period clearly suggests, expected profits on agreed rates therefore, no justification existed to allow liquidated damages, specially without substantiating the same. Accordingly claim put forth by respondent 'Bank' concerning liquidated damages is not sustainable. It may further be observed that payment of future expected profits; calculated as per agreed percentage of mark up on the decretal amount by "excluding liquidated damages" is certainly fair and proper and would meet ends of justice.

In the circumstances I am of the view that the plaintiff is entitled to mark up on the amount in question from the date of filing of this Suit till its realisation. The issue is answered accordingly.

ISSUE No.6: What should the decree be?

11. In view of hereinabove discussion, the plaintiff's Suit is decreed by directing the defendant to pay to the plaintiff an amount of Rs.76,81,057/- (Rs. 86,01,431/- less Rs. 920,374/-) in respect of Mobilization Advance along with mark up from the date of filing of this Suit till its realisation at the prescribed rate of mark-up notified by the State Bank of Pakistan during such period.

12. Suit stands decreed in the above terms. Office to prepare decree accordingly.

Dated: 26.10.2016

Judge