

# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 319 of 2019**

Plaintiffs 1 & 2: M/s. NEIE – SMADB – LILLEY – RMS (JV) & Others, through Mr. Abid. S. Zuberi, Advocate, along with Mr. Ayan Memon and Ahmed Ali Hussain, Advocates.

Plaintiff No.3: RMS (Pvt.) Limited, through Mr. Darvesh K. Mandan, Advocate.

Defendant  
No. 2: Water and Power Development Authority, through Mr. Suleman Mansoor, Advocate, along with Mr. Farhat Kamal, CE/PD, Nai Gaj Dam Project and Mr. Mir Shah Murad, Assistant Director (Legal), WAPDA

Defendant No.5: Techno Consultants International (Pvt.) Limited, through Mr. Saifuddin, Advocate.

Date of hearing: 13.03.2019, 14.03.2019 and 15.03.2019

## **ORDER**

**YOUSUF ALI SAYEED, J** – The Plaintiffs and the Defendant No.2, namely the Water and Power Development Authority (“**WAPDA**”) entered into a Contract on 12.04.2011 (the “**Contract**”) in relation to a public-sector development project for construction of the Nai Gaj Dam (the “**Project**”), which was terminated by the Defendant No.2 in terms of a letter dated 29.08.2018, bearing Reference No. Sectt/2018/Coord/03015 /MTG/6804-11 (the “**Termination Notice**”), ostensibly on the basis of a letter of the same date issued to WAPDA by the Defendant No.5 in its capacity as the designated ‘Engineer’ under the Contract (the “**Certification**”), following which fresh tenders have apparently been invited for purpose of the Project vide Advertisements dated 08.01.2019 & 06.02.2019 (the “**Tender Process**”).

2. Being aggrieved, the Plaintiffs have brought this suit, assailing the termination of the Contract and eliciting final relief in the following terms [sic]:

- “A. Declaration that the Termination Notice dated 29-08-2018 bearing reference No. Sectt/2018/Coord/03015/MTG/6804-11 issued by the Defendant No.2 and the Certification of the Defendant No.5 dated 29-08-2018 are illegal, arbitrary, *malafide*, without jurisdiction and liable to be set-aside;
- B. Declaration that the Advertisements / Publications dated 08.01.2019 & 06.02.2019 issued by the Defendant No.2 for inviting bids for the remaining portion of the contract on 04.03.2019 are illegal, arbitrary, *malafide*, without jurisdiction and liable to be set-aside;
- C. Grant recovery of Rs. 11,150,243,347 in favor of the Plaintiffs to be paid by the Defendant No.1 and/or 2 on account of unpaid/outstanding amounts as listed at Paragraph 11 of the Plaint including the admitted amount of Rs. 4.839 Billion;
- D. Grant Specific Performance of the Contract Agreement dated 25-04-2012 entered into between the Plaintiff No.1 and the Defendant No.2;
- E. Permanent Injunction restraining the Defendant No.2, its agents, officers and/or assigns from continuing with the Tender Process initiated vide Advertisements dated 08.01.2019 & 06.02.2019 and/or from awarding any contract in respect of the NaiGaj Dam to any other party;
- F. Permanent Injunction restraining the Defendant No.1, 2, 3, & 5, their officers, agents and/or assigns from dispossessing the Plaintiffs from the Project Site and/or from removing the machinery and equipment of the Plaintiff and/or from interfering in the Plaintiff's work;

- G. Mandatory Injunction setting aside/cancelling the Termination Notice dated 29-08-2018 issued by the Defendant No.2, Certification dated 29-08-2018 issued by the Defendant No.5 and Tender Notices dated 08.01.2019 & 06.02.2019 by the Defendant No.2;
- H. Mandatory Injunction directing the Defendant No.2, 3, 4 & 5 to abide by their obligations under the Contract dated 25-04-2012 by continuing with the remaining work with the Plaintiffs either collectively or individually;
- I. Grant any other consequential and/or better relief as deemed appropriate by this Honourable Court;
- J. Costs.”

3. It is in this framework that an application under Order 39, Rules 1 and 2 CPC (i.e. CMA No. 2963/19) has been filed, seeking suspension of the Termination Notice and the Certification, as well as to restrain the Defendants, in particular WAPDA, their agents, employees, subordinates and/or anyone or more acting for or on their behalf from continuing with the Tender Process and/or from awarding any contract in respect of the Project to any other party and/or restrain the Defendant No. 1, 2, 3, 4 & 5 from dispossessing the Plaintiffs and/or from interfering in their work, machinery and/or possession as on site.

4. So as to facilitate appreciation of the dispute in its proper perspective, it is pertinent to note that the Certification and Termination Notice read as follows:

**The Certification**

“**Subject: Construction Supervision of Nai Gaj Dam Project**  
Fake Performance Guarantee/Termination of Contract

Reference: (i) Clients Letter No.CE&PD/NGD/1226 dated 28.08.2018  
(ii) Clients Letter No.CE&PD/NGD/1174 dated 06.08.2018  
(iii) Contractor’s letter No. JULY/GM(P)S/18/166 dated 31.07.2018

(iv) Bank of Punjab letter No. TPU/2018/50 dated  
11.07.2018

Reference is made to the Employer's letter No. CE&PD/NGD/ 1226 dated 28.08.2018, whereby, in wake of FAKE Performance Guarantee submitted by the Joint Venture of Nai Gaj Dam Project, consist of M/s NEIE – SMADB – LILLEY – RMS (JV), the Employer has advised the Engineer to invoke the sub clause 74.1(b) of CoC which entitles the employer to terminate the contract.

M/s Techno Consult International (Pvt.) Ltd, under Clause 63.1 of the Conditions of the Contract is of the opinion that the Contractor, M/s NEIE – SMADB – LILLEY – RMS (JV) is persistently non-compliant to CoC, by submitting the FAKE Performance Guarantee for an amount of Rs. 2,715,449,683/-. Therefore, in accordance with Sub Clause 63.1 read in conjunction with Sub Clause 74.1 of Conditions of the Contract, the Engineer thereby certifies to the Employer to terminate the Contract of Construction of Nai Gaj Dam Project signed between WAPDA and M/s NEIE – SMADB – LILLEY – RMS (JV).”

### **The Termination Notice**

“In accordance with the Certification of the Engineer of Nai Gaj Dam Project, vide letter No. WD/195/1501 dated August 29<sup>th</sup>, 2018, the Employer, hereby serves you notice under Sub Clause 74.1 and 63.1 of the Conditions of the Contract in the wake of FAKE Performance Guarantee, as confirmed by the concerned Bank, submitted by the Contractor that after 14 days of receipt of this notice, the Employer will enter upon the site and the works and terminate your employment.

You will not thereby be released from any of your obligations or liabilities under the contract nor will it affect the rights and authorities conferred on the Employer or the Engineer by the contract.

This issues with the approval of the Authority.”

5. As can be fathomed, the Certification and Termination Notice are predicated on the assertion that a Performance Guarantee which had earlier been furnished as a condition precedent to the Contract was subsequently detected as being fake. It is also apparent that prior to issuance of the Certification and Termination Notice, an exchange of correspondence had taken place on the subject between the Plaintiff, Defendant No.2, Defendant No.5 as well as the Bank of Punjab, the content and implications of which will be dilated upon in due course.
  
6. As can also be discerned from the Certification and Termination Notice, the relevant provisions of the Contract, as invoked and referred to therein, are Sub Clauses 63.1 and 74.1, which read as follows:

**Remedies**

63.1 If the Contractor is deemed by law unable to pay his debts as they fall due or enters into voluntary or involuntary bankrupts, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favour of, his creditors, or agrees to carry out the Contract under a committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation, relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, or if the Contractor has contravened Sub-Clause 3.1, or has an execution levied on his goods, or if the Engineer certifies to

the Employer, with a copy to the Contractor, that, in his opinion, the Contractor:

- (a) has repudiated the Contract,
- (b) without reasonable excuse has failed.
  - (i) to commence the Works in accordance with Sub-Clause 41.1. or
  - (ii) to proceed with the Works, or any Section thereof, within 28 days after receiving notice pursuant to Sub-Clause 46.1,
- (c) has failed to comply with a notice issued pursuant to Sub-Clause 37.4 or an instruction issued pursuant to Sub-Clause 39.1 within 28 days after having received it.
- (d) despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, or
- (e) has contravened Sub-Clause 4.1.

then the Employer may, after giving 14 days' notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to complete the Works. The Employer or such other contractor may use for such completion so much of the Contractor's Equipment, Temporary Works and materials as he or they may think proper.

#### **74.1 Integrity Pact**

If the Contractor or any of his Subcontractors, agents or servants is found to have violated or involved in violation of the Integrity Pact signed by the Contractor as Appendix-L to his Bid, then the Employer shall be entitled to:

(a) recover from the Contractor an amount equivalent to ten times the sum of any commission, gratification, bribe, finder's fee or kickback given by the Contractor or any of his Subcontractors, agents or servants;

(b) terminate the Contract; and

(c) recover from the Contractor any loss or damage to the Employer as a result of such termination or of any other corrupt business practices of the Contractor or any of his Subcontractors, agents or servants.

The termination under Sub-Para (b) of this Sub-Clause shall proceed in the manner prescribed under Sub-Clauses 63.1 to 63.4 and the payment under Sub-Clause 63.3 shall be made after having deducted the amounts due to the Employer under Sub-Para (a) and (c) of this Sub-Clause.

7. Pressing his case for interim relief through the aforementioned Application, learned counsel for the Plaintiff contended that (a) the Termination Notice was bereft of proper cause, (b) had been issued in contravention of the terms of the Contract, (c) was mala fide, and (d) was discriminatory.

8. Expounding on such contentions, it was submitted by learned counsel that a significant part of the contract had already been performed by the Plaintiffs and there had been no breach thereunder on their part. It was submitted that that even if there had been some lapse as to the Performance Guarantee, the matter nonetheless did not fall within the ambit and purview of Sub Clauses 63.1 and 74.1. Per learned counsel, the aspect of a fake guarantee, even if the same were accepted as being so, did not fall within the contemplation of those provisions, and the

termination effected on the basis thereof was a mala fide step undertaken for the ulterior motive of depriving the Plaintiffs from the further benefit of the Contract whilst holding up payment of the substantial sums that had already fallen due on account of works carried out to date so as to then divert the funds that ought to be applied for settlement to such third party/parties who would be tasked with completion of the Project following the ouster of the Plaintiffs. Attention was invited to Prayer clause "C" in relation to the sum said to be outstanding, due and payable as well as to a report submitted by the Defendant No.2 before the Honourable Supreme Court, wherein such debt was said to stand acknowledged. It was also submitted on the point of discrimination that in the instant case the Contract had been terminated, whereas the Defendant No.2 had seen fit to condone lapses on behalf of other contractors in relation to Performance Guarantees submitted in respect of other contracts for construction of the Gomal Zam and Basha dams, so as to then permit the contractors in those cases to replace the guarantees that had been found to be fake and allow them continue work under their contracts. It was submitted that in the face of such past practice, it was unreasonable for a different yardstick and a more rigid stance to be adopted in respect of the Plaintiffs.

9. It was submitted that as the termination was irregular, a prima facie case for grant of a temporary injunction stood made out. Furthermore, on the aspect of balance of convenience, it was merely stated that the same was in favour of the Plaintiffs as they were ready to recommence work on the Project if permitted to do so. As to irreparable loss, the only point advanced in that regard was that the reputation of the Plaintiff would be adversely affected if the termination and remained unchecked. Reliance was



placed on a judgment of the Honourable Supreme Court in the case reported as Mohammad Aref Effendi v. Egypt Air 1980 SCMR 588 as well as the judgment of a Division-Bench of the Islamabad High Court in the case reported as Munda Hydropower Ltd through Habib H. Parach and 2 others v. Federation of Pakistan through Secretary Ministry at Water and Power and 2 others 2009 MLD 526.

10. Conversely, it was submitted by learned counsel for the Defendant No.2 that the termination of the Contract had ensued for good cause, as the Performance Guarantee had not been verified by the bank that was purportedly the issuer thereof, namely the Bank of Punjab, and the submission of a fake guarantee constituted a clear violation of the Integrity Pact signed by the Plaintiff, hence fell squarely within the scope of Sub- Clauses 63.1 read with 74.1 of the Contract, as had been invoked for purpose of termination. It was submitted further that the Plaintiffs had been addressed on the subject prior to issuance of the Termination Notice, but had failed to muster a satisfactory response, and the letters addressed by the Plaintiffs following termination themselves evinced the fact that verification of the Performance Guarantee had not be forthcoming from the relevant quarter.
  
11. Learned counsel for the Defendant No.2 invited attention to the letter dated 06.09.2018 (Annexure P/28 to the Plaintiff) addressed by the Plaintiff to the Chairman, WAPDA on the subject of the Termination Notice, wherein it was stated inter alia that “Before going to the court, the Joint Venture is requesting to constitute a committee to resolve our problem of termination in accordance to similar issue in case of Gomal Zam Dam and Basha Dam Contracts”. He submitted that such request itself constituted tacit

acceptance of the fact that the Performance Guarantee in the instant case had been fake. He also invited attention to the subsequent letter dated 10.09.2018 (Annexure P/30 to the Plaint) bearing the caption/subject “**Merciful Request For Withdrawal of Notice for Termination of the Contract**”, whereby the Plaintiff’s had sought to explain the bank’s failure/refusal to verify the Performance Guarantee whilst seeking to shift the blame to the Defendant No.2, stating that “Since award of Contract our commitment with the BOP were not completed by us because WAPDA was not able to pay our IPCs of huge amount due to inadequate budget allocation by the Federal Government. The dispute arise with the Head office of the Bank of Punjab and unfortunately bank has refused to verify the Bank Guarantee No.0002/00264 for Rs.2,715,449,683/-.” He submitted that such statement itself demonstrated that verification had not been forthcoming.

12. On this basis, it was asserted by learned counsel for the Defendant No.2 that the Termination Notice was based on a valid cause and had been issued in accordance with the Contract. It was submitted that even if the termination was irregular or unfounded or had been effected in breach of the relevant terms, subject to this being established, the remedy in the normal course was by way damages to be assessed on the basis of the sum or value the Plaintiff would have received had the Contract not been terminated, including lost profits, so as to protect the Plaintiff’s expectation interest and remedy the injury by providing the “benefit of the bargain” based on the actual value the contract would have had if performed pursuant to its terms. It was submitted that under the given circumstances and in view of the nature of the Contract, specific performance would not be available as a remedy, hence an injunction would also not lie. Reliance was

placed on a judgment of the Honourable Supreme Court in the case reported as M/s. Pakistan Associated Construction Ltd v. Asif H. Kazi & Another 1986 SCMR 820 as well as a judgment of a Single-Bench of the Lahore High Court in the case reported as Chaudhry Construction Co. Limited v. Pakistan and others 1990 CLC 394. It was also submitted that the allegation of discriminatory treatment was also unfounded, as in the instances of the Gomal Zam Dam and Basha Dam contracts was unfounded as the letter dated 11.03.2018, upon which reliance was placed by the Plaintiffs, itself reflected that the contractors in those matters had only been permitted to complete a certain segment/package of relating to a specific part of the overall project and had otherwise been excluded from participating in the bidding process of remaining packages for a period of 12 months due to the submission of the fake documents.

13. Issue was also taken with regard to the lack of independent legal status of the Plaintiff No.1, it being contended that the Plaintiff No.1 resultantly suffered from incapacity to maintain the Suit on such score, and a point of jurisdiction was also raised, however it is not necessary for present purposes to dwell immediately on such aspects, due focus firstly being on whether the essential ingredients for grant of temporary injunction are satisfied under the given facts and circumstances.
  
14. It is well settled that when determining whether to exercise discretion to grant an interim injunction in commercial setting, the existence of a prima facie case naturally arises as the first point for consideration. In addition, the balance of convenience also has to be weighed for purpose of it being determined whether an interim injunction would be appropriate under the

circumstances of the case, and thirdly, the aspect of irreparable loss is to be looked into, for which purpose it has to be considered whether damages would be an adequate remedy for the party injured by the grant of or failure to grant an injunction, for if damages would be adequate, no injunction should normally be granted, however strong the claim may appear to be.

15. Having examined the pleadings and material on record and the respective submissions advanced by learned counsel, it is apparent that in the instant case Clauses 63.1 and 74.1 have been invoked for the reasons stated in the Certification and Termination Notice, and in view of the correspondence between the parties, including the very correspondence emanating from the Plaintiffs, as mentioned in Paragraph 11 above, it cannot be said that there is no basis in that regard. Whilst termination for cause may be a drastic sanction and may, if unfounded/wrongful, expose the principal/owner to potential liability by way of damages for breach of contract, including the contractor's lost profit as well as consequential damages suffered, subject to the same being proven, however, that is not to say that the threat or apprehension of irregular termination of itself warrants remedy by means of an injunction or, as in the present case, suspension of the termination. Generally, Courts do not compel ongoing co-operation between commercial parties in circumstances where, to ensure the proper performance of the agreement, the Court would be required to continually supervise performance. As such, Orders of specific performance, are generally disfavoured in the context of construction law, and the favoured remedies for breach of are usually substitutive in nature, providing an award of money damages in substitution for performance of the actual promise.

16. Indeed, the precedents relied upon by learned counsel for the Defendant No.2 support such an approach, as in the case of *Pakistan Associated Construction* (Supra), which was a case akin to the matter at hand in as much as resurrection of a construction contract had been sought, with the main reliefs being that to declare that "the impugned notice of cancellation, dated 18.7.1985 is null and void" and to appropriately extend the period of Contract", it was held inter alia by the Apex Court that:

“There are more than one good reason why prima facie interim relief keeping in abeyance the cancellation of Contract or of extending the period of its performance, or of allowing access to men and material at site could not be granted by Court. The statutory constraints are to be found in section 21, clauses (a) and (d) and section 56, clause (f) of Specific Relief Act.”

17. The cited judgment in the matter of *Chaudhry Construction* (Supra) is also a case in point, where after considering the commentary in “Hudson on Building Contracts” as well as the judgments in *Garret v. Banstead and Epsom Downs Rly. Co* (1965) 12 L.T. 654: 13 W.R. 878), as well as *Munro v. Wivenhoe, etc.* (1865) 12 L.T. 655), it was held that the rules emerging from these authorities were that:

- (i) A building or an engineering contract for executing work upon the land of another are mere license to enter upon the site or land necessary to execute the work. Such license can be revocable by the employer at any time;
- (ii) No injunction can be issued against the owner at the instance of building contractor. His proper remedy is suit for damages.

18. It merits consideration that, in the instant case, the license granted to the Plaintiff in terms of the Contract is not a license coupled with any interest and there is no implied covenant not to revoke such license in breach of contract so as to make it irrevocable in the absence of lawful termination. Furthermore, even if there could be implied in the contract a negative covenant on the part of the Defendant No.2 not to revoke the license in breach of the Contract, the Plaintiffs cannot rely upon such covenant following termination of the Contract and revocation of the license to seek injunctive relief that would essentially amount to reauthorizing the continuance of work under the Contract, since if that defense and remedy were available, the Plaintiffs would indirectly obtain specific performance of the Contract by forcing the continuance of relations with a contractor with whom the Defendant No.2 is at loggerheads. The judgments cited by learned counsel for the Plaintiff are distinguishable on the facts in as much as the *Egypt Air* case (Supra) involved a general sales agency, and the claim of the plaintiff in that case was that the relationship of agency was coupled with an interest pursuant to and within the meaning of Section 202 of the Contract Act, 1872, thus could not be terminated without consent, whereas under the given facts and circumstances when the principles underpinning Section 202 are examined it is apparent that the same does not, *prima facie*, have any application to the present case. Similarly, the facts of the *Munda Hydropower* case (Supra) are also far removed from the matter at hand as that case pertained to a hydel project commissioned on a Build-Own-Operate-Transfer basis, which was to be transferable to the Government of Pakistan at the end of a concession period, and the litigation that ensued was in relation to an impugned decision to shift the project to the public sector.

19. The balance of convenience also does not require undoing the termination of the Contract, as the dispute provisions contained therein do not prevent a right to terminate from being exercised pending a resolution of the dispute as to the entitlement to terminate, there necessarily having to be clear words to the effect that such a significant contractual right was to remain frozen pending an adjudicator's decision, if that construction is to be supported. On the contrary, the wording of Clause 63.1 negates any such prospect and it also has to borne in mind that the Contract is even otherwise terminable without cause in terms of Clause 75.1, which reads as follows:

**75.1. Termination of Contract for Employer's Convenience**

The Employer shall be entitled to terminate the Contract at any time for the Employer's convenience after giving 56 days prior notice to the Contractor, with a copy to the Engineer. In the event of such termination, the Contractor.

- (a). shall proceed as provided in Sub-Clause 65.7 hereof; and
- (b). shall be paid by the Employer as provided in Sub-Clause 65.8 hereof.

Furthermore, the grant of an injunction under the circumstances would essentially force one of two parties between whom a relationship had otherwise irretrievably broken down to either fall back on and suffer that relationship or suffer delay in execution of the Project, to its own detriment and the national interest. Conversely, if the Plaintiffs ultimately succeeds in establishing that termination was unwarranted, compensation would be available from the offending parties in the form of damages. Indeed, the benefit of the Contract appears to be readily quantifiable, as is evident from Prayer (C) of the Plaint whereby a claim amounts outstanding to date has

been advanced, hence, on such basis, the further damages recoverable, if any, would clearly be quantifiable. Having regard to these facts, it must be held that the balance of convenience in the instant case lies in not granting an injunction and the aspect of irreparable loss is also not in favour thereof. The discretionary relief prayed for must therefore be refused on such grounds as well.

20. In view of the foregoing, CMA No. 2963/19 is hereby dismissed.

JUDGE

Karachi  
Dated \_\_\_\_\_