

# IN THE HIGH COURT OF SINDH AT KARACHI

## High Court Appeal No.428 of 2018

[Sui Southern Gas Company Limited  
vs. M/s. Data Steel Pipe Industries (Pvt.) Limited and another]

### Present:

**Mr. Irfan Saadat Khan, J.**

**Mr. Muhammad Faisal Kamal Alam, J.**

Date of hearings : 18.08.2020 and 08.09.2020.

Date of Decision : 30.09.2020.

Appellant : Sui Southern Gas Company Limited (SSGCL), through Mr. Asim Iqbal, Advocate.

Respondent No.1 : Data Steel Pipe Industries (Pvt.) Limited, through Mr. Taimur Ahmed Qureshi, Advocate.

Respondent No.2 : Nemo.

## JUDGMENT

**Muhammad Faisal Kamal Alam, J:** The Appellant has challenged the order dated 23.11.2018 (*the impugned order*), whereby the Performance Guarantee given by Respondent No.2 [*SILK Bank Limited*] on behalf of Respondent No.1 [*Data Steel Pipe Industries (Pvt.) Limited*] was discharged and directed to be given back to the said Respondent No.1, while granting interim injunction.

2. Succinctly, present Appellant awarded a contract to Respondent No.1 [*Data Steel Pipe Industries (Pvt.) Limited*] for supply of line pipes of different grades vide Local Purchase Order No.12/TKT/17486 dated 12.08.2015. For reference, this document is referred to the *subject*

**Purchase Order**, which is available at page-291 along with a copy of the Contract- '**subject Contract**' [inclusive of General Terms and Conditions], at page 299 (of the Court File).

3. Since delivery schedule in the above contract for supply of line pipes was not adhered to, it resulted in litigation between present Appellant and Respondent No.1, when the latter instituted a Suit No.1681 of 2016; but in due course the same was compromised by the order dated 09.08.2016 passed on a joint application filed by the above parties under Order XXIII Rule 3 of the Civil Procedure Code, 1908 (CPC) [may be referred as '**compromise application**']. It would be relevant to reproduce the terms mentioned in the said application being CMA No.11213 of 2016\_

***“It is respectfully submitted that the parties above-named have settled their dispute out of Court on the following terms and conditions:-***

***1. That the Plaintiff has already delivered 609 meters of 42" OD x 0.812" WT line pipe out of the total contract and agrees to deliver another 2694 meters of 42" OD x 0.812" WT pipe on or before 30<sup>th</sup> August, 2016.***

***2. That the parties agreed that on completion of the delivery as stated in paragraph 1 above, the entire payment for the items delivered shall be paid within a period of 30 days from the receipt of the invoice without deduction of any amount towards losses, penalty or late payment charges.***

***3. That on completion of the delivery and after payment being made against the delivery, as mentioned in paragraphs 1 and 2 above, the contract being Purchase Order No.12/TKT/17485 shall stand terminated in terms of the contract.***

***4. That the instant suit may be disposed of in the above terms with no order as to costs.”***

4. The present Suit No.1165 of 2017 (*latest lis*) was preferred by Respondent No.1 against the Appellant, primarily challenging the correspondence dated 21.04.2017 (at page-247) (being **the impugned letter**) of the latter, wherein it demanded, *inter alia*, liquidated damages for non-delivery of line pipes under the aforesaid Purchase Order. It would be relevant to reproduce the Prayer Clause of this *latest lis*\_

*“It is prayed on behalf of the Plaintiff above named that this Hon’ble Court may be pleased to pass judgment and decree in favour of the Plaintiff as under.*

- 1. Declaration that the Defendant No.1 is not legally entitled to deduct any amount under the garb of liquidated damages/consequential losses and subsequently claim under the Performance Guarantee bearing No.001/16/129/LG/TC as no event giving rise to a claim under the same has arisen;*
- 2. Direct the Defendant No.1 to discharge/release the Performance Guarantee bearing No.001/16/129/LG/TC issued by the Defendant No.2 on behalf of the Plaintiff;*
- 3. Permanently and pending the disposal of the suit, restrain the Defendant No.1, its employees, agents or any other person acting for and/or on its behalf, directly and indirectly from taking any steps/action towards black listing the Plaintiff as envisaged under the Notice dated 21.04.2017;*
- 4. Permanently and pending the disposal of the suit, restrain the Defendant No.1, its employees, agents or any other person acting for and/or on its behalf, directly and indirectly from taking any steps/action towards encashing the Performance Guarantee bearing No.01/16/129/LG/TC and further restrain the Defendant No.2, its employee, agents or any other person acting for and/or on its behalf, directly or indirectly from making any payments to the Defendant No.1 in relation to the Performance Guarantee bearing No.001/16/129/LG/TC;*
- 5. Costs of this suit;*

**6. Any other relief(s) which this Hon'ble Court may deem fit having regard to the circumstances of the case.”**

5. Mr. Asim Iqbal, Advocate, representing Appellant-SSGCL, argues that the terms of settlement between Appellant and Respondent No.1 in the earlier Suit No.1681 of 2016, vide said compromise application, was not intended to novate the subject contract, but to address exigency faced by Appellant at the relevant time, because non adherence to delivery schedule by Respondent No.1 was causing delay in completing the public work. He further argued that the impugned letter of Appellant (*ibid*) is with regard to quantity of line pipes, which was not delivered by Respondent No.1 as per the schedule mentioned in the subject contract, whereas, the line pipes, which were delivered as per the above compromise application, no monetary claim was either made nor mentioned in the impugned letter. The learned counsel has relied upon the following case law to augment his arguments\_

- i. 1994 SCMR page-2189  
*[Mrs. Mussarat Shaukat Ali vs. Mrs. Safia Khatoon and others]*
- ii. 2016 CLD page-527 [Sindh]  
*[Habib Ahmad vs. Meezan Bank Limited and 5 others]*
- iii. 2018 SCMR page-1586  
*[Haji Baz Muhammad Khan and another vs. Noor Ali and another]*
- iv. 2004 SCMR page-1084  
*[Zulqarnain and 2 others vs. Surbuland Khan and another]*
- v. 1992 CLC page-1887 [Karachi]  
*[Dr. Khalid Kamal Khan vs. Dr. Arshad Kamal Khan and another]*
- vi. 1999 YLR page-1094 [Karachi]  
*[Iftekhar Ahmed Lari vs. Messrs. Federal Chemical & Ceramics Corporation, 15<sup>th</sup> Floor, PNSC Building, Karachi through Secretary/Chairman and 2 others]*
- vii. 2016 CLD page-527 [Sindh]  
*[Babib Ahmed vs. Meezan Bank Limited and 5 others]*

viii. 1999 SCMR page-2878  
*[Nooruddin and others vs. Mst. Amiran Bibi and others]*

6. Mr. Taimur Ahmed Qureshi, learned counsel for Respondent No.1, while making submissions has also filed Written Synopsis. He argued in favour of the impugned order and stated that it is not necessary to record evidence in every matter, if the entire controversy can be decided on the basis of legal issue or undisputed facts. He elaborated his submissions, that since the delivery of line pipes were made in terms of the above compromise application, as also reflected in the impugned letter of 21.04.2017 itself, the Appellant is estopped from claiming any liquidated damages under the subject contract, which stood novated in view of the afore referred compromise application. He argued that after delivery of above 2694 meters of line pipes, the Appellant released the payment but retained five percent (5%) retention money. When Respondent No.1 approached the Appellant for releasing the Performance Guarantee and the retention money amounting to Rs.98,224,761/- and Rs.10,376,767/-, respectively, the same was refused, followed by the impugned letter *[ibid]*. While relying on the case law cited by the Appellant's learned Advocate, which according to the learned for Respondent No.1 in fact supports the stance of Respondent No.1, he has cited the following reported precedents to fortify his arguments about disposal of entire Suit on the basis of legal issues and without a full-dress trial\_

- i. 1990 MLD page-2049 [Lahore]  
*[Sindbad Travels (Pvt.) Ltd., Lahore vs. P.I.A. Corporation, Lahore]*
- ii. 2010 YLR page-1883 [Karachi]  
*[Mrs. Tahira Sultana vs. Saleem Rajput and another]*

7. Arguments heard and record perused.

8. Vide impugned order two interlocutory applications were allowed; the first one is CMA No.7382 of 2017 and the other one was 17604 / 2017. The first CMA is filed under Order XXXIX Rules 1 and 2 of CPC, seeking restraining orders against present Appellant and Respondent No.2 from encashing the subject Performance Guarantee No.001/1616/129/LG/TC so also from blacklisting present Respondent No.1; *whereas*, the second application is filed under Section 151 of CPC requesting the Court to direct the present Appellant to discharge / release the above subject Performance Guarantee issued by present Respondent No.2 (SILK Bank Limited); both these applications are in the record of present proceeding at pages-93 and 169.

9. Written Statement and Counter Affidavit to the above interlocutory applications, filed by the present Appellant are also available in record and the same have been perused. Besides questioning the maintainability of the *latest lis*, the stance of present Appellant is that due to delay in supplying the line pipes by Respondent No.1, the public work carried out by present Appellant was halted and substantial losses were incurred; that Respondent No.1 failed to fulfill its contractual obligations; that manufacturing facility of Respondent No.1 lacked production capacity. Similarly, in the para-wise Comments filed by Respondent No.1 in the present Appeal, it is averred, *inter alia*, **that intention of Appellant and Respondent No.1** was that after delivery of subject line pipe (referred to as 'Goods' by Respondent No.1), no claim with regard to loss or late delivery would be raised by Appellant and thus the impugned notice of 21.04.2017 is uncalled for and fanciful, in which damages to the tune of Rs.237,745,105/- is claimed.

10. Undisputedly, under the Purchase Order dated 12.08.2015, issued in pursuance to the Subject Contract, Respondent No.1 was required to

supply 31000 meters of line pipes of different specification(s) to the Appellant by 06.02.2016. For certain reasons timely deliveries were not made by Respondent No.1 as also reflected from its pleadings of earlier Suit No.1681 of 2016 and finally the above compromise application was signed in which it is specifically stated in Clause-1 that Respondent No.1 (at the relevant time) delivered 609 meters of line pipes and agreed to deliver another 2694 meters of line pipes / Goods on or before 30.08.2016. It is also not disputed that Clause-1 of the compromise application was complied with against which the Appellant made payment to Respondent No.1 without deducting any amount towards loss, penalty or late payment surcharge as stipulated in Clause-2 of the said compromise application. The impugned Letter (of Appellant) is in respect of 27,695.76 meters of line pipes, which were not supplied (remained undelivered) to Appellant.

It is relevant to observe that when the above settlement was effected through the said compromise application [between Appellant and Respondent No.1] the Performance Guarantee (dated 15.02.2016 at page-267 of the Court file) was neither released nor the Respondent No.1 was asked to submit a fresh Performance Guarantee corresponding to the reduced quantity of line pipes as mentioned in the compromise application. **Secondly**, the termination clause of Original Contract was retained.

11. If the arguments of Respondent No.1 is accepted then it means that Appellant has given up its claim (waived its claim) with regard to such a huge quantity of Goods, which is almost nine times of the quantity that was delivered (in the manner stated above). Conversely, the stance of Appellant is completely different. Such intricate question can only be decided after Parties hereto lead the evidence in support of their

respective claims, as also held in the reported decisions cited above. The finding in the impugned order that the original contract, which in fact is the subject contract, stood novated, with respect, cannot be sustained, *inter alia*, when both contracting parties have raised serious dispute with regard to novation and non-novation of the contract, coupled with the fact that the undelivered quantity is many times higher than the delivered quantity. By implication a ‘waiver’ cannot be invoked against present Appellant, *firstly*, because its essential ingredient is that a known right is consciously given up; and *secondly*, in the given circumstances, particularly, in the presence of Clauses 25 and 27 in the ‘**subject Contract**’ (about Delivery Failure and Liquidated damages), so also, considering Appellant is a public sector Company. At the cost of repetition (as already stated above), the above significant aspect requires evidence.

12. Both learned Advocates have relied upon the same case law in respect of novation of contract. Crux of the principle laid down in the cited judgments, while interpreting Section 62 of the Contract Act (1872) is that when parties to a contract agree to substitute a new contract in place of the previous one, then performance of original contract is dispensed with; Court has to examine the fact that whether the original agreement was validly rescinded; whether all rights and liabilities also extinguished (under the old contract) by novation, is a question of fact depending on the circumstances of each case.

13. Looking at the controversy in light of the case law discussed in the foregoing paragraphs, We are of the considered view, that when Appellant and Respondent No.1 have specifically alleged their respective interpretation about the above compromise application, wherein admittedly a certain part of the original subject contract has been



retained (concerning the termination of the contract being Purchase Order No.12/TKT/17486), then, it was not correct to give a definite finding in the impugned order that the earlier contract stood novated, while releasing the performance guarantee and granting injunctive relief. In effect through the impugned order the entire suit has been decided, although pleadings of Parties clearly show that triable issues are involved in the *latest lis*. The decisions relied upon by the learned Advocate for Respondent No.1, about disposal of entire cause on the basis of legal issue(s), are not applicable to the peculiar facts of the present controversy, although the rule laid down in these reported decision is an establishment one.

14. The upshot of the above discussion is that the impugned order dated 23.11.2018 is set-aside with an observation that learned Bench seized of the case will rehear the afore-referred CMAs in the *latest lis*, without being influenced by any observation made in this Judgment, which is also of tentative nature.

**JUDGE**

**Dated: 30.09.2020**

**JUDGE**

M.Javid.PA