IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. Nil (- 392) of 2018

Plaintiff	:	China Harbour Engineering Co. Ltd, through Mr. Hassan Mandviwala, Advocate.
Defendant No.1	:	KPT, through Mr. Badar Alam, Advocate.
Defendant No.2	:	Bank Alfalah Limited, Nemo
Dates of hearing	:	04.12.2019 and 18.12.2019.

ORDER

YOUSUF ALI SAYEED, J – The Plaintiff and Pemcon Geo-Engineering (Private) Limited ("**Pemcon**") entered into a Joint Venture Agreement dated 11.07.2009 for purpose of tenders invited in relation to the works to be carried out for construction of the quay wall of the Pakistan Deep Water Container Port being developed by the Defendant No.1 (the "**Project**"), and their tender in the sum of PKR 18,256,166,070 (the "**Contract Price**") was accepted in terms of a Letter of Acceptance dated 12.01.2010, bearing reference No. P&D-G(560)/2007/VI/299 (the "**LOA**"), following which the Plaintiff along with Pemcon entered into a Contract Agreement dated 04.05.2010 (the "**Contract**") with the Defendant No.1, incorporating various addenda as specified in Clause 2 thereof, including but not limited to the LOA, the Instructions to Bidders, as well as the General and the Special Conditions of Contract.

2. As per the requirement of the bid, the Joint Venture of the Plaintiff and Pemcon deposited a Performance Security with the Defendant No. 1 equivalent to 10% of the Contract Price in the shape of a Letter of Guarantee for the sum of PKR, 1,369,212,455/- plus Chinese Yuan 38,353,290/- issued by the Defendant No.2 on 23.02.2010 (the "**Guarantee**"), operatively worded as follows:

> "To
> The Trustees of the Port of Karachi,
> Karachi
>
> Know all men by these presents, that in pursuance of the terms of the bidding documents and its acceptance as conveyed vide letter of acceptance (hereinafter called the documents) vide letter No. P and D-G (560)/2007 /vi/299 dated January 12, 2010, and at the request of the said contractor. We, the guarantor above named, are held and firmly bound unto the Trustees of the Port Of Karachi (hereinafter called the employer) in the sum of the amount stated above i.e. PKR. 1,369,212,455/- (Pakistani Rupees One Billion Three Hundred Sixty Nine Million Two Hundred Twelve Thousand Four Hundred and Fifty Five Only) and CNY 38,353,290/- (Chinese Yuan Thirty Eight Million Three Hundred Fifty Three Thousand Two Hundred And Ninety Only) for the payment of which sum well and truly to be made to the said employer, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. The condition of this obligation is such that the contractor shall submit a performance bond in the shape of bank guarantee for faithful performance of the works relating to quay wall construction works contract for the Pakistan Deep Water Container Port (PDWCP).
>
> Now the condition of the bond is, if the contractor shall well and truly perform and fulfill all the undertakings, covenants, terms and conditions of the said documents during the original terms of the said documents and any extensions thereof that may be granted by the employer, with or without notice to the guarantor, which notice is, hereby, waived and shall also well and truly perform and fulfill all undertakings, covenants terms and conditions of the contract and of any and all modifications of said, documents, that may hereafter be made, notice of which modifications to the guarantor being hereby waived, then, this obligation to be void, otherwise to remain in full force and virtue till all requirements of clause 49, defects liability, of conditions of contract are fulfilled. But in any case the validity of this performance security should not be later than February 28, 2014.

Our total liability under this guarantee is limited to the sum stated above PKR. 1,369,212,455/- (Pakistani Rupees One Billion Three Hundred Sixty Nine Million Two Hundred Twelve Thousand Four Hundred and Fifty Five Only) and CNY 38,353,290 (Chinese Yuan Thirty Eight Million Three Hundred Fifty Three Thousand Two Hundred and Ninety Only) and it is a condition of any liability attaching to us under this guarantee that the claim for payment in writing shall be received by us within the validity period of this guarantee, failing which we shall be discharged of our liability, if any, under this guarantee.

We, Bank Alfalah, Limited Main Branch Karachi (the guarantor), waiving all objections and defences under the contract, do hereby irrevocably immediately and independently guarantee to pay to the employer without delay, upon the employer's first written demand through chief accounts officer, KPT without cavil or arguments and without requiring the employer to prove or to show grounds or reasons for such demand any sum or sums up to the amount sated above i.e. PKR, 1,369,212,455/- (Pakistani Rupees One Billion Three Hundred Sixty Nine Million Two Hundred Twelve Thousand Four Hundred and Fifty Five Only) and CNY 38,353,290 (Chinese Yuan Thirty Eight Million Three Hundred Fifty Three Thousand Two Hundred and Ninety Only), against the employer's written declaration that the contractor has failed to perform the obligations under the contract which payment will be effected by the guarantor to employer's designated bank and account number provided also that the employer shall be the sole and final judge for deciding whether the contractor has duly performed his obligations under the contract or has defaulted in fulfilling said obligations and the guarantor shall pay without objection any sum or sums up to the amount stated above upon first written demand from the employer forthwith and without any reference to the contractor or any other person.

Notwithstanding anything stated herein above to the contrary our total liability is restricted to PKR. 1,369,212,455/- (Pakistani Rupees One Billion Three Hundred Sixty Nine Million Two Hundred Twelve Thousand Four Hundred and Fifty Five Only) and CNY 38,353,290 (Chinese Yuan Thirty Eight Million Three Hundred Fifty Three Thousand Two Hundred and Ninety Only) payable in Pakistani Rupees and shall not exceed this amount in any case. Claims if any must be received in writing at our counters on or before the expiry date February 28, 2014. After this date no claims will be entertained and we shall be absolved and discharged of all liabilities hereunder whether this guarantee is returned to us or not. Claims if any, shall be paid in Pakistani Rupees at the exchange rate prevailing on the date of encashment.

In witness whereof,…"

3. Whilst the Guarantee was initially specified as remaining in force up to 28.02.2014, vide several Amendments the validity thereof was extended from time to time.

4. Apparently, a dispute subsequently arose between the Plaintiff and Defendant No.1 as to alleged delays in execution of works under the Contract, and vide a letter dated 15.02.2018 addressed to the Defendant No.2, the Defendant No.1 made a call for encashment of the Guarantee.

5. The operative part of the aforementioned letter dated 15.02.2018 addressed by the Defendant No.1 to the Defendant No.2 in relation to the Guarantee proceeds in the following terms:

> "Manager,
> Bank Alfalah Limited,
> Karachi Main Corporate Branch,
> B.A Building I.I Chundrigar Road,
> Karachi.
>
> **SUB: "ENCASHMENT OF BANK GUARANTEE"**
>
> With reference to subject matter, it is to inform that **B/G No.CPBD/0298/100005 dated. 23-02-2010** for Rs. 1,369,212,455/- and CNY 38,353,290/- of M/s. China Harbour Engineering Company Ltd, is going to be expired on 30-09-2018.
>
> In accordance with terms and conditions laid down in the above Guarantee you are hereby called upon to pay the Karachi Port Trust the sum of **Rs. 1,369,212,455/-** (Pakistani Rupees One Billion Three Hundred Sixty Nine Million Two Hundred Twelve Thousand Four Hundred and Fifty Five Only) and **CNY 38,353,290/-** (Chinese Yuan Thirty Eight Million Three Hundred Fifty Three Thousand Two Hundred and Ninety Only) plus liquidated Damages, immediately as the contractor has failed to complete the subject project in stipulated time period.
>
> Kindly arrange a pay order equivalent to the amount of above mentioned Bank guarantee in favour of Karachi Port Trust at your earliest please."

6. Being aggrieved, the Plaintiff has brought this suit, assailing the letter seeking encashment of the Guarantee, and praying that this Court be pleased to:-

> "a) declare the Performance Guarantee as extended from time to time valid and still in operation as per the terms and conditions provided in the Performance Guarantee until its final extension dated September 30, 2018.
>
> b) declare that the Impugned Notice / any subsequent Notice in respect of encashment of Performance Guarantee as extended from time to time to be without jurisdiction, malafide, illegal, void ab-initio, of no legal effect, unlawful and without any legal standing and hence is liable to be set aside.
>
> c) permanently restrain the Defendant No. 1, their officers/ agents/privies/cronies from issuing any encashment notice in respect of the Performance Guarantee as extended from time to time and prevent the Defendant No. 1 form taking any adverse action in any manner in respect thereof, including and not limited to issuing any such notice or subsequent encashment notice thereof;
>
> d) grant costs and special costs;
>
> e) grant permission to amend and add any further relief under the circumstances of the case; and
>
> f) grant any other adequate relief deemed fit in the circumstances."

7. It is in this framework that an Application has been filed under Order 39, Rules 1 and 2 CPC, being CMA No. 2582/18 (the "**Injunction Application**"), with an interim Order having been made on 19.02.2018 restraining the Defendant No.2 from proceeding with encashment of the Guarantee.

8. It is also pertinent to mention that at the time of the institution, upon presentation of the Plaint on 19.02.2018, the Office had raised an Objection with reference to the Power of Attorney in favour of the signatory through whom the Suit had been instituted, namely one Wang Xiaoping, which remained unaddressed. The Suit accordingly remained unnumbered and the competence of the signatory also came to be denied by the Defendant No.1 in terms of its Written Statement, with the maintainability of the Suit being impugned during the course of proceedings on the ground that the suit had been filed without authorization, hence was not maintainable and ought to be dismissed.

9. As such, it is the Injunction Application and the question of maintainability that were proceeded on and are addressed as follows herein below.

10. Turning firstly to the Injunction Application, it was contended by learned counsel for the Plaintiff that the Letter dated 14.02.2018 addressed by the Defendant No.1 to the Defendant No.2 making a call for encashment of the Guarantee proceeded on the assertion of the Plaintiff's failure to complete the Project within the stipulated timeframe, whereas the Project had been substantially completed and, at the time, the Defects Liability Period was valid up to 14.12.2018, and in view of such validity as well as the absence of any prior notice to the Plaintiff under Clause 10.3 of the Contract or having recourse to the mechanism for settlement of claims and disputes, as provided, the call for encashment of the Guarantee was unwarranted and unlawful.

11. Reliance was also placed on the judgment of a learned Division Bench of this Court reported as Pakistan Engineering Consultants vs. Pakistan International Airline Corporation & others 1993 CLC 1926, where whilst holding that no order could be passed restraining the encashment of a Mobilization Advance Bond, the encashment of a Performance Bond had been restrained on the basis that it would not be just and proper to allow its encashment as the same was dependent on the commission of default. It was pointed out that such judgment had been upheld in appeal before the Honourable Supreme Court in terms of its decision reported earlier in time as Pakistan Engineering Consultants vs. Pakistan International Airline Corporation & others 1989 SCMR 379. Reliance was also placed on single-bench Judgments of this Hon'ble Court where the encashment of this Court in the cases reported as Messers Zeenat brother (Pvt) Limited vs. Aiewan-e-Iqbal Authority through Chairman, Aiwan Iqbal Complex Lahore & 3 others PLD 1996 Karachi 183; and Messrs Continental Cable (Pvt.) Ltd. V. Messrs China Harbor Engineering Co. Lts. And another 2011 CLD 1625.

12. Conversely, it was submitted by learned counsel for the Defendant No.1 that the termination of the Contract had ensued for good cause, as various works were not completed on the agreed completion date(s) as a result of which the completion of the entire Project had been impeded. Attention was invited to correspondence wherein it was reflected that works had been delayed.

13. It was submitted that it is a well settled position that performance under a bank guarantee stands on a footing similar to an irrevocable letter of credit and it is not concerned in the least with the issue as to whether the party furnishing such guarantee has performed his contracted obligation or not, nor with the question as to whether that party is in default or not and the issuer of the bank guarantee must make payment thereunder upon a demand being made in accordance with its terms and without proof or conditions, if so stipulated, and encashment cannot be interfered with irrespective of the existence of a dispute nor could an injunction restraining payment be granted on such a ground. It was submitted that the plea advanced on behalf of the Plaintiff that encashment of the Guarantee ought to be restrained in view of the alleged existence of a dispute and the plea as to existence of a mechanism under the Contract for resolution thereof was fallacious and untenable.

14. It was argued that a restraint could not be imposed in relation to the encashment of an instrument of the nature of the Guarantee except in cases of fraud or in light of special equities. Reliance was placed on the judgments of the Honourable Supreme Court in the case reported as Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd. PLD 2003 SC 191 and Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 Supreme Court 311, and it was pointed out that in the instant case, the Plaintiff had not even alleged fraud or demonstrated that there were any special equities operating in its favour. It was also pointed out that that whilst the Contract had and Pemcon, and the Guarantee had been furnished accordingly, it was only the Plaintiff that had come forward individually, in the absence of Pemcon and without even impleading such participant in the Joint Venture as a party.

15. Having considered the submissions advanced at the bar, it merits consideration at the outset that the seminal authority from our jurisprudence defining the parameters for interference by a Court in relation to the encashment of a performance guarantee is the decision of the Honourable Supreme Court in the case of Shipyard K. Damen (Supra), where various precedents on the subject of guarantees were examined by the Apex Court, including various judgments of the Supreme Court of India as well the decisions of the English Courts in the cases of *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146 and *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, from which the following principles were distilled:

> "(i) The performance of guarantee stands on the footing similar to an irrevocable letter of credit of Bank, which gives performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier has performed his contracted obligation or not, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee all demand if so stipulated without proof or conditions. Only exception is when there is a clear fraud of which Bank has notice.
>
> (i) There is an absolute obligation upon the banker to comply with the terms and conditions as enumerated in the guarantee and to pay the amount stipulated therein irrespective of any disputes there may be between buyer and seller as to whether goods are up to contract or not.
>
> (ii) The bank guarantee should be enforced on its own terms and realization against the bank guarantee would not affect or prejudice the case of contractor, if ultimately the dispute is referred to arbitration for the reason, once the terms and conditions of the guarantee were fulfilled, the bank's liability under the guarantee was absolute and it was wholly independent of the dispute proposed to be raised.

(iii) The contract of bank guarantee is an independent contract between the bank and the party concerned and is to be worked out independently of the dispute arising out of the work agreement between the parties concerned to such work agreement and, therefore, the extent of the dispute and claims or counter-claims were matters extraneous to the consideration of the question of enforcement of the bank and were to be investigated by the arbitrator.

(iv) Where the bank had undertaken to pay the stipulated sum to respondent, at any time, without demur, reservation, recourse, contest or protest, and without any reference to the contractor, no interim injunction restraining payment under the guarantee could be granted.

(v) The Bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

(vi) When once bank guarantee is discharged, the obligation of the bank ends and there is no question of going behind such discharge bank guarantee. Courts should refrain from probing into the nature of the transactions between the bank and customer, which led to the furnishing of the bank guarantee.

(vii) In the absence of any special equities and the absence of any clear fraud, the bank must pay on demand, if so stipulated and whether the terms are such must be have to found out from the performance guarantee as such.

(viii) The unqualified terms of guarantee could not be interfered with by Courts irrespective of the existence of dispute."

16. As can be discerned, the basic premise is that a guarantee is independent of the contract between the parties giving rise to its issuance. This follows what is known as the 'autonomy principle', which recognises the autonomy of the issuer institution to 'unconditionally' respond to a compliant call on an unconditional guarantee in fulfilment of its promise to pay, and in the absence of the 'fraud exception', is neither obliged nor entitled to consider the contract between the parties.

17. The parameters for application of the 'fraud exception in interlocutory proceedings in respect of performance Bond and guarantees was considered by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2015] 1 WLR 697, on appeal from the Supreme Court of Mauritius, and came to be distinguished from ordinarily applicable test formulated by the House of Lords in the case of *American Cyanamid Co v Ethicon Ltd [1975] AC 396*. In the context of performance Bond and guarantees, the relevant test was then succinctly set out by the Privy Council in the following terms:

> "in interlocutory proceedings the correct test for application of the fraud exception to the strict general rule that the court would not intervene to prevent a banker from making payment under a letter of credit following a compliant presentation of documents was whether it was seriously arguable that on the material available the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and that the bank was aware of such fraud."

18. Hence, once a call had been made, as in the instant case, the Court cannot then grant injunctive relief against the beneficiary as the right to payment under the instrument already stands crystallised when the call is made, and so far as injunctive relief against the issuer is concerned, in such situations, an injunction could be granted, in theory, only if the fraud exception were satisfied. However, in the present case, no plea has been raised as to fraud underpinning the call for encashment of the Guarantee or indeed that such call is not within the validity of the Guarantee or otherwise not in consonance with the terms thereof, and, instead, the pleas taken all relate to the merits of the dispute under the Contract.

19. As to such pleas as have taken with reference to the provisions of the Contract for settlement of disputes, it is pertinent to note that the judgment of the Honourable Supreme Court in the case of *Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 Supreme Court 311* as well as that of the Supreme Court of India in the case of *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another* (decided on July 9, 1969), as referred to in Shipyard K. Damen (Supra), squarely address and answer this aspect of the case set up by the Plaintiff.

20. In the case of *Messrs National Construction (supra)*, it was held by the Apex Court as follows:

> In the instant case, therefore, the bank guarantees furnished by the appellants contain 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. In our view the Courts must given effect to the covenants of the bank guarantees, the performance guarantees, for the smooth performance of the 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. In the instant case, therefore, the encashment of the bank guarantees cannot be postponed pending decision of the arbitration proceedings, which may take years to conclude.

21. Additionally, in *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another 1996 SCC (1) 735*, as referred to in the case Shipyard K. Damen (Supra), it was observed that:--

> "At this juncture it seems necessary to analysis the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contract is not barred and the cause of action for the same is independent of enforcement of the guarantee."

22. As to the contention that the Guarantee was security for payment of liquidated damages, which could not be granted without evidence, it merits consideration that in *Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and another 1996 SCC (5) 34*, as similarly referred to in Shipyard K. Damen (Supra), it was concluded that:--

"The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that on India only reasonable amount ca be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantees making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till and adjudication in that behalf is made either by a court on an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantees is a independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus called to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee."

…

"We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that' is to say, in case of

> fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and. the relief for injunction was sought by the contractor/Respondent No.1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees."

23. In *Cargill International v Bangladesh Sugar and Food Industries Corporation [1996] 2 LLR 524*, Morison J said, when considering an application for an injunction to restrain a call on a bond;

> "However, it seems to me to be implicit in the nature of a bond, and in the approach of the Court to injunction applications, that, in the absence of some clear words to a different effect, when the bond is called, there will, at some stage in the future, be an "accounting" between the parties in the sense that their rights and obligations will be finally determined at some future date. The bond is not intended to represent an estimate of the amount of damages to which the beneficiary may be entitled for the breach alleged to give rise to the right to call."

24. With reference to the Judgments cited on behalf of the Plaintiff, the same were either irrelevant or distinguishable. In this regard, it also merits consideration that the case reported at 1993 CLC 1926 cannot be relied upon for the proposition that a performance bond cannot be encashed unless there is default because such a proposition runs contrary to the judgments of the Supreme Court in the cases of Shipyard K. Damen (supra) and National Construction (supra). Furthermore, whilst

such judgment had indeed been upheld by the Honourable Supreme Court, the judgment of the Apex Court reported at 1989 SCMR 379 hinges on the point that interim orders and the discretion exercised by a High Court is not ordinarily to be interfered with unless such exercise is found to be arbitrary, ergo such decision does not of itself lay down a precedent that a performance bond cannot be encashed without proven default.

25. Under the given facts and circumstances, no prima facie case for an injunction restraining encashment of the Guarantee stands made out, and the Injunction Application is dismissed accordingly.

26. Turning to the aspect of maintainability of the Suit, the matter hinges on the capacity of the signatory through whom the Suit had been instituted. The documents purportedly relevant in that regard, as had been referred to in the plaint with copies being filed therewith at the time of presentation were a Letter of Authority dated 11.07.2009 and Power of Attorney dated 24.11.2016, which read as follows:

The Letter of Authority dated 11.07.2009

"Date: **July 11, 2009**

General Manager (P & D)
Karachi Port Trust,
KPT Head Office,
Karachi.

Letter of Authorization

We hereby authorize Mr. WANG XIAOPING, Chief Representative of China Harbour Engineering Co. Ltd., full power to sign the Tender Documents and/or any other correspondences/documents on behalf of CHEC-Pemcon Joint Venture in respect of the two projects with KPT, i.e. ***Marine Protection Works Contract***, and ***Construction of Quay Wall*** of Pakistan Deep Water Container Port, East of Keamari Groyne. The correspondences and documents signed by him are therefore binding on the Joint Venture."

The Power of Attorney dated 24.11.2016

"**POWER OF ATTORNEY**

To whom it may concern,

that I, the undersigned, in my capacity as the legal representative and the Chairman of the Board of China Harbour Engineering Company Limited (hereinafter referred to as "the Company"), do hereby appoint and authorize **Mr. Wang Xiaoping** to be my true and lawful attorney in **Pakistan**, to do and perform the following on behalf of the Company in the said Country:

1. receiving/sending, handling and signing correspondence from/to individual, company / organization, government, and international organization;

2. negotiating and entering into contract, agreement and letter of intention with individual, company/organization, government, and international organization for the purpose of business development.

The ATTORNEY de facto (SPECIMEN SIGNATURE):_____

This Power of Attorney is valid from **January 11, 2017** to **January 11, 2020**.

For and on behalf of
China Harbour Engineering Company Limited

_____
Lin Yichong
Chairman
November 24, 2016."

27. As is apparent from a plain reading of the Letter of Authority and Power of Attorney, neither of those two documents confers any power or authority on behalf of the signatory to institute any legal proceedings on behalf of the Plaintiff.

28. When confronted with the question as to the existence of any other instrument as may have conferred such authority on Mr. Xiaoping, learned counsel for the Plaintiff referred to a Statement dated 04.12.2019 filed on behalf of the Plaintiff along with copies of various documents, including the copy of a Power of Attorney dated 17.02.2018 in favour of Mr. Xiaoping, which reads as follows:

"**POWER OF ATTORNEY**

To whom it may concern,

That I, the undersigned, in my capacity as the legal representative and the Chairman of the Board of China Harbour Engineering Company Limited (hereinafter referred to as "the Company"), do hereby appoint and authorize Wang Xiaoping holding Passport No.PE1424797 to be my true and lawful attorney for the business of Suit Case No.392/2018 in High Court of Sindh, Karachi, Pakistan for Encashment of Performance Guarantee of Quay Wall Construction Works at Pakistan Deep Water Container Port.

to do and perform the following on behalf of the Company:

1. To represent CHEC in legal proceedings instituted against Karachi Port Trust before the High Court of Sindh at Karachi.

2. To proceed or compromise the abovementioned matter or any other proceedings, and sign any pleadings, affidavits or related documents as may be required;

3. To sign, present and file interlocutory or miscellaneous applications, petitions, affidavits or appeals in the abovementioned matter;

4. To institute any other proceedings which are proper and fit proceedings and in such connection sign any pleadings, affidavits or related documents as may be required;

5. To instruct the abovementioned Advocates to apply for the inspection of judicial and other records in connection with the said proceedings;

6. To do all acts, deeds and things or any of them that may be deemed necessary or advisable in respect of the abovementioned proceedings.

Any act so done by the said Attorney in connection with the abovementioned shall be considered as our own act for all intents and purposes and we hereby agree to ratify and confirm the same to which effect we execute this Power on 17th February, 2018.

The ATTORNEY de facto (SPECIMEN SIGNATURE):_____

This Power of Attorney is valid from 17th February, 2018 to 16th February 2019.

For and on behalf of
China Harbour Engineering Company Limited

_____
Lin Yichong
Chairman"

29. Learned counsel for the Plaintiff pointed out that the Power of Attorney dated 17.02.2018 specifically empowered Mr. Xiaoping to represent the Plaintiff in the Suit as well as to institute proceedings, and merely contended that as the validity of the Power was stated to be from 17.02.2018 till 16.02.2019, the institution of the Suit by Mr. Xiaoping on 19.02.2018 stood ratified and could not be regarded as being without authority. He pointed out that a further Power of Attorney had then been issued in favour of Mr. Xiaoping on 17.02.2019 on the same terms, which was valid from that date till 16.02.2020.

30. For purpose of addressing the question as to whether the Suit was competently instituted, reference may be made to the judgments of learned Division Benches of this Court in the cases reported as Abdul Rahim Versus United Bank Limited PLD 1997 Karachi 62 as well as Razo (Pvt.) Limited Versus Director, Karachi City Region Employees Old Age Benefit Institution and others 2005 CLD Page-1208, where the line of case law on the subject traced from the judgments of the Honourable Supreme Court in

the cases reported as Muhammad Siddiq Muhammad Umar v. Australasia Bank PLD 1966 SC 684 and Iftikhar Hussain Khan of Mamdot Versus Messrs Ghulam Nabi Corporation Ltd PLD 1971 Supreme Court were examined, with the principle being laid down that if the very suit has been filed incompetently, without authorization, then such a defect remains incurable, even by a subsequent ratification by the Board of Directors.

31. As observed, neither the Letter of Authority dated 11.07.2009 or Power of Attorney dated 24.11.2016 conferred any power or authority on Mr. Xiaoping to institute the Suit on behalf of the Plaintiff. As regards the Power of Attorney dated 17.02.2018, it merit consideration that whilst the same was purportedly executed and notarized at Bejing, it was not attested through Pakistan's diplomatic mission in the country. Be that as it may, if that Power of Attorney is examined, it merits consideration that the Notarial Certificate appended therewith bears the date of 08.11.2018 and it is even otherwise evident from the very wording of the document that the same could not have been executed and been in place as on 17.02.2018 in as much as it mentions the notional/provisional number of the Suit, which could only have been known following the institution thereof, and furthermore, Clause 1 itself reflects that the Power of Attorney relates to the legal proceedings "instituted" before this Court. As such, it is apparent that such Power of Attorney was executed subsequent to the institution of the Suit in an endeavour to provide cover to the absence of proper authority in favour of Mr. Xiaoping. However, as held in the above-mentioned cases, ratification of such a defect is not permissible, as such the Power of Attorney is of no avail from the standpoint of the matter at hand. No further document was referred to or otherwise sought to be presented.

32. Under the circumstances, on consideration of the very documents put forward by the Plaintiff, it is apparent that the Suit has been filed without proper authorization, hence the same is dismissed.

JUDGE

Karachi
Dated _____