

The grant of Stay Order in invoking Bank Guarantee (A Case Study)

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1. **Prime Facie Case & Irreparable loss & injury.**

The Advance Payment Guarantee and Performance Securities cannot be invoked by WAPDA to satisfy its claim of liquidated damages or other claims, inter alia, on the following grounds: -

- (i) The **Final Completion Certificate** was duly issued signed and stamped both by the WAPDA and the Consultant. The very minor outstanding works mentioned in the F.C.C. have also been completed.
- (ii) The Final Completion Certificate was issued by the WAPDA and the Consultant after full satisfaction as to the project, and there is absolutely no mention of imposing any liquidated damages and no delay at all, has been ascribed to the plaintiff/contractor in the F.C.C. The imposing of liquidated damages is an afterthought which exhibits fraudulent intention of WAPDA.
- (iii) The duration of the project was extended and the delay was condoned. The extension of contract period is granted under Clause 30 of the General Conditions of Contract. This delay was admitted by all the parties **not to be on account of the plaintiff/contractor.**
 - a. Reliance is placed on minutes of meeting 23.09.1995 which has been appended with the suit and duly relied upon by the plaintiff.



- b. Reliance is placed on the *final* report of the Consultant vide letter dated 7th November, 1995 to WAPDA which was prepared after discussion with the *Project Directors* of WAPDA. This report was a “Decision” of the Consultant under Clause 49(1) of General Conditions of Contract which was never differed to by WAPDA as mentioned in letter dated 07.11.1995 that it was revised and prepared after Consultations with the Project Directors of WAPDA. If WAPDA had differed with the “Decision” of the Consultant it should have invoked 49(1) of the General Conditions which is the resolution of dispute clause and has also been quoted in Para No.8 of the plaint. This Decision was final and binding on the plaintiff as well as on the WAPDA because if WAPDA had differed, it would have invoked arbitration Clause No.49 of the General Conditions of Contract. The Engineer’s rights and duties are given in clauses 2.1 to 2.4 of the General Conditions of Contract. General Role of the Engineer is given in Clause 55.1 of the General Conditions of Contract which gives him the discretion to issue certificates including the Final Completion Certificate under Clause 57.2 of the General Conditions of Contract.
- c. Even in the letter dated December 11, 1995 written by the Consultant to the plaintiff, the Consultant has condoned the alleged delay and granted the time extension claims which were also accepted by WAPDA.
- iv. As far as Performance Guarantee(s) under Clause 9.1 of General Conditions of Contract are concerned, WAPDA has admitted that the Project has been performed as is clear from the Final Completion Certificate, therefore, there is no question of invoking any performance Guarantee after the project has been admittedly completed.
- v. **It is very important to note that it is not the case of WAPDA that the main project has not completed nor is it the case of WAPDA**

that it wants to invoke the securities / guarantees for the works specified in the Final Completion Certificate as incomplete, therefore, by no stretch of imagination WAPDA can invoke the Bank Guarantee/Securities because, they have absolutely no nexus with the alleged counter claim of WAPDA. The counterclaim of WAPDA should have been subjected to the dispute resolution clause i.e. 49(1) of General Conditions of Contract. The Counter claim can, in no way, be adjusted against the Advance Payment Guarantee of the Performance Securities because the bank guarantees and securities given by the plaintiff did not secure the same. The WAPDA has to get its counterclaim adjudicated first and if a decree is passed against the plaintiff for any sum the same may be satisfied in accordance with law.

- vi. Once Final Completion Certificate has been issued and the Contract is complete to the entire satisfaction of the WAPDA, the Bank Guarantee(s) neither can be enforced under the law nor under any principle of equity. It is not amendable to reason that the entire Bank Guarantees/Securities may be enforced when the work has been completed by the Contractor and there had not been any rateable decrease in the amount of guarantee as against the amount of work, and therefore, completion of the work completely takes away the right of WAPDA to encash the Bank Guarantees/Securities. The right of WAPDA of encashment of Bank Guarantees/Securities terminated ipso facto and there being any un-expired period of the Bank Guarantee is wholly irrelevant. The date of completion of work will have ascendancy over the date of expiry of the Bank Guarantee. Clause 9.1 of General Conditions of Contract specifies the providing of Performance Security while Clause 9.4 of the Special Conditions of Contract provides that:

“The Performance Security shall remain in full force and virtue for a period of one year after the scheduled date of the Commercial Operation of the Unit as stipulated in the Contract or till the issuance of Final Completion Certificate whichever is later.” (emphasis added).

It is an admitted fact that Final Completion Certificate was issued on 31st July, 1996. Therefore, upon the issuance of F.C.C. the Performance Securities came to end automatically irrespective of their date of validity being until 28th September, 1996.

- vii. As to time for completion and delays, and any liquidated damages ensuring thereto, the same is covered by Clauses 30 and 31 of the General Conditions of Contract. The imposition of liquidated damages is prescribed in Clauses 31.1.1 and 31.1.2 of the Special Conditions of Contract. It is extremely clear from the said provisions that justifications for delay in a project could be **any cause beyond the control of the contractor; delay, impeding or prevention on account of the employer (WAPDA) or the Engineer “or otherwise”**. The plaintiff has/had given sufficient reasons for the delay of the project which reasons were accepted by the WAPDA and the Engineer, the same being not ascribable to the plaintiff.
- viii. In the instant case, the Bank of China is the issuing bank while HCEB/Bank Al-Falah is the local negotiating Bank. The Bank of China has no presence in Pakistan at all and Pakistani Courts having no jurisdiction over the Bank of China, cannot execute any of its decision, verdicts decree etc.
- ix. In view of the above it is quite clear that the plaintiff has got a good prima facie case and, it shall suffer an irreparable loss & injury if it is made to pay the entire amounts of the Advance Payment Guarantee and the performance securities after it has admittedly performance and completed the project and particularly after the condonation of the delayed period. The reference to report dated 27.03.1996 in the F.C.C. is completely misconceived, never conveyed to the plaintiff, a result of malafide, collusion and fraud by the WAPDA and the Consultant. In Para No.1 of the F.C.C. it is specifically stated that **“The Contractual defect liability period as set out in clause 28 and 33.1 of the General Conditions of Contract is therefore as being fulfilled on 28th March, 1996”** (emphasis added).

After this, by no stretch of imagination, the plaintiff could be held liable and the guarantees could never be invoked. WAPDA itself has failed to pay progress payments and final retention payment. The conduct of the WAPDA is fraudulent.

2. **Balance of convenience.**

Most interesting thing is that even WAPDA since the interim stay order dated September 18, 1996 never challenged the same nor tried to get the same vacated at any forum whatsoever.

Furthermore, in the instant case, the Bank guarantees were to expire on 28.09.1996, the same could not be called earlier as per the dictum laid in PLD 2003 S.C. 215. The letter of WAPDA addressed to the Bank prior to the expiry date of 28.09.1996 has no legal effect. Therefore, the guarantees were never called nor the same were asked by WAPDA or the plaintiff to be renewed or extended. The Guarantees automatically came to an end on 28.09.1996 and WAPDA filed its first written statement alongwith reply to stay application on 2nd of December, 1996 i.e. after the expiry of the Bank guarantees. As the notice of interim stay dated 18.09.1996 had been received by the Bank and WAPDA, the proper course for WAPDA was to immediately act for vacation of stay prior to the expiry date of the Bank Guarantees. Not having done so, the Bank guarantees are no more in the field. It is interesting to note that WAPDA never asked for extension or renewal of the Bank Guarantees. The said Guarantees having been expired on the completion of the work, became non existent and are not in the field, this is irrespective of the given validity date 28.09.1996. Therefore, it is clear that the balance of convenience lies in favour of the plaintiff/contractor.

3. The Bank Guarantees involved in the Faisalabad Project are:

- i. LG No. HCEB:9725/94 dated 27.06.1994;
- ii. LG No. HCEB:9746/94 dated 08.02.1994; and
- iii. LG No. BCC:8982/91 dated 02.02.1991.

which have been extended from time to time and the last date of their expiry irrespective of the automatic expiry upon the completion of the work was 28.09.1996. The terms and conditions of the above sated guarantees appear on

Pages 231, 232, 234 and 236 of the suit file. It is clear from the terms and conditions of the guarantees that the Bank has to take into consideration the factum of the entire completion of work, issuance of the F.C.C., handing over and taking over certificates before allowing the encashment of guarantees, lest, fraud is laid upon by WAPDA against the plaintiff. The Bank, in fact, had come to know of this fraud from the date of issuance of FCC and from the date of termination of the services of the Consultant. In this regard the arguments made in the identical, Kotri Project case, are hereby adopted.

4. **The latest case reported as PLD 2003 S.C. 191.**

In the case of Shipyard K. Damen International Vs. Karachi Shipyard and Engineering Works Ltd. reported as PLD 2003 S.C. 191, the Hon'ble Supreme Court has equated an irrevocable letter of credit with a Bank Guarantee stating that a Bank Guarantee is an independent contract from that of principal contract between the contractor and the owner. The Hon'ble Supreme Court has encompassed the entire Pakistani, Indian and British Law on the subject, and has come to the conclusion that there are certain exceptions to the aforesaid general rule that Bank Guarantees can be invoked without any reference to the principal contract between the parties. These exceptions can be put in brief as follows:

- (a) Whether demand for enforcing the bank guarantees has been made strictly in accordance with the terms of the document concerned?
- (b) Whether there is any allegation of fraud against the beneficiary of which the bank has notice?
- (c) Whether there is any special equity arising out of the peculiar situation of the case giving rise to a strong prime facie arguable case against enforcement of the bank guarantee or not?
- (d) Whether, under the circumstances of the case, irretrievable injustice will occur if the guarantees are invoked?
- (e) Whether in peculiar circumstances, a maltreated party can be left remediless?
- (f) Whether the case at hand falls under "special equities"?

We have to analyze the case at hand on the above mentioned criterias prescribed by the Hon'ble Supreme Court. In this regard it is to be noted that M/S Ewbank Preece Ltd. (EPL) of Prudential House, North Street, Brighton, BNI IRW, United Kingdom were appointed as Consultant as per clause 1.1 "Definitions" of Special Conditions of Contract. Terminating or releasing of consultant in the circumstances of the case was a very big fraud engineered by WAPDA in order to encash the Bank Guarantee. The malafide of the WAPDA not referring the matter to arbitration by disposing off the *foreign consultant* and trying to invoke guarantees without reference to the arbitration clause provided in the Contract clearly show the fraud of WAPDA. In this case the court must prevent irretrievable injustice which may be caused to plaintiff by encashing the securities/guarantees.

As far as irretrievable injustice is concerned, it is to be noted that in the present case, the Bank of China is the issuing Bank while the Bank in Pakistan (Defendant No.4) was the negotiating Bank. The Bank in Pakistan issued the guarantees on the basis of some request of the Bank of China which is the *issuing bank*. Thus it is a case of *special equities* while WAPDA is *playing fraud* on the court, the plaintiff as well as on the Bank Al-Falah as the issuing Bank as the Bank of China has absolutely no presence, no branch in Pakistan and does not come under the jurisdiction of Pakistani Courts. Furthermore, the subject Bank Guarantees were valid only until September 28, 1996 and ceased to exist thereafter. Neither WAPDA nor the plaintiff asked the Bank to extend the duration. The Bank guarantees are not in the filed, in fact as from the date of completion of the work i.e. the date of F.C.C.

As far as the question of duration of stay order as six months is concerned, the same is also not applicable in the instant case as no "public revenue" is involved as required by Order, 39, Rule 4-A CPC and Art. 199. 4-A of the Constitution.

In the instant case a clear fraud on the part of WAPDA has been established, inter alia by the fact that various claims/correspondence/written demands of the plaintiff had never been replied by WAPDA nor decided by the Consultant, particularly the correspondence mentioned in Annexes-A & B with Amended Plaintiff which correspondence has been relied upon in the suit and para 8 of the Plaintiff. It is *prima facie an established fraud by WAPDA*, inter alia,

dispensing with the Consultant when several matters including arbitration were pending.

As clearly described above **special equities** are involved in the instant case. The Contractor having completed the project to the satisfaction of WAPDA and Final Completion Certificate having been issued, the WAPDA should be restrained from encashing the Bank guarantees particularly, when the plaintiff itself has lodged very substantial claims against WAPDA. **A prima facie fraud on the part of WAPDA having been established,** and there being no doubt of the possibility of **irretrievable injustice** occurring to the plaintiff, the plaintiff **being a maltreated party, in the circumstances, cannot be left remedies.** The **special equities** involved in the case require that WAPDA should be restrained from encashing the Bank guarantees. Since WAPDA has adopted dishonest, fraudulent and unscrupulous, practice of trying to encash bank guarantees without any justification, the international commercial and banking trust will revive and Pakistan's commercial image and trust would increase if the WAPDA is restrained from wrongfully encashing the Bank Guarantees of a foreign Company coming from a friendly country. **The fact that WAPDA did not try to get the interim injunction dated 18.09.1996 vacated for six and a half years clearly shows that it knew about the fraud played upon the plaintiff by disposing off the Consultant in order not to make "decisions" on the plaintiff's claims and to avoid arbitration proceedings lest it becomes liable to pay the claims of the plaintiff.** The plaintiff has/had given the due notice of arbitration to the Consultant and the WAPDA as per the provisions of the Contract(s).

The facts and circumstances relating to the commission of fraud have been narrated in the plaint which asserts that WAPDA failed to pay the progress payments as well as the Final Retention Payment. The fraud of terminating the services of the Consultant on 31.07.1996 and not resorting to dispute resolution clause is also mentioned in the plaint. All the ingredients required in the Supreme Courts Judgment PLD 2003 S.C. 191 are present in the plaint itself and the documents relied upon.

In view of the above, the case at hand is an excellent case for the grant of permanent injunction restrained the WAPDA to encash any of the Bank Guarantees/Securities.