JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O. no. 58 of 2022

Siddiqsons Energy Limited
Versus
Private Power and Infrastructure Board (PPIB), and another

Appellant by:	M/s Nadir Altaf, Abdullah Alim Qureshi and Malik Omair Saleem, Advocates
Respondent no.1 by:	M/s Sikandar Bashir Mohmand, Hashim Ali Khan and Barrister Khush Bakht, Advocates
Respondent no.2 by:	Mr. Hisham Ali Khan, Advocate
Date of Hearing:	**17.02.2023**

Sardar Ejaz Ishaq Khan, J:- The appellant is Siddiqsons Energy Limited (**SEL**), a company incorporated to develop a 330 MW coal-powered project in Sindh under the applicable power policies of the Government. SEL filed a suit for declaration and permanent injunction on 03.01.2022 against the respondents Private Power and Infrastructure Board (**PPIB**) and United Bank Limited (**UBL**), praying, insofar as relevant to this appeal, that the notice of demand issued by PPIB to UBL for payment under the performance bank guarantee (**PG**) furnished by the latter on SEL's behalf to PPIB be declared illegal. PPIB issued the notice of demand primarily for failure of SEL to achieve Financial Closing for the project by the date stipulated in the Letter of Support **(LOS)** dated 31.08.2015 issued by PPIB to SEL, that was subsequently extended 7 times, though SEL contended that the notice of demand was defective for failing to specify with clarity the ground for invoking the PG.

2 This first appeal against order arose from the order dated 29.07.2022 passed by the learned Additional District Judge, Islamabad, dismissing SEL's application under Order 39 Rules 1 and 2 CPC for an injunction against encashment of the PG. Between the dates of dismissal of SEL's application and the urgent hearing of this appeal, UBL honoured the PPIB's demand and paid out the guaranteed sum[1], so that the primary prayer in this appeal seeking

[1] The PG secured US$ 3.5 million. SEL's case remained that the amount due under the PG in any event was lesser by circa US$ 200,000.

interim injunction against encashment of the PG had become infructuous. However, the memo of appeal included an additional prayer in the following terms:

> (iii) In the event of the encashment of the Performance Guarantee in pursuance of the Impugned Order, the Respondent no.1 may be directed to deposit the encashed amount in the court till the final adjudication of this FAO.

3 As an appellate court can take into account developments subsequent to the date the appeal is filed[2], the submissions were heard on this prayer. Though the prayer as formulated was for deposit until adjudication of this appeal, during submissions learned counsel prayed that this was an error and the prayer may be read as seeking the desired relief until conclusion of the trial.

4 The pivot of Mr. Nadir Altaf's submissions for SEL remained the grounds of PPIB's mala fide in raising the demand, and the irretrievable injustice in the demand being honoured. His submissions are recorded substantially in the interim orders passed by this court, which are incorporated herein by reference. However, all those submissions are really concerned with the underlying dispute in SEL's case that PPIB's notice to pay under the PG was not warranted in terms of the circumstances surrounding the project development, the terms of the PG itself, the terms of the demand notice, and the terms of the agreements signed by SEL. These are all matters for the learned trial court to assess in awarding the relief if any in the suit. Now that the PG stands paid out by the guarantor bank, it would not be proper for this Court to make an assessment of the validity of PPIB's demand, even if on a 'prima facie' basis. Even if this Court were to conclude that the order of the learned trial court dismissing SEL's application for interim injunction was incorrect and liable to be set aside, this Court will not order reinstatement of the PG, for that would amount to restoring the status quo ante which cannot (or in any event ought not) be done at the interim stage.

5 Citing judgments from the Indian jurisdiction for reinstatement of the PG, Mr. Nadir Altaf submitted that the stay application was dismissed by the trial court on 27th July, and the PG was encashed on 29th July, and urged that the PG be reinstated due to his appellate remedy being frustrated by the

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[2] *Muhammadi vs Ghulam Nabi* (2007 SCMR 761), *Ibrahim vs Rahmatullah* (1985 SCMR 241)

respondents failing to wait for a decision on the stay application in the instant appeal. Those judgments, however, in my humble view, do not have a bearing on this case, for they all relate to customs cases, where the courts deprecated the practice of the customs authorities rushing to encash the bank guarantees despite notice of the appeal being filed along with the stay application, all in clear violation of a circular issued by the superior customs authorities advising the officers not to encash the bank guarantees until the stay application was heard by the appellate tribunal. They are clearly distinguishable on this score.

6 The question falling to be determined by this Court in this appeal remains the narrow one, namely, whether the proceeds of the PG should be allowed to form part of the general funds of PPIB, or should be secured by an order of deposit thereof in Court, or whether other appropriate relief preventing dissipation of the proceeds of the PG should be granted. To this point we will now turn.

7 The preliminary submissions of the learned counsels on this aspect were recorded in the interim order passed by this Court in its order dated 12.08.2022, which are incorporated herein by reference. Mr. Nadir Altaf's submissions, in summation, were that SEL had a legitimate expectation of further extension of the PG without quadrupling the secured sum, that the applicable power policy did not countenance quadrupling of the secured sum anyway, that SEL was a victim of discrimination in that the adjacent project Thal Energy Limited was given a further extension of the LOS without quadrupling the guaranteed sum, that the encashment of the PG amounted to unjust enrichment of PPIB, that PPIB's demand notice did not specify the ground for calling the guarantee which according to him was required under the terms of the PG and the demand therefore violated the terms of the PG, and mores. Those submissions, however, are all about the merits of the PPIB's call under the PG. A ruling on their prima facie merits for the grant of an injunction would have been relevant if the PG had not been paid out by UBL.

8 Mr. Sikander Mohmand for PPIB opposed the prayer for deposit of the proceeds of the PG in court, submitting that such an order would tantamount to attachment before judgment, which could not be done unless the preconditions stipulated in Order 38 Rule 5 CPC were met, which he urged were not met, for

there were no circumstances brought before the Court to show that PPIB was about to dispose of the whole or any part of its property or remove it out of the jurisdiction of this Court with intent to obstruct or delay execution of a decree that may be passed against it in the suit. Mr. Nadir Altaf opposed, submitting that Order 38 Rule 5 was not exhaustive, and that this Court had inherent jurisdiction under section 94 CPC to pass orders for deposit in court to meet the ends of justice. While his submission as a principle of law gleaned from the judgments cited by him authored by eminent judges is correct, those judgments exercised the inherent powers in circumstances quite different from the one before us and in some cases declined to exercise them altogether. In *Balgamwala Oil Mills (Pvt) Ltd vs Shakarchi Trading AG and 2 others*[3], Ajmal Mian C.J. authoring the judgment of a Division Bench of the Sindh High Court, after agreeing with the general proposition that the words 'if so prescribed' in section 94 CPC were not to be read as curtailing the inherent powers of the court from passing orders to meet the ends of justice in circumstances not catered for in the rules, nonetheless declined to restrain the bank from remitting the proceeds to the off-shore defendant under a different letter of credit than that under dispute between the parties. In *Nazar Mohammad vs Ali Akbar*[4], Haider Ali Pirzada J., authoring the judgment of another Division Bench of the Sindh High Court, endorsed the opinion in earlier judgments that the inherent power of the Court was in addition to and complementary to the powers expressly conferred by the Code, and such inherent power was to be exercised when it did not come in conflict with the powers prescribed by the rules. The Sindh High Court in this case referred to several observations expressed in various formulations in precedents that the Civil Procedure Code cannot be taken to have dealt with every conceivable case that may arise in courts so as to bind their hands from passing such orders as may be necessary to secure the ends of justice. However, the circumstance that caused the Court in *Nazar Mohmmad* to order attachment despite the conditions in Order 38 Rule 5 not being demonstrated was that the plaintiff's affidavit averred the defendant's insolvency and that the defendant did not own any property nor was likely to have any by the time of the decree, and this averment was not denied by the defendant. This was the distinguishing and material circumstance that caused the Court in *Nazar Mohammad* to order attachment of the suit property. The

[3] PLD 1990 Karachi 1
[4] PLD 1989 Karachi 635

Court did not attach the suit property in the normal course. Above all, the Court went into much detail about the merits of the plaintiff's claim and found sufficient strength therein before ordering the attachment. In the instant appeal, as already observed, I find myself precluded by convention from rendering definite findings on the merits of SEL's case lest it should prejudice the trial. Because the PG stands paid out, the specific relief of declaration and permanent injunction may very well have to be amended to prayers for damages and recovery, a prospect that Mr. Nadir Altaf submitted was being explored.

9 The other judgments cited by Mr. Nadir Altaf from the Indian jurisdiction[5] expanding the exception of fraud to restrain the encashing of bank guarantees on the grounds of misrepresentation, suppression of material facts, or violation of the terms of the guarantee, calling them as 'of the same genus' as fraud, and doctrinally labelled as 'special equity' and 'irretrievable injustice', are predominantly cases where the bank guarantees in question had not been encashed yet, justifying the injunction against encashing the bank guarantees in the particular facts and circumstances of those cases. The case before me is not that of a pre-encashment injunction.

10 Submissions were therefore heard whether an order in the nature of a Mareva injunction[6] be passed in this case. Mr. Mohmand cited *Muhammad Athar Hafeez Khan vs Ssangyong & Usmani JV*[7] where, His Lordship Mr. Justice Munib Akhtar, when at the Sindh High Court, concluded with his characteristic erudition after analysing precedent that Mareva injunction was invented in the United Kingdom to remedy a deficiency in the English procedural law, which wasn't there in the Pakistani law given Order 38 Rule 5 CPC. His Lordship held that "…*where the Mareva injunction would be substantially or practically equivalent to an attachment before judgment under Order XXXVIII, a Mareva injunction cannot (or at the very least ought not) be issued*." Though the judgment in *Mohammad Athar Hafeez* did not close the door permanently on the exercise of inherent jurisdiction on the pattern of a Mareva injunction, it certainly put a latch on it which would be opened only where the circumstances are extraordinary, with the essential condition

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[5] *Synthetic Foams Limited vs Simplex Concrete Piles (India)*, AIR 1988 Delhi 207; *Isgec Heavy Engineering Ltd vs Indian Oil Corporation Ltd*, (2021) SCC Online Delhi 4748

[6] For background and details, see Balagamwala (supra) and Mohammad Athar (infra).

[7] PLD 2011 Karachi 605

remaining for its exercise that the property in question had to be indubitably the plaintiff's, which, however, cannot unequivocally be said about the proceeds of the PG in the instant case, for the funds have moved out of the custody of the guarantor bank into the general funds of PPIB, enabling Mr. Mohmand to claim that the proceed are now the property of PPIB and no longer that of SEL. *Mohammad Athar Hafeez* concluded at paragraph 20(c) as follows:

> The question whether in other situations, to which English law and/or other common law jurisdictions have extended the Mareva injunction, Pakistani Courts (or to be more precise, the Courts of the Province of Sindh) can or may issue such an injunction in the exercise of inherent jurisdiction, can only be decided on a case to case basis in light of the principles enunciated in the case law.

11 It is not possible for me to hold that the proceeds of the PG now drawn and resting with the PPIB are indubitably the property of SEL, for that would essentially tantamount to rendering judgment for SEL. Nor are the essential conditions under Order 38 Rule 5 for attachment before judgment demonstrated, for no circumstances have been identified that PPIB intends to dispose of its assets to defeat any decree that may be passed in favour of SEL. I find that, in the circumstances of this case, ordering deposit of the proceeds of the PG with the court would be, using the *Mohammad Athar Hafeez* test, 'substantially or practically equivalent to an attachment before judgment'. I therefore decline to order the deposit of the proceeds of the PG with the court.

12 However, the matter does not end there. I should think I would be remiss in the circumstances of this case if I were not to address my mind to the question whether, if the order I am about to pass was not passed, there would be a likelihood that SEL might be left only with a 'paper decree' if it wins the case. While remaining circumspect in expressing my views on the merits of the case, it does appear on reviewing the record in its entirety that SEL indeed has an arguable case, in that its submissions regarding, *inter alia*, the notice of demand falling short of the terms of the PG, the condition of quadrupling of the PG amount for a further extension of the LOS that does not appear expressly in the applicable power policy, the cause of SEL's failure to achieve Financial Closing being partly attributable to a change in PPIB's policy leaving SEL into a situation akin to economic duress in choosing between abandoning its project development investment and risking forging ahead with the project, the

imposition of transmission service charges as a condition to extension of the LOS despite those charges not falling due under the terms of the Power Purchase Agreement, and others, are not entirely without merit, and require a keen and diligent application of mind by the learned trial court to render a just decision. Without saying more on the subject, I consider it in the interest of justice that PPIB's means to satisfy the judgement if awarded against it ought to remain visible to the learned trial court during the trial. Submissions were therefore heard on the question whether the remedy of damages would be illusory if PPIB's assets would be insufficient to satisfy a judgment for SEL. PPIB filed its audited accounts with the Court, which tend to show that PPIB's net assets comprising the PPIB Fund were Rs. 1.48 billion as of 30.06.2022. The sum of the PG encashed was US$ 3.5 million, which at the present exchange rate comes to circa Rs. 1.1 billion. While PPIB's accounts make provision for disputed guarantee sums that stand encashed, whether such provisioning binds PPIB to conserve its Fund until the lis is finally decided is not clear, though it does appear to be the case given the value of PPIB's investments in the sum of Rs. 2.2 billion and the provisioning for the pending guarantee litigation being Rs. 0.875 billion. Once provisioning for the instant litigation is also made, the total provisioning will stand increased to circa Rs. 2 billion, reducing the net asset value of the Fund to about Rs. 0.4 billion. PPIB's investments are near cash equivalents for being Term Deposit Receipts and investments in mutual funds, and can be liquidated with ease. There is a statutory obligation on PPIB under section 15 of the PPIB Act to 'conserve the Fund', which this Court was given to understand was being achieved through the aforesaid investments, and more importantly, was the bulwark against surrender of PPIB Fund or part thereof to the Government voluntarily or under an executive order of the Government. But as noted above, in case the provisioned sums, including the PG in the instant case, are awarded against PPIB, and PPIB does not roll-over its existing investments or decides to liquidate them earlier, its ability to satisfy judgment will be severely stretched. Therefore, short of restricting PPIB of its liberty to use its investments, there is in my view an *ex debito justitiae* justification to require PPIB to keep the trial court and SEL well informed at all times of the state of its realisable assets.

13 Accordingly, relying on the well-settled principle of moulding of relief[8], while the prayer for deposit of the proceeds of the PG in court pending trial is declined, the order is passed under section 94(e) CPC that PPIB will report to the learned trial court immediately if and when the total net realisable value of its liquid plus near-cash equivalent assets declines to an amount which equals (i) the total sum of the provisioning for sums in litigation in its accounts, (ii) plus the sum of SEL's PG encashed by PPIB (if not included in (i)), and (iii) plus 10 percent of the sum of (i) and (ii) above. When so reported, SEL may file an application for appropriate orders, including attachment before judgment, and the learned trial court will then pass an order on such application within 30 days of the application being filed.

14 **Disposed of** accordingly.

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on **11.09.2023.**

Judge

Rana.M.Ifz

Approved for reporting.

[8] *Ahmad Nawaz Khan vs Muhammad Jaffar Khan and others* (2010 SCMR 984); *Volkart (Pakistan) Ltd vs Interavia Pakistan Ltd* (2001 SCMR 671)