



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 55 of 2020

M/s. United Insurance Company Limited

...Appellant

Versus

1. Brig. (R) Iftikhar Mehdi Janjua
2. The Commissioner Insurance, SECP, Islamabad.

...Respondents

Date of hearing:

August 19, 2020

Present:

For Appellant:

Mr. Ali Ibrahim, Advocate High Court,

For Respondents:

- i. Mr. Haroon ur Rashid, Advocate Supreme Court,
- ii. Mr. Aftab Rashid, Advocate,
- iii. Ms. Zainab Janjua, Advocate,
- iv. Ms. Sadia K. Khan, Advocate,
- v. Mr. Faisal Mehdi Janjua,
- vi. Mr. Hasnat Ahmad, Director Insurance,
- vii. Mr. Mateen Abbasi, Assistant Director Insurance,

ORDER

1. This Order shall dispose of Appeal No. 55 of 2020 filed by the United Insurance Company Limited (the Appellant) against the Order dated May 4, 2020 (the Impugned Order) passed by the Commissioner Insurance, SECP (the Respondent No. 2) whereby the Appellant was directed to comply with the Corporate Insurance Guarantee dated June 27, 2008 (the Guarantee) issued in favor of Government of Baluchistan (GOB).



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Facts of Case

2. The brief facts of the case are that Brig. (R) Iftikhar Mehdi Janjua (the Respondent No. 1) being Chief Executive Officer of Allah Hoo Holdings Private Limited (AHHL) filed an application dated March 15, 2019 (First Application) with the Securities and Exchange Commission of Pakistan (the Commission) for recovery of amount of Guarantee from the Appellant. In this regard the Commission has also received a direction dated April 4, 2019 issued by the Lahore High Court, Lahore (the Court). In compliance thereof, the Commission vide order dated November 21, 2019 (First Order) directed the Appellant to comply with the Guarantee, however, compliance of the order was subject to restraining order of court, if any. The aforesaid condition was imposed due to information provided by the Appellant's representative that a Regular Second Appeal bearing diary No. 48090/19 (RSA) is pending before the Court, wherein, the Appellant has challenged the Order dated January 15, 2019 passed by the District Court, Lahore.
3. The Respondent No. 1 filed another application dated January 28, 2020 (the Second Application) with the Commission wherein it was stated that no matter regarding encashment of the Guarantee is *sub-judice* before any court, therefore, the Appellant may be directed to honor the Guarantee. The Respondent No. 1 also filed a Writ Petition No. 447 of 2020 before the Islamabad High Court, Islamabad and sought direction vide order dated February 12, 2020 for early disposal of the Second Application. In compliance thereof, the Respondent No. 2 heard the parties on April 6, 2020, wherein, the Appellant's representative Mr. Rizwan Safdar, sworn through an affidavit that the Appellant had filed the RSA on March 27, 2019 before the Court, against judgment dated January 15, 2019 and same is pending adjudication. On the other hand, the Respondent No. 1 provided a copy of letter dated April 24, 2020 issued by the Additional Registrar of the Court, wherein it was stated that RSA was filed on March 26, 2020, however, the Registrar Office raised certain filing objections, therefore, the RSA was received back by the Appellant's representative on March 28, 2019, thereafter, the RSA was not re-filed. In view of the aforesaid, the Respondent No. 2 concluded that subject matter of the Second Application



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is not pending adjudication before any court, therefore, the Impugned Order was passed and the Appellant was directed to comply with the Guarantee.

4. The Appellant has challenged the Impugned Order through Appeal before the Appellate Bench (the Bench). Hearing in the matter was held on August 19, 2020. The Appellant's representative and the Respondents' representatives reiterated the grounds of Appeal and rebuttals thereof.

Preliminary Objections

5. The Respondent's No. 1 representative raised preliminary objections of jurisdiction and limitation regarding filing and hearing of Appeal before the Bench. The Respondent No. 1's representative stated that the Impugned Order is not appealable under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (the Act) because in said order no substantive issue was decided, rather an administrative direction was issued to clarify the First Order. The Respondent No. 1's representative further stated that the Appellant has not challenged the First Order before any court or forum, therefore, it has attained finality. The Respondent No. 1's representative further argued that if the Impugned Order is treated appealable order even then it is barred by the limitation provided under Section 33 of the Act.
6. The Appellant's representative rebutted the preliminary objections and stated that the First Order was not challenged because its execution was subject to the decision of any *sub-judice* matter and as per record at that time Appellant's RSA was pending before the Court. The Appellant's representative further stated that execution of the First Order was directed through the Impugned Order, therefore, by feeling aggrieved, the Appellant has filed an Appeal within limitation provided under Section 33 of the Act.

The Appellant's Arguments

7. The Appellant has filed this Appeal *inter alia* on the grounds that the GOB's complaint against the Appellant was firstly dismissed by the Federal Insurance Ombudsman (FIO) vide order dated December 18, 2009 and thereafter, appeal against FIO's order was also dismissed by the Executive Director Insurance vide order dated May 5, 2010, however, the GOB has not



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challenged both dismissal orders, hence attained finality. The Appellant stated that subject to the conditions of Guarantee the GOB had right to enforce the Guarantee against the Appellant, however, after above mentioned two dismissal orders, the GOB has not exercised its legal right before any competent forum or court, hence, claim is barred by the limitation of three years provided under the limitation Act, 1908. The Appellant's representative stated that due to lapse of limitation period the GOB cannot initiate any legal proceedings against the Appellant. The Appellant's representative further argued that the Respondent No. 1 or the AHHL had no *locus standi* to file First Application or Second Application with the Commission because the Respondent No.1 was principal debtor, therefore, it cannot step into the shoes of beneficiary (in this case beneficiary is GOB).

8. The Appellant's representative argued that the Respondent No. 2 had no jurisdiction to pass the First Order and Impugned Order and proceedings before the Respondent No.2 were barred under the principle of *Res Judicata* because the matter was already decided by the FIO and the Executive Director Insurance.
9. The Appellant's representative further stated that the Respondent No.2 had no jurisdiction to entertain First Application or Second Application and pass the First Order and the Impugned Order because matter of encashment of Guarantee was *sub judice* before the Court.
10. The Appellant's representative stated that under Section 61 of the Ordinance, the Commission has no power to adjudicate the complaints/applications filed by the Respondent No. 1 because this matter requires recording of evidence before a court of competent jurisdiction. The Appellant's representative stated that the Respondent No. 1 has also not paid the amount of consideration against which Guarantee was issued.
11. The Appellant's representative argued that the Guarantee was conditional, therefore, before claiming the Guarantee, the GOB was required to fulfill the conditions stipulated therein, however, Respondent No.2 has ignored this fact while passing the First Order and the Impugned Order. The Appellant's representative further argued that in the case titled "*Montage Design Build Versus the Republic of Tajikistan and two others*" [2015 CLD 8 Islamabad] (Montage Case) there was the issue of "Irrevocable and unconditional Guarantee" whereas, in the



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Appellant's case Guarantee is "Irrevocable and Conditional", therefore, obligation of encashment of Guarantee is subject to fulfilment of the conditions contained in the Guarantee. In view of above, the Appellant's representative argued that Respondent No.2 while passing the First Order and the Impugned Order has erroneously relied upon the Montage Case.

12. The Appellant's representative stated that the Guarantee was a contract and if parties were not satisfied with the contents and conditions contained therein, then they should have refused to accept such guarantee. The Appellant representative further stated that in this case the AHHL or the GOB has never raised any objection on the conditions incorporated in the Guarantee.
13. The Appellant's representative stated that The Respondent No. 1 is the CEO of the AHHL, which is the principal debtor in the instant controversy. The Appellant's representative stated that it is absolutely unclear why the principal debtor proceeded against the Appellant because it was the AHHL who defaulted to fulfil its contractual commitments towards the GOB and now, AHHL is claiming for the encashment of the Guarantee, even though this is not for the principal debtor to claim. Even otherwise, under the terms of the Insurance Guarantee, it was stated that; " ... and being principal i. e M/ s. AHHL shall first satisfy the claim of GOB and the Insurance Guarantee shall not be "ipso facto encashable". The Appellant's representative stated that this only leads one to believe that the Respondent No. 1 has acted in bad faith from the start, and defrauded the Appellant and the GOB. The Appellant's representative argued that only the Finance Department of the GOB, was capable to bring a valid legal claim in terms of the Guarantee, however, Respondent No.2 had ignored this aspect while passing the First Order and the Impugned Order.
14. The Appellant's representative stated that the Insurance Policy and Insurance Guarantee are not synonymous of each other because instruments have different terms and meanings. In this regard the Appellant had relied upon case titled *Capital Insurance Co. Limited Versus Securities and Exchange Commission of Pakistan and 4 others (2013 C L D 1075)* wherein it has been held that;
"The definition of "Insurance" shows that it includes "entering into" "Carrying out policies or contract" against the payment of premium Insurance Company promise to make payment to insured person of their nominee, in case of happening of any agreed,



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event, specified in the contract, whereas in contract of guarantee the beneficiary is third party, meaning thereby the Insurance Policy or contract are two different subjects, the Insurance company can enter into a contract of Insurance or some other contract and the consideration is the premium, whereas in a contract of guarantee or performance bond the purchaser to pay commission and that commission does not cover the entire amount of contract. In case of encashment of guarantee, the purchaser is bound to pay the amount of guarantee to the guarantor, but in the case of Insurance Policy it is not, in case of death of insured the Insurance Company is bound to pay the insured amount irrespective of the payment of only one or two instalments. In case the insured paid the entire premium and the Insurance Policy is matured, the Insurance Company is bound to pay the insured amount to the insured. In a contract of insurance against different type of loss, the Insurance Company is bound to pay the insured amount without payment of any further premium. In the contract of guarantee, the purchaser of the guarantee is not the beneficiary, and in case of payment of guarantee amount the purchaser has to reimburse the Insurance Company; hence the contract of Insurance and contract of guarantee are different contracts.”

Respondent's No. 1 Arguments

15. Respondent No.1 while rebutting the grounds of Appeal stated that the Appellant has a history of not abiding with its insurance commitments and always uses delaying tactics on various pretexts to avoid the liabilities. Respondent No.1 referred to the Montage Case wherein the Appellant failed to honour an unconditional performance guarantee and the Islamabad High Court, Islamabad had directed the Appellant to honour its commitment as guarantor.
16. Respondent No.1 stated that it had arranged an unconditional and unqualified guarantee, therefore, any condition contained therein is illegal in terms of Section 77 of the Ordinance, which expressly prohibits use of ambiguous language against the interest of the policy holders. Respondent No.1 further stated that, in view of Section 77 of the Ordinance, the Guarantee cannot be termed as conditional because the Appellant intentionally inserted the ambiguous wording in the contract. The Respondent No.1 further stated that requiring AHHL to pay the



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claim of GOB, is against the purpose of the Guarantee, therefore, incorporation of an ambiguous clause in Guarantee defeats the very purpose of the Guarantee.

17. Respondent No.1 stated that Respondent No.2 has already given his decision in favor of Respondent No.1, however, execution of the First Order was subject to a restraining order, if any. Respondent No.1 stated that upon verification it revealed that neither there is any restraining order nor any related matter is *sub-judice*, therefore, Respondent No. 1 filed the Second Application to give definitive findings against the Appellant for encashment of the Guarantee.
18. Respondent No.1 stated that the Appellant cannot avoid an insurance claim on account of non-payment of insurance premium in view of the applicable provisions of Rule 35 of Rules, which provides that no insurance policy shall be liable to be avoided on the ground that the premium has not been paid.

Respondent's No. 2 Arguments

19. Respondent No.2's representative stated that in view of the requirements contained under Section 77 of the Ordinance, incorporation of ambiguous language in the Guarantee cannot defeat the purpose of guarantee. They reiterated the grounds of the First Order and the Impugned Order and prayed to dismiss the Appeal.

The Appellate Bench Analysis and Conclusion

20. The Bench has heard the parties in detail, the matter in hand requires due deliberation because verdict of this Appeal would decide the fate of the First Order and the Impugned Order.
21. The Bench is of the view that preliminary objections of the Respondent No.1 are without any substance and reason. The Bench rejects the Respondent No. 1's assertion that the Impugned Order was a mere clarification of the First Order, therefore, the Appellant cannot challenge the Impugned Order before the Bench. The Bench has reviewed the First Order, which revealed that execution of that order was subject to the decision of any *sub-judice* matter, whereas, through



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the Impugned Order, the Respondent No.2 has decided that there is no *sub-judice* matter, hence execution of the First Order is not barred. The Bench endorses Respondent's No.1 assertion that the First Order was not definitive because its execution was subject to vacation of any restraining order or *sub-judice* matter, therefore, to present a definite finding, the Impugned Order was passed. The Bench is of the view that the Impugned Order has provided a fresh cause of action to the Appellant, therefore, this Appeal has been filed within limitation period provided under Section 33 of the SECP Act, 1997 read with the Securities and Exchange Commission of Pakistan Appellate Bench (Procedure) Rules 2003.

22. The Bench has perused the contents of the Civil Court's Judgement dated September 15, 2018 and Additional District Court's Judgement dated January 15, 2019 whereby, the Appellant's suit and appeal were dismissed respectively. The contents of both orders are sufficient to clarify that the Appellant has challenged the encashment of Guarantee on the ground that GOB had failed to call the Guarantee within the stipulated time. The Bench has noticed that in in the First Order and in the Impugned Order, Respondent No.2 has not decided this aspect, therefore, the Bench will also refrain itself from deciding this issue because it could be only decided after recording of evidence by a court of competent jurisdiction. Furthermore, we are of the view that the Commission or the Bench are not competent forums to decide whether parties have brought the issue of Guarantee within the time provided under the Limitation Act, 1908 or not. Therefore, the Bench will not touch upon the relevant contentions of the Appellant or the Respondent No.1.
23. The Bench is of the view that the contract of Guarantee was executed between GOB and the Appellant and the AHHL had purchased the Guarantee, therefore, in case of any dispute, all parties have legal right to have the execution of the Guarantee. In view of above, we believe that although the Guarantee was purchased by the AHHL, however, being the Chief Executive Officer of AHHL, Respondent No. 1, was also competent to file the First Application and the Second Application, therefore, we reject the Appellant's argument that the Respondent No.1 or the AHHL had no *locus standi*.



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24. The Bench is not inclined to accept the Appellant's assertion that at the time when the First Order and the Impugned Order were passed by the Respondent No.2, the matter was *sub-judice* before the Court, hence the Commission had no jurisdiction to proceed with the matter. The Bench has reviewed the record, which revealed that the Appellant has challenged the Judgement dated January 15, 2019 vide RSA on March 26, 2019, however, the Registrar of the Court has raised certain objections, therefore, to remove the objections, the RSA was received back by the Appellant on March 28, 2019. The Bench has also noticed that the RSA was converted into Civil Revision and was re-filed on May 20, 2020 (the Revision) [As per annexure J of this Appeal the Revision has been allotted number CR No. 23321/2020]. The Bench has perused the record which revealed that hearing of the First Order was held on May 16, 2019 and the First Order was passed on November 21, 2019 whereas, hearing of the Impugned Order was held on April 6, 2020 and the Impugned Order was passed on May 4, 2020. In view of the forgoing, the Bench has no doubt that at the time when the First Order and the Impugned Order were passed, no matter was *sub-judice* before the Court, therefore, the Respondent No.2 has rightly exercised the Jurisdiction of the Commission.

25. The Bench also finds no substance in the Appellant's argument that proceedings of the First Order and the Impugned Order would attract *Res Judicate* or constructive *Res Judicate* because the matter was already decided by the FIO and the Executive Director Insurance. The Bench has reviewed the record, which is sufficient to establish that FIO's order and the Executive Director Insurance Order were not passed on merits rather both were passed on ground that matter is *sub-judice* before court.¹ Therefore, the First Order and the Impugned Order do not attract *Res Judicate* or constructive *Res Judicate*.² Furthermore, the Bench is of the view *Res Judicate* or constructive *Res Judicate* are also not applicable in present case because proceedings before FIO and the Executive Director, Insurance were initiated by GOB, whereas, proceedings before Respondent No. 2 were held upon the request of Respondent No.1.

¹ 2019 CLC 1613 Islamabad

² PLD 2005 SC 605 AND 2000 SCMR 1172



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26. The Bench has reviewed the contents of the contract of Guarantee and Judgement of Montage Case. As per our observation, in Montage Case the insurer company had issued an “Irrevocable and unconditional” guarantee, whereas, the contents of the Guarantee *prima facie* suggest that the Appellant had issued an “Irrevocable and conditional” guarantee. For reference relevant content of guarantee discussed in Montage Case and Guarantee are reproduced below;

Contents of Guarantee in Montage Case	Contents of Guarantee in Present Case
The Guarantor hereby guarantees that the Architect shall use the advance for the purpose of above-mentioned Contract and if he fails and commits default in fulfilment of any of his obligations for which the advance payment is made, <u>the Guarantor shall be liable to the Employer for payment not exceeding the aforementioned amount.</u>	The said guarantee <u>shall be secured by the counter guarantee of M/s. AHHL and being principal i.e. M/s. AHHL shall first satisfy the claim of GOB and the Insurance Guarantee shall not be ipso-facto encashable.</u>
<u>NOTICE in writing of any default, of which the Employer shall be the sole and final judge,</u> on the part of the Contractor, shall be given by the Employer to the Guarantor and on such first written demand, payment shall be made by the Guarantor of all sums then due under this Guarantee without any reference to the Contractor and without any objection.	<u>The GOB shall not be the sole and final judge for deciding whether the Principal (AHHL) has duly performed his obligations under the Contact or has defaulted in fulfilling said obligations</u> and the Guarantor shall pay without objection any sum or sums up to the amount stated above upon first demand from the GOB forthwith and without any reference to the Principal or any other person in line with the covenants stated

27. The Bench is of the view that *prima facie* the Guarantee was conditional and GOB was not the sole judge to decide whether all remedies for recovery against AHHL have been exhausted or not. Whereas, in the Montage Case, guarantee was “Irrevocable and unconditional” and the Employer was given sole and final authority to determine the default. Therefore, we are of the view that the facts and circumstances of the Montage Case are not applicable in the present case.



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28. The Bench accedes with the Appellant's argument that the "Insurance Policy" and "Contact of Guarantee" are two different contracts and both have different characteristics and legal requirements. Therefore, the Bench is of the view that application of Section 77 of the Ordinance and Rule 35 of the Rules in the present case seems unwarranted and against the law. Following comparative analysis is helpful to understand the core difference between "Insurance Policy" and "Contact of Guarantee";

S.No.	Characteristics	In Insurance Policy	In Guarantee	In Present Case
1.	Number of Parties	In insurance policy there are Two parties; 1. Insurer 2. Policy Holder	In Guarantee, there are three parties; 1. Principal Debtor 2. Beneficiary 3. Guarantor	In this case we have three parties; 1. Principal Debtor (The AHHL) 2. Beneficiary (The GOB) 3. Guarantor (Appellant)
2.	Consideration	Premium	Commission	
3.	Who pay consideration	In insurance policy, premium is paid by the policy holder.	In Guarantee, commission is paid by the Principal Debtor.	The AHHL
4.	Entailment of Claim	Policy holder or legal heirs, as the case may be are entitles to receive policy amount.	Third party is entitled to receive amount mentioned in contract of guarantee.	The GOB (Third Party)
5.	Liability to Pay	<ul style="list-style-type: none">In case of maturity of insurance policy, the Insurer shall pay only amount of investment along with ancillary benefits to the Policy holder.In case of happening of event	The Guarantor shall pay the entire amount of Guarantee to the beneficiary.	In this case liability of the Guarantor is subject to fulfilment of the condition contained under the Guarantee.



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		mentioned in the Insurance Policy, the Insurer is liable to pay entire amount of Policy.		
6.	Re-Imbursement	The policy holder is not liable to any re-imbursement.	The Principal debtor is liable to reimburse amount of guarantee to the Guarantor.	AHHL shall be liable to reimburse amount of guarantee, to the Appellant, if Appellant had made payment to the GOB.

29. In view of the above, comparative analysis and as per the judgement titled Capital Insurance Co. Limited Versus Securities and Exchange Commission of Pakistan and 4 others (2013 C L D 1075), it appears to us that Section 77 of the Ordinance is only applicable on the “Insurance Policy”, whereas, the case in hand pertains to the “Guarantee”. Furthermore, the Bench is of the view that Rule 35 of the Rules is also not applicable in this case because it deals with the non-payment of “Premium” whereas, in the contract of guarantee, the person who purchased the guarantee has to pay “commission” as consideration of the contract.
30. The Bench endorses the Appellant’s argument that if parties were not satisfied with the contents of the Guarantee, then they should not have accepted it. However, neither GOB nor the AHHL had ever objected to the contents and conditions of the Guarantee. The Bench is of the view that there is no substance in Respondent’s No.1 claim that it had arranged an unconditional and unqualified guarantee, because prior to invoking the Guarantee, it had never been challenged or disputed by the Respondent No.1 or the GOB.
31. The Bench has noted that in para twelve of the First Order while referring to a letter of the external investigation agency it has been stated that the Appellant is liable to pay Rs.200 million to the GOB, however, as per record the amount of Guarantee is Rs. 20 million only.



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32. The Bench has also noted that in First Application and in Second Application, the Respondent No.1 has also failed to demonstrate any financial implications caused to it due to non-performance of the Guarantee by the Appellant.
33. In view of the above, we hereby *set aside* the First Order and the Second Order, and remand the matter to Respondent No. 2 to decide it afresh, while keeping in view judgement cited in para 29 supra (2013 C L D 1075) and the Montage Case. Furthermore, we also direct the Respondent to consider whether during the pendency of the Revision, initiation of proceedings in the First Application and Second Application are permissible or not. We also direct the Appellant to provide certified attested copies of the suit, appeal and Revision filed before Civil Judge, Lahore, District Judge, Lahore and the Court to Respondent No.2 for an in-depth legal analysis and conclusion. We also direct the Appellant to provide certified attested copies of judgements passed by the Civil Judge, Lahore, District Judge, Lahore and the updated complete order sheet of the Revision, pending before the Court, to Respondent No.2. Notwithstanding the directions contained hereinbefore, the parties are free to present and rely on any other document, laws or case laws to substantiate their claims and support their case.
34. The Appeal is disposed of without any order as to cost.

(Farrukh Hamid Sabzwari)

Commissioner (SCD -PRDD)

(Shauzab Ali)

Commissioner (SMD)

Announced on: **19 JAN 2021**