

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.138 of 2016

M/s Cargill Holdings

Versus

Federation of Pakistan through Secretary, Cabinet Division &
others

Date of Hearing: 15.06.2016

Appellant by: Mr. Abdul Wahab Baloch, learned
Advocate,

Respondents by: M/s Noman Amin Farooqi, & Khurram M.
Hashmi, learned Advocates,
Khawaja Muhammad Imtiaz, learned
Standing Counsel.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 33 of the Privatization Commission Ordinance, 2000, the appellant, M/s Cargill Holdings, which is a company incorporated under the laws of Kenya, impugns the Order dated 04.03.2016, passed by learned Single Judge-in-Chambers, dismissing the appellant's applications (C.M.Nos.1 & 2/2015 in C.S.No.37/2015). Through these applications, the appellant had sought an interim injunction restraining the respondents from re-advertising the sale of Heavy Electrical Complex's ("HEC's") shares, and a direction to the respondents to transfer the management of HEC to the appellant.

2. Learned counsel for the appellant submitted that the appellant's letter dated 21.05.2015 (accepting the terms and conditions of the Letter of Acceptance ("LOA") and Share Purchase Agreement ("SPA"), and furnishing a cheque for US Dollars 2,205,882/-) was prior in time to respondent No.2's letter, whereby the LOA was stated to be revoked by efflux of time; that respondent No.2 should not have presented the cheque for encashment on 26.05.2015 when the appellant had explicitly requested it to present the cheque on 28.05.2015; that the SPA could not be signed prior to 21.05.2015, because there were several unresolved issues especially the litigation instituted by the employees of HEC in which a prayer was made for the setting

aside of the transaction; that respondent No.2 should have considered the appellant's suggestion to extend the date for the execution of the SPA from 21.05.2015 until the decision of the Court; that the appellant had suggested that it would pay a post dated cheque which could be encashed only once a favourable decision was given by the High Court in the litigation instituted by the employees; that after the issuance of the LOA, there had been mismanagement of the affairs of HEC incurring liabilities of Rs.390 Million; that after the issuance of the LOA, the appellant had not sought the re-negotiation of the terms of the SPA; and that respondent No.2's decision not to execute the SPA with the appellant is based on *malafides* and arbitrariness. The learned counsel prayed for the impugned order dated 04.03.2016 to be set aside, and respondent No.2 to be restrained from re-initiating a tender bidding process for the privatization of the strategic stake in the HEC.

3. On the other hand, learned counsel for respondent No.2 submitted that even though the appellant had not executed the SPA or paid Rs.225 Million by 21.05.2015, respondent No.2, in pure good faith, presented the cheque for Rs.225 Million for encashment so that the transaction could be taken forward; that the appellant wanted to embroil respondent No.2 in litigation, and with this purpose and mind gave a cheque which could not be encashed; that the said cheque had not been issued by the appellant (M/s Cargill Holdings), but by Cargill Commodities Limited; that the bank account maintained by Cargill Commodities Limited was not a dollar account, but a Kenyan Shilling account; that the oblique motives of the appellant are apparent from the fact that it filed C.S.No.37/2015 before this Court, and obtained injunctive relief on 02.06.2015; that after obtaining the said relief, the appellant informed respondent No.2 that the cheque was not to be encashed. The learned counsel further submitted that the appellant would be free to participate in the re-tender bidding process for the strategic stake in HEC, if it qualifies under the new terms and conditions of such a process.

4. I have heard the learned counsel for the contesting parties, and have perused the record with their able assistance.

5. The record shows that on 01.06.2015, the appellant instituted Civil Suit No.37/2015 for declaration, specific performance, rendition of liabilities and mandatory injunction against *inter-alia* the Privatization Commission of Pakistan (respondent No.2). Along with the said suit, the appellant also filed two applications i.e. (C.M.Nos.1&2/2015 in C.S.No.37/2015) for interim relief - one to restrain the respondents from re-advertising the sale of HEC's shares, and the second for a direction to the respondents to transfer the management of HEC to the appellant.

6. Respondent No.2 contested the said civil suit by filing a written statement. Through an advertisement published in the newspaper on 15.12.2014, respondent No.2 invited Expressions of Interest ("EOI"), and Statement of Qualification ("SOQ") for the privatization/dis-investment of approximately 97% shares of the Government of Pakistan in the HEC. The last date for the submission of the EOI and SOQ was 23.01.2015. Only three parties, including the appellant are said to have submitted their SOQs by the due date. These three parties were qualified to take part in the bidding process. Thereafter, respondent No.2, in pre-bid meetings, is said to have provided the relevant information regarding the shares to be privatized, and the bidding process to the qualified parties. All the qualified parties were required to deposit an amount of Rs.25 Million as earnest money along with the bid application form by 04.03.2015. Only the appellant deposited the earnest money, whereas the other two qualified parties did not. As there was only one qualified party (i.e. the appellant), in the arena, the Board of respondent No.2, in its meeting held on 09.03.2015, decided to recommend to the Cabinet Committee on Privatization ("CCOP") to negotiate the sale of the HEC with the appellant, and to set a reserve price of Rs.500 Million. These recommendations were considered and approved by the CCOP. A Negotiation Committee was constituted, which held meetings with the appellant, who offered

to take-up all the existing bank liabilities of the HEC, retain all HEC employees and pay Rs.100 million in cash to respondent No.2. The board of respondent No.2 recommended the acceptance of the appellant's offer to the CCOP. The CCOP in its meeting dated 24.03.2015, approved the conditional sale of HEC, subject to the following conditions:-

- i) The Buyer shall assume all current and future liabilities of the HEC.*
- ii) The Buyer shall also be responsible to take up the liabilities pertaining to the gratuity and provident fund of the employees.*
- iii) The Buyer (M/s Cargill Holding) shall not benefit from any previous losses and potential tax adjustments in the future, if any."*

7. Negotiations were again held between the appellant and respondent No.2, which culminated in a revised offer made by the appellant. The appellant offered to take up all the existing and future banking and operation liabilities of the HEC, retain all HEC employees, take up liabilities of gratuity and provident fund, and pay Rs.250 Million in cash to respondent No.2. The appellant also offered not to benefit from the previous losses and the future tax adjustment, if any. After the CCOP approved the sale of HEC to the appellant, the LOA dated 06.04.2015, was issued to the appellant.

8. The salient features of the LOA were that the appellant's offer of Rs.250 Million for the 97% of the issued and paid up Capital of HEC consisting of 14,100,015 ordinary shares along with management control, was accepted by respondent No.2. Rs.250 Million (less the earnest money already paid) was to be paid on the execution of the SPA. Between the period of the issuance of the LOA and the execution of the SPA, the existing management of HEC was not to take any operational, financial or business decision without consulting respondent No.2. The acceptance of the appellant's said offer was expressly made conditional upon the receipt of the remaining amount in the sum of Rs.225 Million through bank drafts or pay orders or electronic transfer or cheque on the date of the execution of the SPA. The signing of the SPA and the transfer of the shares mentioned above to the appellant was to take place immediately upon the

receipt of the full amount of the sale price by respondent No.2. Under clause 12 of the LOA, the SPA was to be executed within a period of 45 calendar days from the date of the issuance of the LOA. Time was stated to be of the absolute essence. In the event, the appellant did not execute the SPA or make payment of the above referred amount within a period of 45 days, the LOA was to be considered as revoked without any notice. Furthermore, the failure of the appellant to make the payment of Rs.225 Million within a period of 45 days from the date of the issuance of the LOA was to result in the revocation of the LOA as well as the forfeiture of the earnest money. The appellant is said to have sent an undated letter confirming and accepting the LOA.

9. Now in terms of the LOA dated 06.04.2015, the last date for the execution of the SPA and the payment of Rs.225 Million was 21.05.2015. Vide letter No.F.PC/Priv./HEC/06/2013-14/, dated 21.05.2015, respondent No.2 informed the appellant that the LOA stood automatically revoked/expired by efflux of time, and that the earnest money deposited by the appellant stood forfeited. On the same very day (i.e. 21.05.2015), the appellant, through a letter, confirmed the acceptance of all the terms of the LOA, and the SPA sent by respondent No.2 to the appellant on 06.04.2015 and 14.05.2015, respectively. The initialed copies of the LOA and SPA were also submitted by the appellant. Along with the said letter dated 21.05.2015, the appellant gave cheque No.000001, dated 21.05.2015, drawn on Diamond Trust Bank Kenya Limited, Branch Code 630359, for an amount of Rs.225 Million, from account No.0029824001 belonging to Cargill Commodities Limited. Respondent No.2 was requested to grant seven extra days for the funds to be transferred from overseas. The appellant requested for the cheque to be presented for encashment on 28.05.2015. Furthermore, the appellant requested respondent No.2 to have the SPA vetted by the Law Division Government of Pakistan.

10. Whether respondent No.2 sent its letter dated 21.05.2015 intimating the expiry of the LOA, was earlier or later in time to the appellant's letter dated 21.05.2015 accepting the terms of the

LOA and the SPA is to be resolved after the recording of evidence by the Trial Court. Nevertheless, it seems that respondent No.2 decided to go ahead with the process and present the said cheque for encashment. Respondent No.2 presented the cheque for clearance on 26.05.2015, but the same was returned as 'wrongly drawn'. On 01.06.2015, the appellant instituted civil suit No.37/2015 before this Court. On 02.06.2015, the appellant informed respondent No.2 that it had to stop the cheque from being encashed, as the Court had issued an injunctive order. The appellant also informed respondent No.2 that the Diamond Trust Bank Kenya Limited had also been requested not to encash the said cheque. On 08.05.2015, the Diamond Trust Bank Kenya Limited returned the said cheque to respondent No.2's bank.

11. In Civil Suit No.37/2015, the appellant has *inter-alia* prayed for a mandatory injunction and a direction to the respondents to execute and sign the SPA proposed by the appellant, and a direction to the respondents to transfer the management of the HEC to the appellant. The appellant also prayed for an injunction restraining the respondents from encashing the cheque dated 21.05.2015 for an amount US Dollars 2,205,882/- drawn on Diamond Trust Bank Kenya Limited. As mentioned above, alongwith the said suit, the appellant filed two applications for interim relief, one to restrain the respondents from re-advertising the sale of HEC,s shares, and the second for a direction to the respondents to transfer the management of HEC to the appellant. Vide order dated 04.03.2016, the appellant's said application were dismissed by the learned Single Judge-in-Chambers. The appellant's suit, however, is still pending adjudication. This appeal has been directed against the said order dated 04.03.2016.

12. A contract comes into existence when the agreement is signed, sealed and delivered by the executing parties. No concluded contract between the appellant and respondent No.2 had taken place. This is apparent from the fact that the appellant in its civil suit had prayed for a mandatory injunction directing

respondent No.2 to execute and sign the SPA. The respondents had decided to negotiate the sale of the strategic stake in HEC with the appellant after the two pre-qualified bidders did not deposit earnest money. This negotiation process culminated in the issuance of the LOA dated 06.04.2015, which was duly acknowledged and accepted by the appellant. In terms of the said LOA, the appellant was under an obligation to deposit Rs.225 Million within a period of 45 days of the issuance of the LOA, failing which the LOA stood revoked. This 45 day period was due to lapse on 21.05.2015. The appellant waited until the eleventh hour to communicate its acceptance of the terms of the SPA. The above mentioned cheque for an amount of US Dollars 2,205,882/- was also given on 21.05.2015. Had this cheque been encashed, matters would have been different, and perhaps the contesting parties would not be in Court. However, this cheque could not be encashed, because it was stated to be 'wrongly drawn'. The ill motive of the appellant is apparent from the fact that on 02.06.2015, Cargill Commodities Limited instructed Diamond Trust Bank Kenya Limited not to make any payment under the said cheque. In collaboration with Cargill Commodities Limited, the appellant, vide its letter dated 02.06.2015, informed respondent No.2 that the appellant had to stop the encashment of the cheque. By this stage, the appellant had been able to obtain injunctive relief in C.S.No.37/2015. This conduct of the appellant, in our view, is not above board. Given the steps taken by the appellant's to make sure that Rs.225 Million is not paid to respondent No.2, it cannot claim to have approached the Court of equity with clean hands.

13. Paragraph 12 of the LOA dated 06.04.2015, is reproduced herein below:-

"12. You undertake to execute the SPA within the stipulated period of 45 calendar days from the issuance of this LOA, time being of absolute essence. In case you fail to execute the SPA and not make payment of amount referred to, in clause 9 above within a period of 45 days, this LOA shall automatically stand revoked without any notice."

14. As the appellant did not pay Rs.225 Million within the 45 days of the issuance of the LOA (i.e. by 21.05.2015), the LOA

stood revoked. Respondent No.2 extended concession to the appellant by depositing the above mentioned cheque for encashment on a date beyond 21.05.2015. The mere fact that the account holder "Cargill Commodities Limited" had instructed its bank not to make any payment under the cheque brought the matter to a close.

15. In view of the aforementioned, we do not find any reason to interfere in the Order dated 04.03.2016, passed by the learned Single Judge-in-Chambers, which is strictly in accordance with the law. Resultantly, this appeal is dismissed with no order as to costs. Needless to mention that the observations made by us in this judgment shall not be taken into account by the learned Single Judge in deciding Civil Suit No.37/2015.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

Qamar Khan*

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Approve For Reporting.