

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

FAO NO.82 OF 2020

Samsung Gulf Electronics FZE.

Vs.

Latif Hakeem, etc

**Appellants by : Barrister Ali Zafar, Advocate.
Mian Muhammad Kashif, Advocate**

Respondents by : Mr. Muhammad Saqib Bhatti, Advocate.

Date of hearing : 24.09.2020.

LUBNA SALEEM PERVEZ, J. This is an appeal under section 104 read with Order 43 Rule 1 (r) of the Code of Civil Procedure, 1908, against the order dated 30.07.2020, passed by learned Additional District Judge, West-Islamabad, whereby application under Order XXXIX Rule 1 & 2 CPC filed by the Appellant / Samsung Gulf Electronics (“SGE”) was dismissed.

2. Facts of the case are that the appellant/SGE entered into a Distribution Agreement with Respondent No. 3 (“Greentalk”), for distribution and sale of Samsung products/mobiles in Pakistan and Afghanistan. It has been contended by the Appellant SGE that Greentalk avails extra time for payment of Samsung mobiles over and above the given time and kept the payment pending and when the Greentalk failed to make payment of outstanding dues against 49 shipments through 19 Letter of Credits (“LCs”) of the value of USD 24,111,324/-, the SGE approached Mashrik Bank, UAE, for encashment of LCs when they were informed by the Bank that the said 19 LCs are fake, fabricated and forged and has not been issued by the said Bank. Thus, SGE filed civil suit for recovery of USD 21,053,032/-

(value as per commercial invoice) with interest and compensation before Additional District Judge, West-Islamabad, against Respondent No. 1 namely Mr. Latif Hakeem, the sole Director and Respondent No. 2 namely Mr. Bilal Asghar, CFO of Greentalk along with three other respondents alleging commission of offence of fraud and misappropriation for obtaining mobile phones from SGE by submitting 19 fake LCs. The SGE along with suit also filed application under order XXXIX Rule 1 & 2 CPC requesting interim injunction for restraining the respondents from alienating and disposing of the properties listed in the application on the ground of fraudulent misappropriation of funds of SGE by Respondents and diverted it by investing in the real estate thus, claiming that the properties actually belongs to SGE. The learned Judge dismissed the application of SGE by observing that plaintiff (SGE) has failed to establish *prima facie* case and; the balance of convenience would lean towards defendants (respondents in present appeal) and the irreparable loss would be of defendants and not of the SGE, if granted interim injunction is granted. Hence present appeal.

3. Learned counsel for the SGE submitted that the respondents have stolen the mobiles worth USD 21,053,032/-by issuing proforma invoices duly signed by Respondent No. 2/Mr. Bilal Asghar, and fake 19 LCs of Mashrik Bank, UAE; that the learned Judge has not properly appreciated arguments that SGE has suffered huge loss on account of fraud committed by respondents; that the learned Judge has incorrectly observed that allegation of fraud against respondents is mere verbal assertion as entire record consisting of emails, proforma invoices and fake LCs, etc have been duly attached with the suit as documentary proofs in support of the claim; that learned Trial Judge has erred in observing that the SGE has filed the suit

for recovery in order to avoid the arbitration proceedings before the rightful jurisdiction of Arbitral Tribunal of DIFC and LCIA Dubai as the respondents have filed the application for arbitration before said Arbitral Tribunal after filing of the suit; that the present suit for recovery has no nexus with the arbitration proceedings commenced on the application of respondents before Arbitral Tribunal Dubai; that since, huge amount of loss is involved, SGE has requested for interim injunction in respect of the properties listed in the application under order XXXIX Rule 1 & 2 CPC in order to secure and protect the recovery particularly in clause (b) of Order XXXIX Rule 1 CPC which provides *that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors* the Court in such an event can grant temporary injunction to restrain such act. Learned counsel for SGE argued that there are provisions in CPC whereby interim injunction can be granted (i) under Order XXXIX Rule 1 and 2 (ii) under Order XXXVIII Rule 5 and (iii) under 151 CPC i.e. inherent power of the Court; that the law does not permit unjust enrichment of one person on the expense of another. The learned counsel submitted that the interim injunction to restrain the respondents from disposing of the property has been applied to safeguard its interest as the respondents have already disposed of one of the immovable properties and there is apprehension of disposing of other properties if they are not restrained. In support of his contention, reliance is placed on the judgment of Hon'ble Supreme Court of Pakistan re: *Mohiuddin Molla v. The Province of East Pakistan (PLD 1962 Supreme Court 119)*, *Mst. Afshan v. Syed Kamran Ali Shah (2013 CLC 1220)*, *M/s ELKO Organization (Pvt.) Ltd. v. Riaz Ul Islam (2013 YLR 719)*, *Muhammad Aneess vs. Abdul Qayyum alias Kalla Khan (2009 YLR 1616)*,

M/s Nishat Talkies v. M/s Zeray Enterprises Ltd. (1984 CLC 2366), Habib Bank Limited v. Hotel Metropole Limited (1987 MLD 2341) Santosh Promoters (Pvt.) Ltd. v. Intrasoft Technologies [2016 SCC Online Cal 8268 (Calcutta High Court)], Harleen Jairath v. Prabha Surana [2019 SCC Online Cal 2372(Calcutta High Court)] and Cosmopolitan Trading Corporation v. Engineering Sales Corporation & others (AIR 2001 Rajhistan 331) State Bank of India v. M/s Fravina Dyed Intermediates (AIR 1989 Bombay 95). Learned counsel for the SGE further contended that the liability has not been denied by the respondents as the respondents in their application before Arbitral Tribunal asked for setting off the amount against their claim is, therefore, admission on the part of respondents which the learned Judge did not consider while dismissing the application for injunction; that the learned Judge without deciding the respondent's application under section 4 of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, has observed that the suit has been filed to avoid jurisdiction of Arbitral Tribunal of DFIC and LCIA Dubai, and without giving any reason decided that the suit is arbitrable; that the act of fraud is not covered under the arbitration clause of Distribution Agreement, thus, is a subject of civil jurisdiction under CPC; that suit for recovery has been filed against the act of fraud of the individuals as there is no denial of submitting fake LCs by the respondents, therefore, the learned trial Court has jurisdiction to allow application for interim protective measures under Order XXXIX Rule 1 & 2 CPC. Learned counsel for SGE lastly contended that appellant has a prima facie case as the claim is based on documentary evidence admitted by the respondents. The balance of convenience is in favour of SGE as it apprehends disposal of properties by

the respondents which, if not secured/safeguarded by the order of the court under Order XXXIX Rule 1(b) CPC, SGE would suffer irreparable loss. He relied on case laws reported as *Bashir Ahmed Versus Muhammad Aslam* (2003 SCMR 1864), *Inam Naqshband Versus Haji Shaikh Ijaz Ahmad* (PLD 1995 SC 314), *Jameela Pir Bukhsh Versus Appellate Authority and others* (2003 SCMR 1524), *Qureshi Construction Co. Ltd. Versus Government of Sind* (1983 SCMR 235), *Jahangir Siddiqui Versus Noman Abid Investment Management Limited* (2013 CLD 1965) and *Mst. Afshan Versus Syed Kamran Ali Shah* (2013 CLC 1220).

4. On the other hand, learned counsel for respondents controverted the arguments and submitted that there is no illegality or irregularity in the impugned order dated 30.07.2020, and the application filed under Order XXXIX Rule 1 & 2 CPC by the SGE has been rightly dismissed; that the case against the respondents is not maintainable as the Greentalk is a company, the SGE is also established under the laws of UAE and the Mashrik Bank in whose name the LCs have been submitted is also located in Dubai and all the alleged impugned transactions took place in Dubai, UAE, therefore, the Courts of Pakistan have no jurisdiction to entertain the suit; that the SGE has not come to the Court with clean hands as it has concealed the fact of filing civil case for recovery of the same amount in Dubai Court. Learned counsel relied on *Sajjad Ahmed versus Chairman, Capital Development Authority* (2016 CLC 896 Islamabad) and *The Stillman's Company (Pvt.) Ltd. Versus S.M. Anees* (2019 YLR 815 Sindh). He submitted that the dispute between the parties is a commercial dispute as connected with the Distribution Agreement and the respondents have also suffered financial losses as a result of SGE's breach of the agreement; that

the alleged period of commission of fraud does not commensurate with the period of invoices and LCs; he submitted that in essence the SGE's contention is that the properties allegedly in ownership of respondents have been purchased from the money of the SGE, as such, it is alleging *benami* transaction in respect of the properties of the respondents without substantiating its claim; that the allegation of fraud levelled by the SGE is baseless and malicious to mislead the Court; in respect of properties listed in the application under Order XXXIX Rule 1 & 2 CPC, learned counsel for respondents submitted that most of the properties are not owned by the individual respondents and the remaining properties have been purchased in the years 2015, 2016 & 2017; that both the parties are bound by the contractual obligation and the issue agitated by the SGE purely relates to business dispute for breach of Distribution Agreement, which can be resolved through arbitration provided under clause 12.7 of the agreement vide arbitration rules of DIFC-LCIA Arbitration Center; that respondents, therefore, has filed application for Arbitration of the matter in terms of the said clause on 27.08.2020 and on their application, the sole arbitrator has also been appointed after rejecting the request of the SGE for appointment of three arbitrators; that, therefore, the respondents have filed application under section 4 of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, which application is still pending decision. In this regard he relied on *The Stillman's Company (PVT.) Ltd. versus S.M. Anees (2020 CLD 15)* and *Messrs Travel Automation (Pvt.) Ltd. through Managing Director Versus Abacus International (Pvt.) Ltd. through President and Chief Executive (2006 CLD 497)*. He contended that the claim of USD 20 million is admitted, however, it is subject to adjustment

of the claim of USD 21,481,919/- against rebate of incentive scheme which is outstanding against SGE; that the LCs alleged to be fake by SGE are open LCs, template of which was provided by SGE in order to comply the documentary formalities for delivery of goods; that proforma invoice is not an absolute proof of payment rather it is only issued to incorporate transaction in the books of account; that the claim is against the Greentalk, therefore, the Directors cannot be made party in the suit; that the only purpose of filing suit is to frustrate the arbitration proceedings; that the cases relied upon by the learned counsel for the SGE are all distinguishable and based upon its own facts; that purchase of property is a constitutional right of a person, as such, the properties owned by the person cannot be attached on mere allegations and verbal assertions. Learned counsel also relied on section 56 of Specific Relief Act, 1877, and submitted that it is a substantive provision and while considering temporary injunction under Order XXXIX Rule 1 & 2 CPC provisions of section 56 of the Act, 1877, are also to be kept in mind.

5. Learned counsel for SGE in rebuttal submitted that the amount claimed by the SGE has been admitted by the respondents; that providing template for preparing fake LCs by SGE is an imaginary story of the respondents and contended that as to why the SGE would provide any such template of Mashrik Bank which could be used for fraud and cheating against it; that no concealment of any fact has been made by SGE and filing of suit against the respondents has been duly disclosed in the suit against the respondents; that explanation to Section 10 CPC does not preclude the courts in Pakistan from trying a suit founded on the same cause of action in foreign courts; that Directors of the Greentalk have been made party to the suit due

to the fact that the fraud has been committed by Latif Hakeem and Bilal Asghar, in their individual capacity; that the dispute in civil suit is not a business or commercial dispute as asserted by the respondents as the goods worth USD 21 million have been obtained by the respondents through fraud, cheating and on the basis of forged and fake documents, thus, the nature of proceedings before the Trial Court is entirely different and not arbitrable under clause 12.7 of the Distribution Agreement under DIFC and LCIA Rules.

6. Arguments heard, record perused.

7. Perusal of the record reveals that SGE, a non-resident company based in U.A.E, entered into a distribution agreement on 01.01.2020 with respondent No.3/Greentalk which is the sole proprietorship concern of respondent No.1/Latif Hakeem; the place of business of Greentalk is in Ras-Al-Khaima, U.A.E; according to the distribution agreement, Greentalk was appointed as a non-exclusive distributor by SGE to distribute and sell product to end-users in the territory which means Afghanistan as defined in clause 1.1 of the agreement dated 01.01.2020. According to the submissions of the learned counsel, the SGE filed suit for recovery of U.S dollar 21,053,032/- when it came to know about the fraud and misappropriation of money by Greentalk along with which an application u/o XXXIX Rule 1&2 CPC for interim injunction was also filed seeking attachment of the properties allegedly owned by Respondent No.1, on the ground of securing the amount alleged to be recoverable from the respondents as it apprehended enforcement of decree in case it is decided in favour of the SGE. The argument of the SGE did not convince the learned ADJ, West-Islamabad, who, vide impugned order dated 30.07.2020, dismissed the application.

8. It is well settled position of law that the parties seeking interim injunction u/o XXXIX Rule 1 & 2 are required to satisfy the Court on three basic factors i.e. (i) prima facie case (ii) irreparable loss, damage or injury (iii) balance of convenience in favour of the applicant. The superior Courts in the following cases dilated upon the provisions of order XXXIX Rule 1 & 2 CPC with regard to three essential factors for grant of interim injunction:-

“MCB vs Adam G Insurance Company” (2003 MLD 688 Karachi):

“For grant of injunction under Order XXXIX of the Civil Procedure Code, the party seeking grant of injunction has to establish the existence of three essential ingredients, i.e., existence of a prima facie case; likelihood of irreparable loss or legal injury for non-grant of temporary injunction; and that the balance of convenience ought to be in favour of the party seeking temporary injunction. It is also the requirement of law that all the three requisites/essential ingredients must be fulfilled before injunction can be granted in favour of a party and absence of any one of these essential ingredients would not warrant grant of injunction”.
Muhammad Hussain Khan vs. N.I.B Bank Limited (2009 CLD 42 Karachi):

8. It is settled principle of law that a party would be entitled to relief under Order XXXIX Rules 1 and 2 C.P.C. provided that it satisfies the Court that it has a prima facie case; that balance of convenience is in his favour and the irreparable loss and injury could be caused to him if interim relief is not granted. The aforesaid three phrases are not rhetoric phrases but elastic words to meet a wide range of situation in given set of facts and circumstances. The burden is always on the plaintiff/applicant to satisfy the Court that a prima facie case exists in his favour. The Court must further satisfy itself that non-interference by Court would result in irreparable injury to a party seeking relief. Irreparable injury means that the injury must be a material one, one that Court cannot adequately compensate by way of damages. The Court is expected to exercise sound judicial discretion to find out the amount of substantial mischief or injury, which is likely to be caused to the other party if the injunction is granted.

Abdul Razak Adamjee Versus Director-General, Karachi Development Authority (1995 MLD 803 (Karachi):

Injunction is a discretionary relief. As a rule discretion is to be exercised in accordance with reason and sound judicial principles. The Court while dealing with an application for grant of temporary injunction has to look to and assess all the circumstances of obtaining in a suit and moreso, as such is an equitable relief. An injunction is to be issued in aid of equity and justice. The Court has to scrutinise and analyse the conduct of the plaintiffs to assess their entitlement to grant of such relief and look to the reasonableness of the orders sought.

Muhammad Riaz Versus Federal Construction Corporation Ltd (1987 Clc 345(Karachi):

The learned counsel for the plaintiff has stated that he has no interest in carrying on the execution and administration but his interest should be

protected. Therefore, the interim order of stay is being sought not for restoration of status-quo ante or for exercising the power of performing the duties and obligations under the agreement but for protection of his financial interest which he can claim even after taking over under clause 10 and termination of agency under clause 11 of the contract. No doubt the plaintiff has a prima facie case but merely on this ground interim injunction cannot be granted. The plaintiff has to further establish that balance of convenience is in his favour and if interim injunction is not granted irreparable injury shall be caused to him.

Thus, in view of the judgments cited hereinabove, it is mandatory that all the three ingredients i.e. prima facie case, irreparable loss and balance of convenience must exist for consideration of grant of interim injunction u/o XXXIX Rule 1 & 2 CPC in favor of party.

9. One of the mandatory ingredient, which the applicant is required to prove before court is “irreparable loss” in case of refusal of injunction application. The Hon’ble Lahore High Court has defined the term “irreparable loss” and “balance of convenience” in the judgment titled as *Computer Data Systems (Pvt.) Ltd vs. Mst. Shahzan Zafar (2004 MLD 850 Lahore)* as under:-

“Irreparable loss means such loss which cannot be adequately remedied by award of damages and the balance of convenience means that balance of mischief or inconvenience to the parties.”.

10. It has also been settled by the superior courts that where the claim of loss and recovery is ascertainable then the loss cannot be said to be irreparable. In this regard reliance is placed on the judgment of Hon’ble Supreme Court of Pakistan passed in the case of ***Muhammad Hussain vs. Chairman, Pakistan Telecommunication*** (PLD 1995 Lahore 456) wherein it has been observed that *A monetary loss cannot be considered to be an irreparable loss for the purpose of granting or refusing temporary injunctions.* The Hon’ble Sindh High Court, Karachi in the judgment titled as ***M/s Universal Business Equipment Pvt. Ltd vs. M/s Kokusai Commerce***

*and others” (1995 MLD 384) has held that The plaintiff has filed the suit for recovery of damages allegedly suffered by it on several counts, including the losses and damages that would be suffered during the following two years on account of the alleged premature termination of contract which was allegedly to last till 30.12.1995. The plaintiff having valued the losses in terms of money, it cannot be said that it would suffer irreparable loss. This Hon’ble Court in the case titled as **Nauman Azhar Versus Celvas Private Limited (2020 CLC 675)** has held that *If the loss of the plaintiff was measurable in terms of money, injunction could not be granted.**

11. The principles laid down in the above cited judgment of the Hon’ble Courts in respect of grant of temporary injunction u/o XXXIX Rule 1 & 2 CPC are summarized as under:-

- i. For issuing temporary injunction essential ingredients are prima facie case, irreparable loss and balance of convenience in favour of applicant is considered.
- ii. Burden of the proof is on the **applicant** seeking injunction u/o 39 Rule 1&2 to satisfy the Court regarding existence of prima facie case, irreparable loss or injury in case of refusal and balance of convenience in its favour.
- iii. The apprehensions, dishonor and humiliation are irrelevant considerations for granting or not granting the temporary injunction.
- iv. When there is a threat of infringement of right vesting in a litigant, temporary injunction can be granted.
- v. Temporary injunctions are not to be granted only on the basis of existence of prima facie case. It is incumbent on the Court to take into account the other two ingredients also.
- vi. While granting interim injunction u/o 39 Rule 1&2 the provision of section 56 of the Specific Relief Act, 1877 are also to be kept in view.
- vii. Injunction is a discretionary relief to be exercised with sound reasons and principles by assessing all the circumstances obtaining to the suit moreso equitable relief.
- viii. Injunction is to be issued in aid to the equity and justice.

- ix. Balance of convenience means, comparative mischief or inconvenience to the parties in case of refusal of grant of temporary injunction.
- x. Irreparable loss/injury means, the loss which cannot be adequately compensated or remedied by award of damages.
- xi. If loss is measurable in terms of money, the question of suffering irreparable loss does not arise.
- xii. Ascertainable monetary loss cannot be considered to be an irreparable loss for the purposes of granting or refusing temporary injunction.

12. The case of the appellant, therefore, has been examined keeping in view the principles settled by the superior courts for grant of temporary injunctions in terms of u/o 39 Rule 1&2 CPC. It is the case of the learned counsel for SGE that by submitting all the relevant documents regarding fake LCs on the basis of which the respondent had purchased the goods from SGE is sufficient to prove the *prima facie* case of the petitioner and, therefore, it is contended that the respondents be restrained from disposing of or alienating the properties listed in application u/o XXXIX Rule 1&2 CPC to avoid irreparable loss by securing its interest in view of involvement of huge amount in suit. The contention of learned counsel has been examined and found devoid of any force as SGE is yet to prove the allegations of fraud and misappropriation against the respondents by substantiating the documents filed with the suit to prove its *prima facie* case of bonafide claim of USD 21,481,919/- and unless proved, the assertions of SGE are mere allegations and accusations of fraud which cannot form basis for grant of temporary injunctions. One of the argument on behalf of SGE is that the immovable properties against which it is seeking interim injunction has been purchased by respondent from illegal gains by defrauding SGE through fake LCs and invoices, however, reply of Respondent No.1 in this

regard has been examined wherein the respondent has denied the ownership of most of the properties as per list attached at page 159-A and 159-B of his reply and the ownership of the properties which they acknowledge to have been purchased before the date of distribution agreement i.e. 01.01.2020. The learned counsel for SGE was not able to substantiate with documentary evidence that the list of properties provided by him owned by Respondents and purchased after 01.01.2020. Therefore, the SGE could not successfully convince the court in respect of claim of irreparable loss to SGE if interim injunction is not granted. Moreover, the appellant itself has accurately measured its financial loss which in view of established law enunciated by superior courts cannot be considered as irreparable loss for grant of interim stay. In view thereof, grant of any temporary injunction for disposing and alienating of the properties which are not owned by the respondents would not only be unjustified but extremely illegal and under the circumstances irreparable loss or injury would cause to those who are the owners of those properties in case any injunction is granted. Hence, the comparative balance of convenience does not lean in favour of the appellant. Moreover, perusal of the record revealed that after filing of the suit by SGE, the respondents have submitted an application for arbitration in terms of clause 12.7 of the distribution agreement before DIFC-LCIA Arbitration Center on 27.08.2020, whereby the sole arbitrator had also been appointed and arbitration proceedings have been commenced. After filing the arbitration petition before DIFC-LCIA Dubai, the respondent has also filed an application u/s 4 of Recognition and Enforcement (Arbitration agreements and Foreign Arbitral Award) Act, 2011, which is pending before learned ADJ. It has also revealed from the record that the SGE has also filed a case

for recovery of the same amount before the Dubai Court on 20.05.2020, vide case No. 112/2020, which is also pending. The issues in arbitration proceedings are similar, as such, have possibilities of resolution of controversies in the same.

13. For the foregoing discussion and in view of the principles laid down by the superior Courts, I decline to interfere with the order passed by the learned ADJ, which is hereby upheld. Consequently, instant appeal is dismissed, accordingly.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on _____.

JUDGE

APPROVED FOR REPORTING.
Blue Slip added

Uploaded By: Engr. Umer Rasheed Dar