

**ORDER SHEET
HIGH COURT OF SINDH AT KARACHI**

**Suit No.1297 of 2016
Suit No.660 of 2017**

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

**Present:-
Mr.Justice Muhammad Ali Mazhar**

Suit No.1297 of 2016

**MTW Pak Assembling.....v/s.....Shahzad Riaz
Industries Pvt. Ltd. & another**

Suit No.660 of 2017

**MTW Pak Assembling.....v/s.....Open Joint Stock
Industries Pvt. Ltd. Company Minsk
Tractor Works &
others**

For hearing

- 1. CMA No.8750/2016 (Suit No.1297/2016)**
- 2. CMA No.2473/2017 (Suit No.660/2017)**

Dates of hearing: 11.04, 13.04, 20.04 & 2.5.2017

Mr.Muhammad Jamshid Malik, Advocate for the Plaintiff.

Khawaja Shams-ul-Islam, Advocate for the Defendant No.1 in Suit No.1297/2016 and for Defendant No.2 in Suit No.660/2017. *(Defendant No.1 in Suit No.1297/2016 and defendant No.2 in Suit No.660/2017 is the same person)*

None present for the other defendants.

Muhammad Ali Mazhar, J: This order will dispose of two injunction applications filed by the plaintiff in the aforementioned suits for declaration and injunction. The ins and outs and finer points of the law suits are as follows:

- (i) In Suit No.1297/2016, the plaintiff has prayed for the declaration that during subsistence of Technology Transfer Agreement, Trademark License Agreement, Agency Agreement and the Maintenance Agreement, the plaintiff has exclusive rights to supply, distribute and sell Belarus Tractors of the defendant No.2. The plaintiff has also prayed for permanent injunction against the defendant No.1 from enticing the suppliers and dealers of the plaintiff and or disparaging the plaintiff's business. The injunction application CMA No.8750/2016 was fixed for orders in the court on 25.05.2016, when the learned single Judge passed the following order:

“Notice for 03.06.2016. Meanwhile, defendant No.1 is hereby restrained from selling Belarusian tractors except through plaintiff.”

- (ii) Whereas in Suit No.660/2017, the same plaintiff has prayed for declaration, injunction and also added relief of cancellation of the Sales Contract dated 01.03.2016 and the Protocol Negotiations dated 30.01.2017 executed by the defendant No.1 with the defendant No.2. Directions have also been sought against the defendant Nos.1 and 2 to deliver up the Sales Contract and Protocol Negotiations to the court for cancellation. The plaintiff in this suit too sought the declaration that they have exclusive rights to import, assemble, supply, distribute and sell Belarus Tractors model 510 in Pakistan. The permanent injunction has been sought against the defendant No.1 (Open Joint Stock Company Minsk Tractors Works, the company registered under the laws of the Republic of Belarus) from selling and/or supplying the aforesaid tractors to any person in Pakistan except the plaintiff. In this suit also an injunction application (CMA No.2473/2017) was filed which was fixed for orders on 09.03.2017 when the learned Judge was pleased to pass following interim order:

“Meanwhile defendant No.1 is hereby restrained from selling, exporting and supplying Belarusian tractors model No.510 to any person in Pakistan except the plaintiff, as well defendants No.3 and 4 are hereby directed that they shall ensure that instant order passed (today) is complied with in its letter and spirit.”

2. The learned counsel for the plaintiff argued that the plaintiff is a joint venture with foreign entity incorporated in the republic of Belarus by the name of BelPakSnab LLC. The paramount object of incorporating plaintiff is to

import, assemble and sell the Belarusian Tractors. The license agreement dated 27.4.2015 was initially valid up to 31.12.2016 thereafter it was extended till 31.12.2018 through a supplementary agreement dated 19.12.2016. By means of this agreement the know-how of assembling as Semi-Knocked Down Units (SKD) tractor was transferred and allowed to the plaintiff. The plaintiff was allowed to use the trademark "Belarus" on Semi-Knocked Down Units (SKD) in Pakistan; Vide contract dated 25.05.2015 Minsk Tractor wanted to be sure that the plaintiff had the capacity and will have continuous production of tractors in Pakistan and the plaintiff was required to import 2500 completely built units as well as semi-knocked down units in Pakistan. This agreement was made valid till 15.7.2016 as per Addendum 8 and the same was fulfilled by the plaintiff by importing 2502 tractors. This agreement had also an exclusivity clause mentioned in Clause 11.7. He further argued that defendant (Shahzad Riaz) on the other hand deals with the importing CBUs only, as he earlier failed to setup assembly plant requiring SKDs. As soon as the defendant (Shahzad Riaz) came to know the relationship between the plaintiff and Minsk Tractors he filed Suit No.975/2015 and obtained stay order. During pendency of the stay order the plaintiff not only suffered great losses, but could not adhere to with the timelines of Agreement dated 5.5.2015 for importing 2500 tractors (Both CBUs and SKDs). The stay order was vacated in the month of September, 2015 and the imports resumed. After the execution of the agreement dated 25.5.2015 Minsk and plaintiff agreed upon various amendments through 8 Addendums. Addendum 4 was executed on 21.1.2016 through which Clause 11.7 was deleted.

Thereafter Minsk Tractor and the plaintiff executed Addendum 5. When the plaintiff came to know that Shahzad Riaz (Defendant) is going to import tractors, the plaintiff approached this court through Suit No.1297/2016 and this court was pleased to grant injunction. The defendant nevertheless imported more than 400 tractors and sold the same in contempt of the orders of this court. Based upon the exclusivity of the plaintiff, Minsk Tractors has been advising all its previous importers to place their orders with the plaintiff. The defendant (Minsk Tractors) has chosen to remain absent in both the suits and their absence can only mean to accept the stance of the plaintiff and not to the contrary.

3. It was further contended that the defendant (Shahzad Riaz) has wrongly relied upon a forged letter of Minsk Tractors that apparently mentions that the said agreement dated 25.5.2015 was amended to exclude the "exclusivity". Even the Ministry of Industry of Belarus vide their letter dated 23.5.2016 confirmed the exclusivity between the Minsk Tractors and the plaintiff. Notwithstanding the above, the apparent dispute between the plaintiff and Minsk Tractors regarding Addendum No.4 is a fiction created by defendant (Shahzad Riaz), as the Addendum No.4 was superseded by Addendum No.5, 6, 7 and 8. Clause 11.7 survives the expiry of the agreement and it determines the future relationship of the parties therein. All the agreements between the plaintiff and Minsk Tractors are cumulative and not individual. The defendant (Shahzad Riaz) instituted the Suit No.2265/2016 without impleading the plaintiff and the said suit was withdrawn by the defendant (Shahzad) once the defendant (Minsk Tractors) agreed to supply him

the tractors, that too in grave violation and breach of the agreement dated 25.5.2015 that the defendant had executed with the plaintiff. The learned counsel in support of his arguments referred to **1992 CLC (Karachi) 1036 (Karachi Development Authority vs. Hadi Bux Memon and another) and PLD 1983 (Karachi) 387 (Muhammad Matin vs. Mrs. Dino Manekji Chinoy and others).**

4. The counsel for the defendant (Shahzad Riaz) argued that the court may take judicial notice of the conduct of the plaintiff who has approached this court with unclean hands by concealing the facts, as both suits are nothing but implementation of the contract dated 25.5.2015 specially clause 11.7 of the said agreement. Neither at the time of filing of Suit No.1297/2016 on 25.5.2016 nor at the time of filing Suit No.660/2017 on 09.3.2017 the plaintiff disclosed the factum of Addendum No.4 dated 21.1.2016, whereby clause 11.7 of the agreement dated 25.5.2015 was annulled but in both suits the plaintiff obtained stay order on concealment of facts. The plaintiff has also concealed a letter dated 14.3.2017 issued by Open Joint Stock Company (defendant No.1 in Suit No.660/2017) wherein it was categorically mentioned regarding annulment of clause 11.7. The aforesaid Addendum No.4 dated 21.1.2016 and letter of defendant No.1 dated 14.3.2017 are available in court file of Suit No.1297/2016 at page 395 and and Addendum No.4 is at page 399. The aforesaid documents are also available at pages No.735 and 809 to 811 in the file of Suit No.660/2017 annexed to the written statement filed by Shahzad Riaz, therefore, not only the aforesaid suits are not maintainable but the injunction applications are also liable to be dismissed with exemplary cost as neither the

plaintiff has made out any prima facie case nor balance of convenience lies in its favour nor irreparable loss shall be caused to them rather the balance of inconvenience lies in favour of the defendant Shahzad Riaz in the aforesaid suits as admittedly his 1100 tractors are lying at the Port and heavy demurrage is being incurred to him day by day, therefore, he is also entitled for issuance of delay detention certificate under the provisions of Customs Act, 1969. He further argued that injunction applications are liable to be dismissed and the defendant Shahzad Riaz may be allowed to get his tractors cleared from the Port as due to stay granted by this court, the consignment is stuck at Port Qasim. He referred to **2006 CLD (Lahore) 210 (Pak China Chemicals vs. Department of Plant Protection and another)**.

5. Heard the arguments. Precisely in Suit No.1297/2016 the plaintiff has prayed for issuance of declaration that in the course of incidence and pervasiveness of technology transfer, Trademark License Agreement, Agency Agreement, the plaintiff has exclusive rights to supply, distribute and sell Belarus Tractors in Pakistan and they have also entreated for restraining order against the defendants from exporting and or marketing said tractors in Pakistan except passing through the plaintiff. Whereas in Suit No.660/2017, the same plaintiff has applied for declaration that the sales contract dated 1.3.2016 and Protocol of Negotiations dated 30.1.2017 by the defendant No.1 (*defendant No.2 in Suit No.1297/2016*) in favour of defendant No.2 (*defendant No.1 in Suit No.1297/2016*) is fraud upon the plaintiff. All over again the plaintiff has claimed exclusivity in this suit also to

import and distribute Belarus Tractors model 510 in Pakistan.

6. The learned counsel for the plaintiff has also referred to license agreement dated 27.4.2015 through which the defendant No.2 granted rights to the plaintiff for assembling of produce of license in the territory (with use of assembly units, parts and components supplied by the Licensor) including the rights to sell and render maintenance service in the territory. But despite this license agreement the licensor in Clause 2.3 clearly mentioned that they reserve the right to grant such licenses to the third parties in the territory. Clause 2.3 is reproduced as under:-

“2.3 The Licensor reserves the right to grant similar Licenses to the third parties in the ‘Territory’.”

In **Clause 1.4** the **‘Territory’** means the territory of **Islamic Republic of Pakistan.**

7. The learned counsel further focused on the license agreement 27.4.2015 by dint of which the licensor (defendant No.2) granted a non-exclusive license to the plaintiff for the right to use in the territory the trademark for marketing the produce assembled and marketed by the licensee. The tenure of the agreement was limited up to 31.12.2016 and according to clause 10.4 this was valid only in inter-relation with the license agreement for tractor assembly production concluded between the parties to the present agreement. Learned counsel also referred to the contract dated 25.5.2015 whereby the defendant No.2 agreed to deliver to the plaintiff Tractors

and SKD Tractors assortment according to Annexure “2” attached with this agreement which over all displays booking of 2501 Tractors out of which 2000 were SKD (Semi Knockdown) and 501 Tractors CBU (Complete Build Unit).

8. The nucleus and focal point is Clause 11.7 of the Contract dated 25.5.2015. For the ease of reference, it is reproduced as under:-

“11.7 The Seller hereby agrees, undertakes and confirms that after delivery of this Contract, it shall not sell tractors/products etc. of OJSC MTW in Pakistan in future except through the Buyer (MTW PAK).”

9. Bearing in mind Clause 11.7, the plaintiff’s counsel claims exclusivity as according to the tenor of the aforesaid clause the defendant No.2 (Open Joint Stock Company Minsk Tractors Works) is legally responsible and obligated to maintain exclusivity of the plaintiff and after delivery of tractors in line with assortment mentioned in Annexure “2” the company “Open Joint Stock Company Minsk Tractors Works” is not allowed to sell tractors/products in Pakistan in future except through the plaintiff. Learned counsel for the plaintiff pointed out one more agreement dated 16.5.2016 whereby the Contract dated 25.5.2015 was extended up to 16.6.2016 without any change in terms and conditions. So again the learned counsel for the plaintiff maintained exclusivity. He also referred to Addendum No.1 to 3 and 5 to 8, whereby, the validity of contract dated 31.12.2015 was extended from time to time.

10. A quick look and preview to Addendum No.4 dated 21.01.2016, makes it unequivocally translucent without a shred of doubt that the contract dated 25.05.2015 was made valid up to 20.04.2016 but in clause 6 of this Addendum it was clearly provided that clause 11.7 of chapter 11 dated 25.05.2015 shall be considered annulled, however, in clause 7, it was further provided that all other terms and conditions of contract dated 25.05.2015 shall remain unchanged and the parties confirmed their obligation under them. Whereas, in clause 9, it was further provided that this Addendum No.4 is considered to be the integral part of contract dated 25.05.2015 and comes into force from the moment of its signing by both the parties. Clause (6) of the **Addendum No.4** is somewhat apropos to the extant controversy which is copied for the ease of reference as under:-

“6. Clause 11.7 of Chapter 11 <<Other Conditions>> to the Contract No. 112/00236091/150066-1 dd. 25.05.2015 shall be considered annulled.”

11. In my assessment and exploration, the plaintiff taking into consideration the above clause integrated and assimilated in the Addendum No. 4 has lost the right of exclusivity if any on annulment and extinction of Clause No.11.7 of the contract dated 25.05.2015 therefore at this moment in time, tentatively the question of asserting exclusive right by the plaintiff does not arise. One more letter dated 14.03.2017 is available at page No. 397 thru which the senior official of defendant No.2 intransigently and with diehard confirmed that the plaintiff does not have any exclusive right for the supply of Tractors to the Islamic Republic of Pakistan. In this letter too, they

corroborated that vide Addendum No. 4, the clause 11.7 of the commercial contract dated 25.05.2015 has been annulled.

12. The Plaintiff has challenged the agreement dated 01.03.2016 through which Shahzad Riaz placed an order for supply of Tractors to Open Joint Stock Company Minsk Tractor Works according to annexure 2 appended to the agreement. The plaintiff has also challenged Protocol of negotiations between the Open Joint Stock Company Minsk Tractor Works with Shahzad Trade Link Pakistan dated 30.01.2017. It is clear from both these documents that Addendum No. 4 was executed on 21.01.2016, whereby, the plaintiff lost exclusivity rights if any whereas Open Joint Stock Company Minsk Tractor Works entered into contract with Shahzad Riaz on 01.03.2016 which is much after the date of Addendum No. 4. Learned counsel for the plaintiff made much emphasis that in all Addendum agreements, all other terms and conditions of the agreement dated 25.05.2015 were saved. This may be so for residual clauses but the end result and aftermath of Addendum No. 4 which annulled Clause 11.7 cannot be overlooked and disregarded. So far all pragmatic and business-like *raison d'être*, the plaintiff at this juncture not entitled to claim any exclusivity or exclusive rights to sell and market the tractors in the territory of Pakistan. It is also a distinctive facade that not only plaintiff signed the Addendum No. 4 and all the more so they never denied the actuality and or authenticity of this document.

13. The “Open Joint Stock Company Minsk Tractor Works” which has been incorporated under the laws of

republic of Belarus is defendant in both the suits but they never move in on to defend at least till such time the hearing on injunction applications in both the suits was concluded before me. The counsel for the plaintiff has drawn the presumption that their absence means to support the plaintiff which is a misconceived understanding or presumption in my view. The said company has already annulled the former exclusivity clause which I have discussed conscientiously so the continuation of interim orders against the defendant Shahzad Riaz is causing disparagement to him whose consignment is blocked at the port and there is also no justification to continue it against other defendants.

14. The learned counsel for the plaintiff relied on Karachi Development Authority case (supra) in which court held that for the purpose of the availability or absence of a prima facie case under Order XXXIX, rules 1 and 2, C.P.C. the facts canvassed by both the sides have to be examined and it is on the preponderance of facts, as based on documentary material and averments in the way of affidavits that the concept of arguable case has to be determined. In the case of Muhammad Matin (supra) the court held that the words "prima facie case" has been judicially interpreted and explained in a number of cases. The court also referred to the case of Suigas Transmission Company v. Suigas Employees' Union in which our apex court considered the words "prima facie", and expressed that a prima facie case would be spelt out if a serious question of law, or, fact was raised in the plaint, on which the parties have to go to trial. In such enquiry, the objection by the defendants even as to maintainability of the suit will not be a proper criterion.

The same judgment also drew attention to the text book on Specific Relief Act by Sardar Muhammad Iqbal Khan (1981 edition) in which the learned author at page 652 has summarized the legal position in the following words:

"Though reliefs by specific performance and by injunction belong to the same branch of law, yet there is a distinction between the remedies, in that specific performance is directed to compel the performance of an active duty while an injunction is generally directed to prevent the violation of a negative duty. The Court by an injunction ties up the hands of the defendant and preserves unchanged not only the property itself but also the relation of all the parties thereto. Again relief by way of issue of an injunction is granted by the principle of quia timet, and if the Court finds that there is a substantial question to be investigated and the matter to be preserved in status quo till the final determination of that question, it is a sufficient ground for granting an injunction."

15. I have no cavil to the aforesaid well settled legal position developed through judicial precedents. But in the present scenario, the position is quite distinguishable simply for the reasons that after annulment of Clause 11.7 through addendum from the contract dated 25.05.2015, the plaintiff may continue their case with their principal to enforce their contracts and question as to whether the right of exclusivity terminated rightly or wrongly but in this wrangle, the defendant has no privity except that after annulment of exclusivity clause, the "Open Joint Stock Company Minsk Tractor Works" agreed to supply some quantity of tractors to the defendant Shahzad Riaz. The learned counsel appearing for Shahzad Riaz referred to case of Pak China Chemicals (supra) in which court held that agent's right to claim privilege of sole agent after expiry of fixed term after lapse of prescribed period would stand terminated and agent would cease to have any right.

16. Recently in the case of **Al-Tamash Medical Society versus Dr.Anwar Ye Bin Ju & others. (2017 MLD 785)**, I have discussed the niceties and nitty-gritties for granting injunction and held that the phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy.

17. In the case of **Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority & others** reported in **2010 MLD 1267**, I have also discussed the rule of granting injunction and held existence of prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application and such evidence of material should be of the nature that by considering the

same, court should or ought to be of the view that plaintiff applying for injunction was in all probability likely to succeed in the suit by having a decision in his favour. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted. It is for the plaintiff to show that the inconvenience caused to him would be greater than that which may be caused to the defendant. An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice or restraining an act, which it esteems contrary to equity and good conscience. In the case of **Naseem-ul-Haq versus Raes Aftab Ali Lashari**, reported in **2015 YLR 550 [Sindh]**, I have discussed Section 42 of Specific Relief Act 1877 and held that any man's legal character is generally taken as the same thing as a man's status. Words "right as to any property" are to be understood in a wider sense than "right to property" and words "interested to deny" denotes that defendant is interested in denying right of plaintiff or his legal character. Denial of right constitute a cause of action to maintain an action under Section 42 of Specific Relief Act, 1877. Relief of declaration is a discretionary relief that can be granted in the case where substantial injury is established and in absence of denial of right no relief of declaration can be granted. In the case of **Ilyas Ahmed versus Muhammad Munir**, reported in **PLD 2012 Sindh 92**, again I held the expression, legal character has been understood as synonymous with the expression status. Section 42 of the Specific Relief Act applies only to a case where a

person files a suit claiming entitlement to any legal character or any right to property which entitlement is denied by the defendants or in denying which the defendants are interested. Section 42 would be attracted to a case in which the plaintiff approaches the court for the safeguard of his right to legal character or property but where right to his own legal character or property is not involved the suit is not maintainable.

18. The plaintiff has failed to make out any prim facie case warranting the conformation of ad-interim order. The balance of convenience and or inconvenience is in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted. At this stage there is also no question of irreparable injury, however if at any later stage, the plaintiff would be able to prove and substantiate any violation or defilement of alleged exclusivity clause or its wrongful annulment by their principal "Open Joint Stock Company Minsk Tractor Works" which triggered some losses and impairments then the plaintiff may ask for the damages and compensation in accordance with law but at this stage I am not inclined to continue injunctive order any more against any defendant.

19. As a result of above discussion, injunction applications are dismissed.

Karachi:
Dated.17.5.2017

Judge