

**IN THE HIGH COURT OF SINDH AT KARACHI**

**SUIT NO. 1999 / 2018**

**Plaintiff:** M/s ICI Pakistan Ltd. and another through  
Mr. Abdul Sattar Pirzada & Mr. Qazi Umair Ali,  
Advocates.

**Defendants:** Muhammad Yousaf & others through  
Mr. Khalid Mehmood Siddiqui Advocate for  
Defendant No. 9.

*For hearing of CMA No. 15035/2018.*

**Date of hearing:** 14.01.2019.

**Date of order:** 14.01.2019.

**ORDER**

**Muhammad Junaid Ghaffar, J.** This is a Suit for Declaration, Permanent Injunction and Damages and through listed application the Plaintiff seeks a restraining order against Defendant No.9 from releasing the amount of Rs. 74,301,129/- to Defendant No.1 to 8 till final disposal of this Suit.

Learned Counsel for the Plaintiff submits that Plaintiff No.1 purchased Plaintiff No. 2 from Defendants No.1 to 8 pursuant to a Share Purchase Agreement on 08.11.2016, whereas, another Agreement ("Escrow Agreement") dated 23.12.2016 was also entered into between Defendants No.1 to 8 and Plaintiff and Defendant No.9 i.e. Habib Bank Limited. According to him the share purchase agreement had certain provisions as to representation and warranties by the sellers (Defendants No.1 to 8) in Clause 7 which required various disclosures in respect of the assets of the company and so also to the effect that there are no litigation or proceedings pending against the company. He further submits that the sellers / defendants were also required to disclose material information as defined in the agreement, whereas, Clause 8 pertains to indemnity and undertaking and for the present purposes as to the injunction application, it is clause 8.1.1(e)

which is relevant and provides that any liability or claim raised or to be raised by the tax authorities against the Company in relation to the period prior to closing is to be indemnified and paid by the sellers, whereas, the Escrow arrangement is provided in clause 8.2 and deals with the retained consideration which was to be maintained for a period of two years as provided in the separate Escrow Agreement and the amount or claim pursuant to clause 8.1.1(e) was to be adjusted by the Plaintiffs / purchasers. According to him as per the agreed understanding, it has been certified by one of the Chartered Accountants that amount of Rs.2,500,184/- is to be paid by the sellers, whereas, there is another demand of the tax authorities for Rs.2,056,241/- and again it is to be paid by the sellers / Defendants. Per learned Counsel on 19.09.2017 before closing of the transaction, a notice has been issued by the tax department for conducting an audit for the tax year 2013, and another notice has also been issued on 26.4.2018 under Rule 44(4) of the Income Tax Rules and again the said notice pertains to the period for which the sellers are liable. According to him till such time these amounts are determined and adjusted / paid by the sellers, the amount lying in the Escrow account shall not be released to the Defendants as failing which the Plaintiffs substantial rights would be prejudiced; therefore, listed application be allowed.

On the other hand, learned Counsel for the Defendant has also read out the relevant provisions of the agreement in question as above and submits that insofar as the two determined amounts are concerned, they have been paid from the Escrow account and by the sellers and to that effect for the present purposes there is no dispute. As to two other notices learned Counsel submits that there are no determined amounts, whereas, these are only notices which may or

may not culminate in any liability and as per the agreement as well as the Escrow arrangement, after passing of two years, the amount lying in the Escrow account is to be released to the Defendants and Plaintiff cannot ask to retain such amount for all times to come. He further submits that Plaintiff's Suit is pending and they have also claimed damages and if any amount is due, they can always seek a recovery. He lastly submits that the intention of the parties was clear as they had agreed for a period of two years for such purposes and if no such amount has been adjudged as a liability, the Escrow account cannot be retained or continued forever, hence the application may be dismissed.

While exercising his right of rebuttal learned Counsel submits that it is only the claim which is relevant and it is not that the amount must have been determined as well to retain and continue with the Escrow account.

I have heard both the learned Counsel and perused the record. As to the arrangement of purchase of Plaintiff No.2 by Plaintiff No.1 from Defendants as well as the two agreements as above, there appears to be no real dispute and therefore, further facts need not be discussed. Coming to the issue in hand it would be advantageous to refer to the relevant provisions which are under dispute between the parties including the Definition of Escrow Agent, Escrow Agreement, Material Effect and Retained Consideration including clause 7 & 8 of the agreement which reads as under:-

**“Escrow Agent”** means Habib Bank Limited Pakistan;

**“Escrow Agreement”** means the escrow agreement entered into between the Seller, Purchaser and the Escrow Agent, for the purposes of holding and dealing with the Retained Consideration as contemplated under clause 8.2.1 hereof;

**“Material Effect”** means any event, occurrence, fact, condition, change, development or effect that has a, direct or indirect, material effect in respect of the assets, valuation, business operation, liabilities, profits, prospects or financial condition of the Company in excess of PKR 500,000/- (Pak Rupees Five Hundred Thousand);

**“Retained Consideration”** means an amount equivalent to PKR 80,000,000/- (Pak Rupees Eighty Million only) to be deposited with the Escrow Agent in terms of this Agreement and the Escrow Agreement;

**7.1.2.** The Sellers hereby, jointly and severally, represent and warrant to the Purchaser, as on the Closing Date, as follows:

- (a) Organization and Ownership
  - (a) The Company is duly and properly incorporated, organized, in good standing and validly operating under the laws of Pakistan; and
  - (b) .....
  - (c) .....
  - (d) .....
- (e) Assets of the Company
  - (i) .....
  - (ii) there are no subsisting claims with respect to the assets of the Company, except as mentioned above, and
  - (iii) The Company has not disposed of or agreed to dispose of any business or asset of the Company.
- (f) .....
- (g).....
  - (i).....
  - (ii) There are no litigation or proceedings in the nature of suit, appeal, reference, petition, application, arbitration, conciliation, show cause notice, objection notice filed / instituted against the Company which is currently pending adjudication before any court, authority or arbitrator, or threatened to be instituted;
- (h).....
- (i).....
- (j) Material information and Disclosure
  - (i) It has disclosed all material information in respect of the Company for purposes of the Purchaser’s decision to enter into the Transaction and which information is true and complete;
  - (ii) There has no change, or any development reasonable likely to involve a change in the condition (financial or otherwise) of the Company or the assets and liabilities, general affairs or prospects of the Company that is material in the context of this Agreement and the purchase of the Sale Shares or that may cause a Material Effect; and
  - (iii) The Sellers have not made any misrepresentation / fraudulent misstatement in the past, which may make the Company liable to any claims or damages or otherwise which could have a Material Effect.

- (k) Agreements, Transactions and Approvals
  - (i) The Company is not in breach of any agreements it is a party to;
  - (ii) The Company is not bound by any restraint of trade agreement/arrangement;
  - (iii) The Company is not liable to pay, and has not been invoiced with or become liable to pay or be invoiced with any costs, charges, expenses or other amounts;
  - (iv) The Company is not party to or subject to any contract, transaction or obligation which is material to the business of the Company and which (a) is not in the ordinary course of business; (b) is not on an arm's length basis; or (c) restricts its freedom to carry on its business in such manner as it thinks fit so as to have a Material Effect on the Company; and

## 8. INDEMNITY AND UNDERTAKINGS

### 8.1. Indemnity/ Undertakings

**8.1.1. The Sellers hereby, jointly and severally, agrees to indemnify, defend and hold harmless the Purchaser against and from all losses, damages, costs, claims proceedings and consequences imposed, sustained, incurred or suffered by or asserted against the Purchaser, directly or indirectly, relating to or arising out of:**

- (a) a breach of any warranty or representation made by the Sellers under this Agreement;
- (b) a breach of any other provision of this Agreement by the Sellers;
- (c) transfer of Plot No. 32/2 in favour of the Company as contemplated under this Agreement;
- (d) failure to appropriately fund, manage or comply with all requirements and formalities in relation to the provident fund, gratuity fund, workers welfare fund, workers profit participation fund of the Company (which the Seller has not be disclosed);
- (e) **any liability or claim raised or to be raised by the tax authorities against the Company and any liability or claim raised or to be raised in relation to the workers welfare fund or the workers profit participation fund against the Company in relation to the period prior to Closing (regardless of the Sellers having disclosed the facts and circumstances in this respect as part of the Disclosed information);**

### 8.2 Escrow Arrangement

**8.2.1** The Parties agree that for the purposes of securing the obligations of the Sellers, the Retained Consideration shall be deposited and maintained with the Escrow Agent for a period of 2 (two) years, in accordance with the Escrow Agreement, Consequently, **in the event that the Purchaser has any claim against the Sellers pursuant to clause 8.1.1 (e) above, the Purchaser shall be entitled to seek such amount from the Escrow Agent from the Retained Consideration deposited with it and consequently the Total Consideration shall stand adjusted accordingly.**” (Emphasis supplied)

Perusal of the aforesaid relevant provisions reflects that there are two parts of the arrangement for which the sellers could be held liable. One is in respect of the representation and warranties as provided in clause 7; however for the present purposes the injunction application is not in respect of such claim, nor the learned Counsel for the Plaintiff has pressed upon this aspect of the case. As to the other arrangement clause 8 provides for indemnity and undertaking and clause 8.1.1(e) provides that the Sellers hereby, jointly and severally, agrees to indemnify, defend and hold harmless the Purchaser against and from all losses, damages, costs, claims proceedings and consequences imposed on, sustained, incurred or suffered by or asserted against the Purchaser, directly or indirectly, relating to or arising out of **any liability or claim raised** or **to be raised by the tax authorities** against the Company and any liability or claim raised or to be raised in relation to the workers welfare fund or the workers profit participation fund against the Company **in relation to the period prior to closing** regardless of the sellers having disclosed the facts and circumstances in this respect as part of the disclosed information. This clause and its understanding is crucial for the present purposes. The words which have been used are in relation to “**any liability or claim raised** or “**to be raised by the tax authorities**”. It is not in dispute that insofar as the two claims as mentioned in the earlier part of this order are concerned, they have been paid and satisfied and now the dispute between Plaintiff and Defendants is only confined to two subsequent notices by which the Plaintiff No. 2 has been confronted as to their liability in respect of certain transactions. Though the amount is yet to be determined; but at least it appears that a claim has been raised or intention has been

shown to raise a claim. The parties had agreed between themselves for indemnification which covers both, that is, any liability or claim **raised** or **to be raised** by the tax authorities. Therefore, the understanding in my view is also in respect of any claim which is though raised; but not yet determined, and therefore, the Defendants stance is of no help. Though an argument was made that a period of two years was provided and once it is passed without determination of an amount, the above clause i.e. 8.1.1(e) would not apply; however, I am not inclined to accept this contention for the simple reason that at least a notice has been issued within the period before closing of the transaction and also pertains to the period prior to Sale. Further it has been raised within the 2 years period as agreed, and in law (Income Tax Ordinance, 2001) it could even be raised for a much larger period. If at a later stage a demand is raised which admittedly pertains to the period for which the sellers are liable, then the Plaintiff would not be in a position to recover the same if the injunction application is disallowed. They only have to make a prima facie case and to show that balance of convenience lies in their favour and if injunction is refused they would suffer irreparable loss. In my view in the facts and circumstances of this case, all three ingredients are present and Plaintiff has clearly made out a case for indulgence by this Court.

In view of such position by means of a short order in the earlier part of the day, the listed application was allowed by restraining Defendant No. 9 from releasing the amount available in the Escrow account till final disposal of this Suit and these are the reasons thereof.

**J U D G E**

ARSHAD/