ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1722 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiffs:	**A.H.M Securities (Pvt) Ltd. & others** **Through Mr. Rehan Kiyani, Advocate.**
Defendant No.1:	**Pakistan Stock Exchange Limited** **Through Mr. Ijaz Ahmed, Advocate.**
SECP:	**Through Mr. Syed Ebad, Advocate.**

1. For hearing of CMA No.12832/2018.
2. For orders on CMA No. 1220/19.

Date of Hearing: **28.01.2019**
Date of Order: **28.01.2019**

O R D E R

Muhammad Junaid Ghaffar J. This is a Suit for Declaration, Damages and Injunction. Through application at Serial No.1, Plaintiff seeks a restraining order against Defendant No.1 from imposing or collecting increased I.T. Charges as per decision taken in Meeting held on 12.03.2018, and consequently suspension of Notice dated 04.06.2018 whereby in somewhat similar manner, the same have been demanded from all the Plaintiffs. Application at Serial No.2 has been filed subsequently under Order XI Rule 12 CPC, and is fixed for orders seeking production of certain documents, on which according to the Plaintiffs, reliance has been placed by the Defendants in support of increase of I.T charges.

2. Learned Counsel for the Plaintiffs submits that through impugned Notice dated 04.06.2018 issued to all Plaintiffs, the Plaintiffs have been asked to opt for any of the four categories from amongst the increased charges of I.T services; whereas, the said decision taken in the meeting on 12.03.2018 is without any lawful authority. According to him the increase is to the extent from a minimum of 290% to a maximum of 524%, which is not only arbitrary; but is also excessive. According to him

the Plaintiffs are already paying the Trading Fee; whereas, no service of any nature is additionally provided; therefore, the principle of *quid pro quo* is applicable and no such charges can be demanded. He further submits that after joining of SECP as a Defendant, they have filed their response and referred to some recommendation of a Consultancy Firm, which is not on record and through application at Serial No.2; the Plaintiff seeks production of such report so as to see justification for such exorbitant increase in the I.T charges. Per learned Counsel there is nothing in the Software, which could be termed as new; nor has any new hardware been additionally provided, which could result in the increase of I.T. charges. He further submits that the increase and the process adopted by Defendant No.1 is clandestine in nature, of which the Court has to take note of. In view of his submission he has prayed for grant of the listed application.

3. On the other hand, learned Counsel for Defendant No.1 submits that initially SECP was not joined as a party; whereas, in Para 9 & 10 of the Plaint, specific plea was taken against SECP, hence Plaintiff has not come with clean hands. According to him reliance on any such reference to a document by SECP is misconceived at least for the injunction application, which was filed prior to joining of SECP, and therefore, Plaintiffs have no case. According to him Plaintiffs are represented on the Board of Directors of Pakistan Stock Exchange / Defendant No.1, as they are holders of Trading Right Entitlement Certificates ("TREC") as well as shareholders; therefore, the allegation that the charges were increased in a clandestine manner is misconceived and not substantiated either from the record or the pleadings. He further submits that it is only 37% of the total cost of providing I.T services, which is being demanded; whereas, the rest of 63% is still being absorbed by Defendant No.1; hence no case is made out. According to him this increase was also approved by SECP; whereas, everything was notified as Defendant No.1 is a Public Limited Company and nothing can be concealed. He further submits that at least 120 out of the approximately 230 members/TREC Holders have already agreed to the revised rates and even certain plaintiffs have also agreed and are paying the increased charges of I.T services. Per learned Counsel insofar as Trading Fee is concerned, it is recovered from the Investors in full, and is never paid by the Plaintiffs; therefore, this is no ground to dispute the increase in I.T charges. He submits that four categories of

members have been notified and the Members, who have lesser volumes of trading of Shares are only required to pay Rs.24,000/- per annum which comes to Rs.2,000/- per month. Therefore, the argument that charges are excessive and arbitrary is misconceived. Per learned Counsel the last time charges were increased was in 2007 and even if the software services have gone cheaper, as contended, the Plaintiffs cannot object to such an increase as still a major portion of the cost is being borne by Defendant No.1. He submits that all ingredients for grant of an injunction are lacking in this matter, whereas, no irreparable loss will be caused, as it is only the amount of money which is in dispute, which could be finally adjudicated at the trial of the Suit. He has prayed for dismissal of the injunction application.

4. Counsel for SECP has adopted the arguments of Counsel for Defendant No.1.

5. While exercising right of Rebuttal, learned Counsel submits that though some of the Plaintiffs as well as others, who have not come before the Court have agreed to pay the increased charges; however, this does not disentitles the remaining Plaintiffs to claim the relief as prayed for. He finally submits that since no additional service is being provided; therefore, charges cannot be increased.

6. I have heard all learned Counsel and perused the record. The plaintiffs grievance in short is in respect of the notice dated 4.6.2018 issued by Defendant No.1, whereby, the Plaintiffs and other TREC holders have been given a timeline to opt for any of the 4 packages offered by them in relation to acquiring I.T. services. This notice is based on some meeting and decision taken on 12.3.2018. The Plaintiffs are aggrieved by both and have filed this Suit on 5.9.2018. Initially when the Suit was filed, only one Defendant i.e. Pakistan Stock Exchange was arrayed, and the entire relief, which was being sought was also against the sole Defendant. However, perusal of prayer clause "C" & "D" reflects that such relief was against *"Defendant No.1"* and not against *"Defendant"*. This is not understandable as when there was only a *"Defendant"*, why the prayer is against "Defendant No.1". It is further noticed that in other prayer clause(s) as well as injunction application, there is correction and overwriting in respect of the same issue, which again leads to the

presumption that when this Suit was being prepared and in fact filed, there were more than one Defendant; but then it was changed; however, proper correction was not made. Sans any explanation to satisfaction, nonetheless, after obtaining ad-interim order and upon filing of counter affidavit on 17.09.2018, the Plaintiff filed an application under Order 1 Rule 10 CPC for joining SECP as a Defendant in this matter. The application was allowed only to the extent of joining SECP vide Order dated 01.11.2018; but without any consequential amendment of the plaint. It further appears that though SECP was not joined as a Defendant initially but in the Plaint in Para-9 while reproducing Regulation 3.4.1 of the Rule Book, the words *with the approval of the Commission* are highlighted in bold and so also underlined and while confronted as to why in such a situation, SECP was not arrayed as a Defendant, learned Counsel contended that this was an honest mistake. However, with utmost respect, in my view this does not appear to be appreciable inasmuch as the prayer clause as well as injunction application reflects that the Plaint was drafted against Defendant No.1, which leads to a presumption that there was another Defendant but while filing the Plaint, the said Defendant was deleted. Why this was done, has though not been explained, but is not a mystery; however, this Court has restrained itself in commenting on such conduct of the Plaintiffs' Counsel. Therefore, in this view of the matter and the discussion hereinabove, any reliance placed on the counter affidavit of SECP and reference to any such report of the Consultancy firm as contended, while arguing the injunction application, does not appear to be correct and justified. This has no merits and accordingly discarded. At the same time application at Serial No.2 is also based upon the same stance, and therefore, again has no legal justification.

7. Coming to the merits of the Plaintiffs' case in respect of decision taken in Meeting dated 12.03.2018 and subsequent Notice dated 04.06.2018, it is an admitted position that before demutualization of Karachi Stock Exchange, and creation of Pakistan Stock Exchange, the Plaintiffs were its members and are now TREC holders. Admittedly, they are duly represented on the Board of Directors of Defendant No.1; therefore, to argue that they were kept in dark and had no knowledge is not an attractive argument. It is also a matter of record that majority of the TREC Holders have no objection to any such increase. Even some of

the Plaintiffs as mentioned in the interim order dated 17.9.2018 have not even sought any injunction as they have agreed to pay the said amount. Insofar as the alleged increase in percentage terms claimed in the plaint is concerned, again the same is on the face of it unjustified and non-supportive so as to impress the Court. The impugned Notice has already categorized the TREC holders in 4 categories, whilst the lowest is being demanded only Rs.2000/- per month additionally, therefore, no case to this effect is made out.

8. Moreover, though learned Counsel has made an effort to argue that Defendant No.1, even otherwise in terms of its Regulations as well as Rule Book has no lawful authority to levy any such charges; however, since long they are paying the said charges and have never objected. It is only when they have been increased that the Plaintiffs have shown any concern. No doubt, there can't be any estoppel against law; nor the Plaintiffs can be restrained from challenging such levy; but at the same time, at least this admittedly denies them any right to claim an injunctive relief. It is to be borne in mind that if a certain provision is introduced in the Ordinance or Law, it remains a valid part of the Statute, unless otherwise, it is clearly demonstrated that it lacks Constitutional authority. It is a settled proposition of law that until and unless a Statute or a part of it, has been held or declared to be ultra-vires, the same remains operative for all intents and purposes. The present applications are to be decided keeping in view the three main ingredients for passing an injunctive order i.e. prima-facie case, balance of convenience and irreparable loss, viz-a-viz law already in field and being acted upon by the Plaintiff for so long. If any act or Rules is challenged being ultra vires, that could only be adjudicated upon at the final stage of the proceedings and not through an injunction application. The grievance of the Plaintiff is otherwise monetary in nature and can well be compensated at the trial stage if the Plaintiff is able to successfully prove its case finally and no injunction can be granted in such a matter.

9. It is needless to observe that principles governing the grant of temporary injunction are now well-settled and in short it can be summarized that before grant of an injunction, the Court must be satisfied that the party praying for relief has a prima-facie case and balance of convenience is in his favour and that refusal to grant relief

would cause him an irreparable loss. If the party fails to make out any of the three ingredients, he would not be entitled to injunction and the Court would be justified in declining to issue injunction. Even where all the three ingredients for grant of temporary injunction are satisfied the relief can still be refused for other reasons. And coming before the Court with *unclean hands, concealment of facts* or *non-joining of a party*, which ought to have been joined at the very first stance, can be one such reason. It is not that the Court must always ignore such conduct of the Plaintiff and if otherwise a case is made out, completely remain oblivious of these happenings. After all the Court is to exercise certain discretion in granting an injunction, and discretion can only yield in favor of one who has come with honest and true facts before the Court. Here in this matter perusal of Para 9 of the Plaint clearly reflects that much stress was laid on approval of Commission, before any increase in charges could be made. This was typed in bold letters with underlining, and despite this SECP was not joined as a party. Though it can be argued on behalf of the Plaintiff that this may not have much effect on the merits of the case; however, the entire emphasis of the learned Counsel has been the response of SECP and the reference to some report of the Consultant. Nonetheless, this Court is of the view that this was purposeful and intentional. The reasons for doing this are very obvious and known to all concerned; but at the same time are unfit to be printable. Moreover, this Court must show restraint by not commenting any further, as it would definitely require discussion on the overall conduct before the Court which may have serious repercussions which are presently unwarranted at this stage of the proceedings. But it would suffice to observe, that whilst exercising discretion this definitely has a bearing on the grant of or refusal of an injunctive relief.

10. The Hon'ble Supreme Court of India in the case reported as ***Dalpat Kumar v. Prahlad Singh*** **(1992)1 SCC 719** has been pleased to dilate upon this issue of all three ingredients for grant of an injunction viz. a. viz the conduct of the party seeking such an injunction in the following terms:

> "the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the

> conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima-facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima-facie case is not to be confused with prima-facie title which has to be established on evidence at the trial. Only prima-facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs, protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status-quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad-interim injunction pending the suit."

11. Thus, in the facts and circumstances of this case, the irreparable loss, if any, which the plaintiff may suffer due to denial of injunction would be negligible compared to the loss which the defendants would suffer on grant of injunction. In my considered view, grant of injunction will not only put the defendants to hardship but will also be oppressive and cause them an irreparable loss. It is not in dispute that the Plaintiffs are being provided the I.T. services without interruption, whereas, if they want, they can have it discontinued; but they have chosen not to do so, as they apprehend losses in running their businesses. When the above circumstances are taken into consideration in their totality, it weighs more in favor of Defendants rather than Plaintiffs. Insofar as Plaintiffs are concerned, there doesn't appear to any case of an irreparable loss, which otherwise is always subject to making out a prima facie case in order to entitle a person to seek interim injunction. It is settled law that unless it is shown that a litigant has a prima facie case, grant of injunction on the plea of irreparable loss would be of no legal significance. In the present case the plaintiffs have miserably failed to make out any such case in their favour; hence injunction application is liable to be dismissed.

12. A learned Single Judge of this Court in the case reported as ***Sayyid Yousaf Husain Shirazi v Pakistan Defence Officer's Housing Authority*** (**2010 MLD 1267**) has been pleased to hold as under;

All three essential ingredients must be fulfilled. Absence of anyone of such ingredients would not warrant grant of injunction. Court at this stage has to make only a tentatively, assessment of the case for enabling itself to see whether three requisites for grant of injunction exist in favour of plaintiff or not. Relief of injunction is discretionary and is to be granted by Court according to sound legal principles and ex debito justitiae. 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 or 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. The term "prima facie case" is not specifically defined in the Code of Civil Procedure. The Judge- made-law or the consensus is that in order to satisfy about the existence of prima facie case, the pleadings must contain facts constituting the existence of right of the plaintiff and its infringement at the hands of the opposite party. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendants if the injunction is granted. It is for the plaintiffs to show that the inconvenience, caused to them would be greater than that which may be caused to the defendants. Irreparable loss would mean and imply such loss which is incapable of being calculated on the yardstick of money.

13. In view of hereinabove discussion and the facts and circumstances of this case, this Court is of the view that Plaintiffs have failed to make out any case for indulgence for grant of an injunctive relief as their case falls outside the settled parameters / ingredients for grant of an injunction, and therefore, both the listed applications were dismissed on 28.01.2019 by means of a short order, and these are the reasons thereof.

Judge

Ayaz P.S.