ORDER SHEET

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

**Suit No.1929 of 2018**

| DATE | ORDER WITH SIGNATURE OF JUDGE |
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| **Plaintiff:** | **Akbar Adamjee through Mr. Khawaja Shams-ul-Islam Advocate.** |
| **Defendant No.1:** | **Performance Automotive (Pvt) Limited Through Mr. Basim Raza, Advocate.** |
| **Defendant No.2 & 3** | **Porsche Middle East & Porshce A.G. Through Mr. Omair Nisar, Advocate.** |
| **Defendant No.4:** | **Collector of Customs (East) Through Mr. Muhammad Bilal Bhatti, Advocate along with Syed Muhammad Raza Naqvi, Deputy Collector MCC Appraisement (East).** |
| **Defendant No.5:** | **Qasim International Container Terminal Limited through Mr. Sohail Muzaffar, Advocate along with Ms. Maimoona Advocate.** |
| **Federation of Pak:** | **Mr. Osman A. Hadi, Assistant Attorney General.** |

For hearing of CMA No.16710/2018 (Under Order 1 Rule 10 CPC)
For hearing of CMA No.16711/2018 (Under Order 1 Rule 10 CPC)
For hearing of CMA No.14489/2018 (Under Order 39 Rule 1&2 CPC)

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| **Date of hearing:** | **29.01.2019-13.02.2019-14.03.2019 24.04.2019-08.05.2019-16.05.2019** |
| **Date of Order:** | **02.07.2019** |

**O R D E R**

***Muhammad Junaid Ghaffar J.*** This is a Suit through which the Plaintiff seeks specific performance of contract dated 15.6.2017 entered into with Defendant No.1, and through application at Serial No.3, a prayer has been made for delivery of Vehicle in question through Nazir of this Court from the Customs authorities with certain directions to Defendant No.1, whereas, applications at Serial No.1 and 2 have been filed on behalf of Defendant No.2 and 3 seeking deletion of their names from the array of Defendants in this Suit. All these applications have been heard together and are being decided through this common order.

2. The precise facts as stated are that Plaintiff entered into a contract / agreement dated 15.6.2017 with Defendant No.1 for purchase of a Vehicle i.e. New Porsche Panamera Turbo S E-Hybrid MY 18 (Model 2018) ("**Vehicle**") for a total sale consideration of USD 336,900/- which has been paid in Pakistani rupees, whereas, even after shipment of the Vehicle from Germany, through Defendant No.2 and 3, and arrival of the same at Karachi Port, on or about 28.4.2018, it has not been delivered. It is the case of the Plaintiff that with malafide intentions and bad faith, Defendant No.1 did not filed Goods Declaration ("**GD**"), and intends to sell the same to another Customer or re-export the same, whereas, the case of Defendant No.1 is that the contract has been cancelled and the amount paid by the Plaintiff has been offered to be refunded along with 6% interest; hence, no question of any performance arises.

3. Learned Counsel for the Plaintiff has contended that a proper contract was entered into with Defendant No.1 and entire sale consideration has been paid, and even after shipment and arrival of the Vehicle, it has not been cleared and delivered to the Plaintiff; that it was agreed that clearance of the Vehicle is the responsibility of Defendant No.1, whereas, any increase and or change in customs duty will not be passed on to the Plaintiff; that the delivery date was December 2017, which has not been honored; that payment of entire amount has been acknowledged vide email dated 21.2.2018; that Vehicle has arrived at Karachi Port on 28.4.2018 and was shifted to NLC Yard of Defendant No.5 on 1.5.2018; that vide email dated 14.5.2018 it was assured on behalf of Defendant No.1 that the same will be cleared and delivered soon; that Defendant No.1 has taken shelter under Foreign Exchange Circular No.7 of 2018 issue by State Bank of Pakistan on the ground that now GD cannot be filed; however, the said Circular has no retrospective effect and therefore this cannot be made basis for refusal of delivery of the Vehicle; that another F.E. Circular No.12 of 2018 dated 13.8.2018 permits clearance of Vehicle in question; that notwithstanding these Circulars, it was the responsibility of Defendant No.1 to immediately file GD and get the Vehicle cleared after payment of duty and taxes which has not been done; that a binding and conclusive contract was entered into by the parties and now on one pretext or the other, with malafide intentions and to gain benefit of the increase in price of the Vehicle and the higher rate of dollar, the Defendant No.1 intends to sell the Vehicle to another customer; that in terms of clause 15 to 21 of the contract, Plaintiff was required to pay the entire sale consideration during certain

period of time which has been done and acknowledged, therefore, no case is made out on behalf of Defendant No.1 to oppose and refuse performance of the contract on technical grounds; that it is not in dispute that the Vehicle was shipped and arrived at Karachi Port much prior to issuance of F.E. Circular 07 of 2018, whereas, even in the said Circular, a cutoff date for filing of GD was provided which has not been met by Defendant No.1; hence, the fault, if any is on the part of Defendant No.1 and not the Plaintiff; that in these circumstances it would not be justified to penalize the Plaintiff who has got a vested right in favor as the entire contract has been performed; that Defendant No.1 has no right to either seek re-exportation of the Vehicle nor can it be sold to anyone else; that in similar circumstances in the case of *Umair Bin Zahid v Dewan Mushtaq Motor Co. Ltd.* Vide order dated 15.3.2010 passed in Suit No.1453/2008 this Court has been pleased to order delivery of Vehicle to the Plaintiff and the said order has been upheld in the case of *Dewan Mushtaq Motor Co. (Pvt) Ltd., v Umair Bin Zahid* (**2015 MLD 1251**); that insofar as the applications filed on behalf of Defendant No.2 & 3 are concerned, they are liable to be dismissed as they are the manufacturers and suppliers of the Vehicle in question, whereas, they have entered into certain correspondence with the Plaintiff in respect of delay in delivery of the Vehicle and Plaintiff is also seeking compensation for such delay; therefore, they are a necessary and proper party, and cannot be deleted from the array of Defendants in this Suit. In support of his contention, he has further relied upon the cases reported as ***Agha Saifuddin Khan v Pak Suzuki Motor Company Limited (1997 CLC 302), Commissioner of Income Tax v Siemens AG (PLD 1991 SC 368), Aroma Travel Services (Pvt) Limited v Faisal Al Abdullah Al Faisal Al-Saud and others (2017 YLR 1579), and Government of Pakistan v M.I. Cheema Dy. Registrar, Federal Shariat Court and others (1992 SCMR 1852).***

4. On the other hand Learned Counsel for Defendant No.1 has contended that the relief being sought through listed application is in fact the entire full and final relief in the Suit; hence, the same cannot be granted a the injunction stage in view of the dicta laid down in the cases reported as *Al Huda Hotels and Tourism v Paktel Limited* (**2002 CLD 218**) and *Islamic Republic of Pakistan v Muhammad Zaman Khan* (**1997 SCMR 1508**) and *United Bank Limited v Ahsan Akhtar* (**1998 SCMR 68**); that the relief being sought on behalf of the Plaintiff is barred in terms of section 12 and 21(a) & (d) of the Specific Relief Act, 1877; hence the same cannot

be granted by this Court in terms of s.56(f) ibid; that the Plaintiff has himself set-up its case that he can be compensated monetarily for non-performance of the contract, therefore, the relief being sought by way of listed application cannot be granted; that the contract is in respect of a moveable property by virtue of s.5 of the Sale of Goods Act, 1930, and as such damages is the only and appropriate remedy for the Plaintiff; that from bare perusal of the contract in question it is clear that the very nature of the same is of a revocable contract; hence, in terms of s.21(d) of the Specific Relief Act, the relief being sought is barred; that in terms of clause 7 of the contract it can be cancelled or revoked at any point of time without assigning any reasons whatsoever, and prior to filing of this Suit on 11.10.2018, it has been revoked, therefore, no performance of such a contract can be ordered; that without prejudice, Defendant No.1 in a bonafide manner has agreed to refund the entire sale consideration along with 6% interest and has already issued a cheque for Rs.38,243,681/- which has been refused without any plausible justification; that as per law settled in the case reported as *Petro commodities Pvt Limited v Rice Export Corporation of Pakistan* (**PLD 1998 Karachi 1**), if a party cannot seek injunction as final relief, then the party is also disentitled to seek a similar relief at an interlocutory stage; that in terms of clause 41 and 54 of the contract, all risks and liabilities of the Vehicle rests with Defendant No.1 till such time the physical possession is handed over; and since it has not been passed over, therefore, the relief being sought is also otherwise barred in terms of Sale of Goods Act, 1930 and reliance may be placed on the cases reported as ***Bank Alfalah Ltd v Neu Multiplex and Entertainment Square Company (Pvt) Ltd., (2015 YLR 2141), Universal Business Equipment (Pvt) Ltd., (1995 MLD 384) and Concentrate Manufacturing Company of Ireland and 3 others v Seven-Up Bottling Company (Private) Limited (2002 CLD 77)***; that it is also the case of Defendant No.1 that the Plaintiff has not fully paid the sale consideration and an amount of Rs.1,458,830/- is still outstanding due to change and increase in dollar exchange rate, therefore, the relief being sought cannot be granted for having defaulted; that without prejudice, the contract in question has now been frustrated in view of F.E. Circular No.2 of 2017 dated 2.2.2017 and F.E. Circular No.7 of 2018 dated 20.7.2018 and cannot be performed due to s.56 of the Contract Act, 1872; that the Vehicle in question was imported by Defendant No.1 from Defendant No.2 & 3 on open account basis, and as such no amount had to be paid or remitted by Defendant No.1 to

Defendant No.2 & 3, whereas, in terms of F.E. Circular 7 of 2018 such type of imports are now disallowed by State Bank of Pakistan, and therefore, the Defendant No.1 is unable to otherwise seek clearance of the same from Customs; that in terms of Foreign Exchange Manual an importer is now required to obtain an Electronic Import Form ("**EIF**") through its Bank ("**Authorized Dealer**") enabling it to seek clearance of the imported goods from Customs, whereas, on 14.9.2018 Defendant No.1 approached its Authorized Dealer for issuance of EIF and also sought exemption from F.E. Circular 7 of 2018; however, such request of Defendant No.1 was kept pending by the Authorized Dealer and after much delay, the same has been refused, whereas, the representation against the same is still pending with State Bank of Pakistan, therefore, no relief of the nature being sought can be granted by this Court; that this has resulted in nonperformance of the contract in question for which Defendant No.1 cannot be blamed; that even all other Vehicles imported by Defendant No.1 in similar fashion are also stranded at the Port and have not been cleared due to such restrictions; that Plaintiffs contention brought before the Court through statement dated 10.04.2019 to the effect that other Vehicles have been cleared from Customs is not correct, as those Vehicles were not imported on open account basis; hence, cannot be made applicable to the case of the Plaintiff; that insofar as the applications of Defendant No.2 & 3 are concerned, Defendant No.1 has no objection to the grant of the same. In view of these submissions he has prayed for dismissal of the injunction application.

5. Learned Counsel for Defendant No.2 & 3 has contended that these Defendants have no concern with the issue in hand as the contract was entered into by the Plaintiff with Defendant No.1, whereas, neither they are necessary parties nor proper parties and this Court while exercising powers under Order 1 Rule 10 of Civil Procedure Code ("**CPC**") may order deletion of the names of Defendant No.2 & 3; that the purpose of exercising such powers is to curtail and shorten the issue before the Court as otherwise this would lead to multiplicity of proceedings which is not appropriate; that notwithstanding the fact that a Plaintiff is a "dominus litis", such discretion of the Plaintiff is circumscribed in law and first it has to show occurrence of a cause of action which is admittedly lacking in this case; therefore the listed application(s) merit consideration and may be allowed in the interest of justice. In support of his contention he has relied upon the cases reported as ***Lawyers Foundation for Justice v Federation of Pakistan (PLD 2019 Lahore***

***43)***, ***Engro Foods Limited v Province of Sindh (2018 MLD 866)***, ***Aroma Travel Services (Pvt) Limited v Faisal Al Abdullah Al Faisal Al Saud and others (2017 YLR 1579)*** and ***Tajuddin v Ferozuddin Ahmed (2010 YLR 256)***.

6. I have heard all the learned Counsel and perused the record. First I would like to deal with the two applications listed at serial No.1 and 2 filed on behalf of Defendants No.2 and 3 under Order I Rule 10, CPC for deletion of their names from the array of Defendants. The precise arguments raised by their Counsel is to the effect that insofar as the contract for delivery of the Vehicle in question is concerned, the same was entered into by the Plaintiff with Defendant No.1 and, therefore, the dispute, if any, is between them and has no concern with Defendants No.2 and 3. However, this argument does not appear to be justified and the matter is not so simple. Defendant No.1 acts as an agent / importer of the Vehicle in question, which is manufactured by Defendant No.3, whereas, Defendant No.2 in Dubai, U.A.E. is also owned and managed for and on behalf of Defendant No.3 handling the shipment of Vehicles in this part of the world. Defendant No.3 is a manufacturer of a renowned Vehicle i.e. "**Porsche**" and for such purposes, it has offices as well as agents worldwide. Perusal of the contract in question dated 15.06.2017 clearly reflects that insofar as Defendant No.1 is concerned, they are acting on behalf of Defendants No.2 and 3 for shipment and delivery of the Vehicle in question. The contract further provides in clause-16 that *50% payment is required in advance to confirm sales contract and remaining 50% upon shipment confirmation of the Vehicle by the manufacturer (Defendant No.3)*. In clause-22, it has been provided that production will be confirmed by *Porsche A.G (Defendant No.3)* upon receipt of booking amount. Clause-34 provides that tentative delivery schedule is six (06) months subject to order booking (which is 50% advance payment) and transfer of funds into ***Porsche bank account***. Similarly, clause-36 provides bill of lading for shipment tracking purposes will be shared through Email after receipt of balance payment from customer, subject to bill of lading being received by PAL (Defendant No.1) from Germany. The precise case of the Plaintiff is that after entering into the contract in question and payment of the entire amount, the Vehicle has not been delivered and so also it has not been shipped on time as per agreed terms and conditions. It further appears that the Plaintiff being aggrieved with the conduct of Defendant No.1 also approached Defendant No.2 through Email dated 09.10.2018 and in fact made a complaint to such effect which was replied through an Email

dated 09.10.2018 by Defendant No.2 wherein they had shown regrets in respect of the service received from Porsche Centre Lahore (Defendant No.1) and offered sincere apologies for the obvious disappointment caused as a result of such complaint. Perusal of this correspondence clearly reflects that though Defendants No.2 and 3 have not entered into a direct contract with the Plaintiff; but it is not in dispute that the Vehicle in question has been manufactured by Defendant No.3 and the corresponding company to attend any complaints for this part of the world is in Dubai i.e. Defendant No.2. The grievance of the Plaintiff as a whole is to the effect that delay has been caused in delivery of the Vehicle and for that purposes, in addition to an injunction, the Plaintiff is also claiming compensation and damages for such delay. This fact that whether the delay was caused due to the conduct of Defendant No.1 or not, can only be determined when both Defendants No.2 and 3 are present before the Court as it is not in dispute that the Vehicle in question has been manufactured and shipped by these two Defendants. It may also be noted that the Plaintiff has bought the Vehicle with the name and brand of ***Porsche*** and has paid huge amount of money to Defendant No.1, having no other choice as they act as the sole and authorized agent / importer of the said Vehicle on behalf of Defendants No.2 and 3 in Pakistan. Therefore, in all fairness, I am of the view that presence of Defendants No.2 and 3 is required as proper parties, if not as necessary parties. Therefore, both these applications filed on behalf of Defendants No.2 and 3 separately are misconceived and, are accordingly hereby **dismissed**.

7. Insofar as the injunction application of the Plaintiff is concerned, the facts have been precisely discussed hereinabove and it is not in dispute that the Plaintiff and Defendant No.1 have entered into a Vehicle order agreement dated 15.06.2017 ("**contract**") in respect of the Vehicle in question having contract reference No. PTH-15-06-004A for a total sale consideration of US $ 336,900. The contract provided a payment schedule and it is not in dispute that the entire payment of this amount has been made by the Plaintiff and to this effect a receipt has been issued on 26.12.2017 by Defendant No.1. Though the learned Counsel for Defendant No.1 has made an attempt that the entire amount has not been paid and there is an outstanding amount of Rs.1,458,830/- against the Plaintiff but the receipt itself, as above, negates such contention and, therefore, I am of the view that this appears to be an afterthought on behalf of Defendant No.1. It further appears to be an admitted position

that though the Vehicle was not shipped as per agreed timeline, however, finally it was shipped through Bill of Lading No. 605792476 dated 9.4.2018 and arrived at Karachi Port on 28.04.2018 on "CPM CAPE MAYOR" and was allotted index No. 146 in the Import General Manifest. Moreover, the arrival of the Vehicle is not in dispute, however, despite such arrival Defendant No.1 in whose name the shipment was affected as a consignee / importer failed to file a goods declaration within time as provided under Section 80 and 82 of the Customs Act, 1969. Section 82 of the Customs Act, provides procedure in case of goods not cleared or warehoused or transshipped or exported or removed from the port within ***twenty days*** after unloading or filing of declaration. It further provides that if any goods are not cleared for home-consumption or warehoused or transshipped or are not loaded on the conveyance for export or removed from the port area within such period of their arrival at a customs station or within such extended period not exceeding ten days, an officer not below the rank of Assistant Collector may allow, and such goods may, after the due notice given to the owner if his address could be ascertained, or after due notice to the carrier, shipping or customs agent, custodian of the goods, as the case may be, if his address could not be ascertained, may be sold in auction or taken into custody by Customs and removed from the port to a Customs warehouse for auction under the order of the Assistant Collector notwithstanding the fact that adjudication of the case under section 179, or an appeal under section 193, or 196, or a proceeding in any court is pending. This provision of law has been apparently violated by Defendant No.1 and there is no justifiable argument put forth on its behalf.

8. It further appears that the Plaintiff kept on approaching Defendant No.1 for delivery of the Vehicle; however, Defendant No.1 failed to get the same cleared from the Customs Authorities and in between F.E. Circular bearing No. 07 of 2018 dated 20.07.2018 was issued by State Bank of Pakistan. The said Circular puts a restriction on imports made on *"open account basis"* for a number of items including Vehicles; however, it also provides an exception to the effect that this restriction will not apply on goods in transit where shipping documents (e.g. Bill of Lading, Airway Bill etc.) have been issued on or before the date of issuance of this Circular; however, GD's against such consignments must be filed by the Importer with the Customs latest by 10.8.2018. Now as could be seen from the facts of this case that admittedly the Vehicle, though belatedly as against the agreed period in the contract, had arrived at port on 28.4.2018,

whereas, F.E. Circular No.7 of 2018 was issued on 20.7.2018 i.e. after 83 days of the arrival of the Vehicle. Not only this, even this very Circular provided a grace period of 21 days to the Importers to file GD's of their consignments for which Bills of Lading had already been issued. Despite such grace period, Defendant No.1 failed to avail the benefit of the same. In fact there would not have been any occasion even to avail such benefit as provided in the said Circular, had Defendant No.1 been vigilant and willing to file GD immediately upon arrival of the Vehicle. While confronted in this regard as to why from 28.4.2018 till issuance of Circular on 20.7.2018, and even thereafter, no effort was made to file the GD and get the Vehicle cleared, no satisfactory response has been given to the Court. The only argument which has been advanced in this regard is that the Authorized Dealer was approached for issuance of E.I.F, but the Authorized Dealer has shown inability to assist Defendant No.1 in presence of Circular No.7 of 2018, whereas, in terms of the Foreign Exchange Manual, and the directions of the State Bank of Pakistan, the representation against such refusal of the Authorized Dealer is now pending for a decision with the State Bank of Pakistan. Firstly, it may be noted that insofar as the Plaintiff is concerned, the contract required to make payment of the amount, whereas, the import was to be made by Defendant No.1. The Plaintiff has made the entire payment, and if, for any reason there is some delay or obstruction in the timely delivery of the Vehicle, the responsibility in this regard is on Defendant No.1 and not the Plaintiff. Secondly and without prejudice to this, it is an admitted position that Defendant No.1 kept on waiting from 28.04.2018 and never filed the G.D for clearance of the Vehicle, and in between the Circular was issued putting certain restrictions. It is not clear as to why such delay occurred; but in any case, this is on the part of Defendant No.1.

9. The question that the Authorized Dealer has refused to issue E.I.F has got nothing to do with the Plaintiff, as well as the Vehicle in question, as the same had arrived much before the restriction was in place. The inability of the Authorized Dealer, if any, is subsequent to the issuance of the Circular and even after expiry of the grace period of 21 days provided therein; and, therefore, Defendant No.1 now cannot take any shelter on the ground that the Authorized Dealer has failed to issue E.I.F and the representation is pending with the State Bank of Pakistan. If Defendant No.1 was sincere in performing the contract in question then immediately would have approached the Customs Authorities or this Court seeking release of the Vehicle and even for condonation and

benefit of the Circular in question. However, this is admittedly not the case of Defendant No.1. In fact, Defendant No.1 conveniently has offered to refund the amount with 6% interest in rupees to the Plaintiff. Such conduct on the part of Defendant No.1 is totally against the conditions of the contract in question. Even if the contract provides that it is revocable, the Court is required to see the facts and circumstances under which such a condition can be invoked by any of the parties. In this matter, entire contract has been performed and at this belated stage when admittedly Defendant No.1 has defaulted and the delay is on its part, any such revocation, even if provided in the conditions of the contract, cannot be unilaterally exercised and such exercise must not be accepted by the Court. During hearing of these applications, concerned Deputy Collector of Customs (East) was summoned, who on 08.05.2019, was present before the Court and submitted that pursuant to Public Notice No.2 of 2016, a Customs Officer of Additional Collector level has powers to even waive the requirement of E.I.F in respect of specific cases to cater for any untoward or unforeseen situations. Admittedly, Defendant No.1 has not approached the Collectorate for seeking permission for filing G.D. The other argument, which has been raised by the learned Counsel for Defendant No.1, is to the effect that the import in this case has been made on ***open account basis*** and in such a situation, Defendant No.1 is not supposed to pay or remit any amount to the supplier i.e. Defendant No.3 and, therefore, now the only option available is to re-export the Vehicle in question to the shipper, as Defendant No.1 cannot obtain EIF now and make remittance of the amount which is not supposed to be sent to Defendant No.3. However, this argument is belied when the same is examined vis-à-vis the conditions of the contract in question. In clause-16, as already noted hereinabove, it has been provided that 50% payment is required in advance to confirm sales contract and the remaining 50% upon shipment confirmation of Vehicle by the manufacturer. Similarly, clasue-34 provides that tentative delivery schedule is six (06) months subject to order booking on 50% advance payment and ***transfer of funds into Porsche bank account***. Now if the amount is to be transferred into Porsche bank account then how the argument could be advanced that this is an import on ***open account basis*** and no remittance has to be made to Defendant No.3. Therefore, even this argument cannot be sustained as the same is contradictory in nature and against the very conditions of the contract in question.

10. There is another aspect of the matter, which has though not been argued but needs to be looked into by this Court being a question of law. State Bank of Pakistan has, while issuing F.E Circular No.07 of 2018 on 20.07.2018, (whereby certain restrictions have been placed on import of various goods), though giving a cut-off date that the consignments for which bill of ladings have been issued prior to 20.07.2018; but for which G.Ds are filed by 10.08.2018, will not be affected by the issuance of this Circular. Insofar as the protection of the bill of ladings issued prior to 20.07.2018 is concerned, the same appears to be within the mandate of Para 4 of the Import Policy Order, 2016, and the proviso thereof, which is squarely applicable to the facts of this case. The proviso to Para 4 ibid provides that *the amendments brought in this Order from time to time shall not be applicable to such imports* ***where Bill of Lading (B/L)*** *or Letters of Credit (L/C) were issued or established prior to the issuance of amending Order*. Though in this matter there is no amendment in the import policy, but even if the Circular in question is to be treated as an amendment putting some restriction on the import, the import in question is covered and protected and must not be affected by the issuance of the said Circular, as the Bill of Lading is prior to issuance of the said Circular. It is settled law that in cases of imports, wherein, letters of credits are duly established or imports have been affected by issuance of Bills of Lading or Airway Bill, they are always protected from any subsequent change or restriction in the Import and or Export of any commodity, as the case may be. The proviso as above is in line with it. Therefore, in the circumstances, at the same time putting restriction to file G.Ds within a prescribed date, does not appear to be in consonance with Para 4 and its proviso to the Import Policy Order, 2016. In this matter, the second part of F.E. Circular in question, whereby it has been stated that benefit of the same will only be available to bill of ladings issued prior to 20.07.2018 and for which G.Ds are filed by 10.8.2018 does not appear to be lawful, and therefore, cannot be approved by this Court. In this case admittedly the bill of lading has been issued on 9.4.2018 i.e. much prior to the issuance of circular on 20.07.2018, and therefore, for all legal purposes the import in question is fully protected and the importer cannot be compelled to file his G.D by a certain date and if not then the benefit of cut-off date would not be available.

11. This is against the settled principles of law as approved in various cases of this Court as well as the Hon'ble Supreme Court. The Lahore High Court in the case of ***Kaghan Impex v. Central Board of Revenue***

***& Others*** **(PLD 1982 Lahore 608)** had the occasion to examine an amendment made in the Import Policy Order, whereby in terms of SRO dated 13.10.1980 an amendment was made in Para 8(4) of the Import Policy Order, 1980, which resultantly read as *"Import of goods from India (including goods of Indian Origin from any country) will be allowed to public sector agencies"***.....,** whereas, previously the words read as *"Import of goods from India (including goods of Indian origin) will be allowed to public sector agencies"…* The petitioner imported its consignment from Singapore prior to the amending SRO dated 13.10.1980, however, when it arrived in Pakistan, the same was confiscated on the basis of the amending Notification that goods from India and of Indian Origin from any country are no more importable by the private sector. The learned Lahore High Court was pleased to hold as under:

> The change in the import Policy Order, *1980,* through the amending provisions cannot affect past and closed transactions and the petitioners have a vested right to demand that their case be decided according to the law as it existed when the action was begun, unless the amendment shows a clear ; intention to the contrary. I am, however, of the considered view that the amendment does not operate retrospectively. Reference may also be made to *B. G. N. Bhandari v. Rehabilitation Authority, Lahore (2)* and *Ahmad Ali Khan v. Muhammad Raza Khan and others (3),* wherein it was held that a subsequent change in the law cannot affect past and closed transactions.

12. In appeal the matter went before the Hon'ble Supreme Court and the case is reported as ***Central Board of Revenue v. Messrs Kaghan Impex and another*** **(PLD 1989 SC 463)**, wherein the Apex Court observed as under;

> There is force in these submissions. As already stated the ban contained in the Import Policy Order, 1979, was directed only to goods of Israel, South Africa, Taiwan a province of the People's Republic of China, Rhodesia or goods originating from any of these countries. It was only later on i.e. on 13-10-80 that a similar ban was imposed for the first time in relation to goods originating from India. The Government apparently was becoming wiser by lapse of time and by stages, but the amendment made on 13-10-1980 could not, as rightly pointed out by the High Court, apply to the goods E which were imported much earlier.
>
> In the result when the disputed goods were imported by the respondents and arrived in Pakistan notwithstanding the fact that they were goods of Indian origin having been imported not from India but from another country (Dubai) they were not liable to confiscation in terms of Import Policy Order, 1979, then in force.

13. Similarly in the case reported as ***Government of Pakistan through Ministry of Finance v Manzoor Brothers*** (**1995 SCMR 516**), the Hon'ble Supreme Court had the occasion to examine the judgment of the learned Lahore High Court in respect of a similar situation, wherein, on the basis of a Ruling dated 15.8.1993 issued by the Chief Controller of Imports and Exports, the clearance of consignments for which the Bills of Entries were filed prior in time i.e. on 20.2.1983 and 31.5.1983, was withheld by the Customs, and the Apex Court approved the observations of learned Lahore High Court in the following manner;

> In this case, the respondent firm had presented the Bills of Entry in one case on 20-2-1983 and in the other on 31-5-1983. The Policy ruling was given on 15th August, 1983. This ruling could not affect goods imported before 15-8 1983. We, therefore, agree with the following observation of the High Court:
>
> > "The present goods were imported in March 1983 and if at all the ruling of the Controller-of Imports and Exports had to be applied, it should only have been in respect of imports made on or after 15-8-1983 which was the date of the ruling of the Controller. The application of the Controller's decision retrospectively on the case of the petitioner cannot be permitted, because the goods were imported by the petitioner around March 1983."
>
> No good ground for interference with the orders of the High Court has been made out. Accordingly, these appeals must be dismissed. No costs.

14. In this case it is not in dispute, rather an admitted position that the date of Bill of Lading is much prior in time. It is not in dispute that import has been effected and is lying at the Container Terminal of Defendant No.5. Therefore, in the given facts even if the Circular dated 20.07.2018 issued by SBP treated as a restriction under Para 6 of the Import Policy Order, 2016, (and this is without touching merits to the effect that whether such a letter falls within this clause), the same is even otherwise, not applicable on the import in question as per the Proviso to Para 4 of the Import Policy Order, 2016.

15. Now coming to the case law relied upon by the learned Counsel for Defendant No.1, and the objection regarding grant of the relief being claimed by the Plaintiff and the bar contained in various provisions of law including Specific Relief Act and the Contract Act as claimed and alleged. Firstly, it is to be noted that per settled law, while granting or refusing a relief in a case of specific performance, the Court has to first look into the very peculiar facts of each case, and then to make up its

mind, either to grant the same or not. At the same time it may also be noted that such relief is discretionary in nature and it is not mandatory upon the Court to grant such relief. The Hon'ble Supreme Court in the case of ***Liaqat Ali Khan and others v. Falak Sher and others*** (**PLD 2014 SC 506**), has observed that "….***the things as regards powers of the Court in exercising its discretion, become even more clear that there is no two plus two, equal to four formula available with any Court of law for this purpose, which can be applied through cut and paste device to all cases of such nature. Conversely, it will be the peculiar facts and circumstances of each case, particularly, the terms of the agreement between the parties, its language, their subsequent conduct and other surrounding circumstances, which will enable the Court to decide whether the discretion in terms of section 22 (ibid) ought to be exercised***....."

16. The case of ***Universal Business Equipment (Supra)*** has no relevance with present facts as in that case it was an issue pertaining to an agency agreement which had a fixed tenure and was terminated, and therefore the Court came to the conclusion that in such cases damages is the appropriate remedy and specific performance cannot be ordered. In the case of ***Bank Alfalah (Supra)*** there was no formal contract between the parties, and therefore the Court refused to grant indulgence. In the case of ***Concentrate Manufacturing Company (Supra)***, the claim was in respect of protection under s.202 of the Contract Act, as well as assignment of a Trademark as claimed, and therefore the Court was of the opinion that no performance can be ordered. Again in the case reported of ***Al-Huda Hotel (Supra)*** there was no formal contract signed between the parties and therefore the Court was not inclined to grant the relief as prayed. The case of ***Islamic Republic of Pakistan (Supra)*** was in respect of a service contract and has no relevance with the facts of the present case. On the other hand in this matter neither the Contract is in dispute, nor the amount agreed between the parties and its entire payment, whereas, it has been fully performed by Defendant No.1 except clearance of the Vehicle from Customs showing inability on the ground of issuance of F.E. Circular 07 of 2018. Therefore, due to peculiarity of the facts in this case, the case law relied upon on behalf of Defendant No.1 are not applicable as being distinguishable on facts.

Comment [J1]:

17. On the other hand learned Counsel for the Plaintiff has placed reliance on the cases which are based on almost similar facts and need to be considered in deciding the listed application. In the case of **Agha Saifuddin Khan (supra)**, a learned Single Judge of this Court has been

pleased to grant injunction in somewhat similar facts, wherein the plaintiff before the Court had come up with a prayer for a mandatory injunction for issuance of directions to the Nazir of this Court to collect one Potohar Jeep from defendant No.1 on deposit of balance sale consideration and thereafter deliver the same to the plaintiff. The precise facts were that on 14.07.1994, plaintiff booked a Potohar Jeep from the defendants and paid Rs.25,000/- as part consideration, whereas, the balance amount of Rs.382,000/- was to be paid before the delivery of the vehicle. There was delay in the delivery of the vehicle on the ground that there was no delivery time fixed, whereas, the price was tentative and was supposed to be enhanced subsequently. The learned Single Judge in that case came to the conclusion that the stance of the defendant is not justified and considerable time had passed but the vehicle was yet to be delivered, and therefore, the injunction application was allowed by directing the plaintiff to deposit the agreed sale consideration with the Nazir of this Court and thereafter also execute a bank guarantee of the disputed amount and upon fulfilling of these two conditions, Nazir was directed to collect the vehicle as per agreement from the defendant and deliver the same to the plaintiff and thereafter defendant No.1 shall be entitled to withdraw the balance sale consideration deposited by the plaintiff. The relevant findings of the learned Single Judge are contained in para 6, 7, 12, 13 and 14 and reads as under:

> **“** 6. The reliefs sought by the plaintiff through the present application are in the nature of mandatory injunction which is provided under section 55 of the Specific Relief Act, 1877 as well as in Order XXXIX, Rule 10, C.P.C. This section provides discretionary powers to the Court to grant an injunction which the Court is capable of enforcing in order to prevent breach of an obligation and when it is necessary to compel the performance of certain acts. There is no other provision available in the Civil Procedure Code, 1908 for granting a mandatory injunction. The Courts have granted such relief after resorting to the provisions of section 151, C.P.C. However, this Court has considered application of sections 94 and 151, C.P.C. in the case of Mst. Salina Jawaid and 3 others v. S.M. Arshad and 7 others (PLD 1983 Karachi 303) where one of the questions involved was grant of injunction as well as appointment of receiver in a suit where minors were also party. In this reported case, it was held by this Court as follows:--
>
> > "...It is not possible and I also do not consider it prudent to specify or identify the various situations or reasons, where or when the Courts will exercise their inherent powers under section 94 or section 151, C.P.C. for granting a temporary injunction or appointing a receiver. In each case the Court evaluates the overall situation considering the peculiar facts and circumstances on record and then the decision is taken whether in the interests of justice inherent powers are to be exercised or not. Each case has its own different set of facts and again and again new situations come before the Courts and, therefore, I may repeat, it is not possible to lay down specific principles restricting the power of Courts to exercise their inherent, jurisdiction in certain specified situations or for certain reasons only. If this were done, it would only impede the administration of justice and restrict the development of law. "
>
> 7. The above view as held in the case of Mst. Salina Jawaid (supra) was approved by a Division Bench of this Court comprising of Mr. Ajmal Mian and Mr. Mukhtar Ahmed

Junejo, JJ, (as their lordships then were) where it was held "that in .a fit case the Court may grant interim injunction even if the case does not fall within the four corners of the well-settled principle under Order XXXIX, Rules 1 and 2, C.P.C. if the facts of the case so demand, C in order to foster the cause of justice". (Balgamwala Oil Mills (Pvt.) Ltd. v. Shakarchi Trading A.G. and 2 others PLD 1990 Karachi 1). The cases cited by Mr. Muhammad Maqsood are not relevant as in the case of Muhammad Raza the question, of breach of contract and damages was involved. In the present case, the defendants have neither denied to deliver the Potohar Jeep nor have pleaded breach of contract. The case of the defendants is that they are prepared to deliver the said jeep but on a date as convenient to them and on payment of market price as determined by them. The rule laid down in the case of Messrs Abdul Razzak & Company is also of no help to the defendant No. i . In the last reported case, it was held by this Court that the material relief in the suit being the relief for the refund of Rs.2,00,000 which was, maintainable, therefore, the relief with regard to the declaration and permanent injunction became redundant in the circumstances of the suit.

8. .....

9. .....

10. .....

11. .....

12. It appears from the agreement between the parties that time period for delivery of car is mentioned in the agreement. The delivery of the car in any case is to be made to the buyer by the seller. It must be done either at the appointed time and if no time is fixed then within reasonable period as required under section 36(2) of the Sale of Goods Act which lays down that:

> "Section 36(2).--Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. "

In the instant case, since the plaintiff himself is asking for delivery of car after expiry of a period which can be treated as reasonable, therefore, considering the circumstances, the defendant No. I cannot refuse his request that no time for delivery is fixed when the circumstances of the case suggest that cars were delivered to others in preference to the plaintiff without any justification. Finally, one cannot ignore the fact that the defendant No. I is the only company which produces cars of the description in Pakistan and it is not possible to get such car from any other manufacturer which further justifies the claim of the plaintiff for specific performance against the defendants.

13. Here, it would be advantageous to refer the case of Adamjee Paper and Board Mills Limited v. Maritime Agencies (1984 CLC 440) where a learned Single Judge of this Court Mr. Zaffar Hussain Mirza, J. (as his lordship then was), after referring to the provisions of Order XXXIX, Rule 10, C.P.C. and to section 94 of the C.P.C., held that such interlocutory orders ought to be made by the Court when it is "just or convenient". In this reported case, the plaintiff placed an order for supply of wood pulp with a supplier in Sweden which were to be shipped from U.S.A. to Pakistan through a Letter of Credit. The plaintiffs alleged that the defendants failed/neglected to issue the delivery order without any justification and therefore they filed a suit for declaration that under the Bill of Lading the defendants are bound to deliver the goods to the plaintiff and with the further prayer for issuance of a mandatory injunction directing the defendants to deliver the goods to the plaintiff after realising usual port and custom dues. Alongwith the suit, the plaintiffs also filed an application with the similar prayers as of the instant application in the present case In view of the facts alleged in the reported case, this Court passed the following order"—

> "The next question, therefore, in the present case is whether the interlocutory order for direction to deliver the goods to the plaintiffs is necessary for the protection of some rights of the plaintiffs. The glaring fact is that the goods were imported by- the plaintiffs for use as industrial raw material in their paper manufacturing factory. It is, also true that there are very few paper mills in the country and that there is shortage of paper. In these circumstances the anxiety and the urgency shown by the plaintiffs to obtain the consignment at the earliest is patently understandable----------

> ----------In this view of the matter I have come to the conclusion that the plaintiffs have made out a strong prima facie case and a special equity in their favour for interlocutory relief. Having regard to the circumstances of this case, as discussed above, I am clearly of the opinion that it would be just and convenient to order delivery of the goods by the defendants to the plaintiffs. But in order to protect the rights of the defendants the plaintiffs must be required to furnish a bank guarantee for an amount of Rs. 11 lacs to be applied to the payment of the amount found due and payable by the plaintiffs to the defendants on the decision of this suit. "
>
> 14. No doubt against the column "tentative delivery period" in Annexure-B, the words "six months" have been mentioned which have not been denied by both the parties. From the date of booking till filing of the suit (September, 1995) 14 -months have passed and there is no plausible explanation or reason given by the defendants for such delay. In my view; the term "tentative period of six months" may justify the defendant No. I to extend the period of delivery from six months to seven, eight or nine months but this does not empower the seller to extend the delivery up to an indefinite period without assigning lawful reason or justification. The same principle is attracted while interpreting the word "provisional". Here also the defendants are liable under the law to give some good and plausible explanation for enhancement of price. In view of the above discussion of facts and law, I am of the view that the plaintiff has made out a case for the relief as prayed in the application. Accordingly, this application is granted in the following terms:-
>
> (i) That the plaintiff is directed to deposit the balance sale consideration of Potohar Jeep amounting to Rs.3,57,000 with the Nazir of this Court within one month.
>
> (ii) That the plaintiff shall also execute a bank guarantee within a week for a sum of Rs.54,000 with 14 % mark-up to the satisfaction of the Nazir of this Court with the condition to deposit the said sum as mentioned in the guarantee with this Court, in case if his claim in the suit is dismissed, to be paid to the defendant No: 1 if found entitled.
>
> (iii) After compliance of the conditions (i) and (ii) the Nazir of this Court will collect the Suzuki Potohar Jeep of white colour and as of same qualification and specification as mentioned in Annexure-B to the plaint from the defendants and shall deliver the same to the plaintiff.
>
> (iv) The defendant No. I shall be entitled to withdraw the amount as mentioned in term (i) above without prejudice to their defence.
>
> (v) In view of the peculiar circumstances of this case, I direct the office to' fix this suit for regular hearing within six months after framing of issues. **”**

18. Similarly, in Suit No.1453 of 2008, a learned Single Judge of this Court (Sajjad Ali Shah, J as his lordship then was) in somewhat similar circumstances vide order dated 15.03.2010 was pleased to pass a mandatory injunction in respect of a vehicle namely Mitsubishi Pajero. The dispute again was in respect of the delay on the part of the defendant, and after considering the contentions of the respective counsel, the learned Judge was of the view that the injunction ought to be granted. The relevant findings are as under:

> **“** On merits the scrutiny of the record reflects that there is only one document available on record whereby the Plaintiff No.3 i.e. Leasing Company had placed an order upon the Defendant No.1 titled as “Confirmed Purchase Order”. A perusal of this document reflects that the Plaintiff No.3 on 21.04.2008 on behalf of Plaintiff No.1 had placed upon Defendant No.1 an order for 2.8L vehicle for a total price of Rs.44,99,000/- in terms of the quotation given by Defendant No.2. There is not a single document on record to show that Plaintiff No.3 ever made any variation in the said Confirmed Purchase Order. The plea of Defendant that the Leasing Company on account of non-availability of 2.8L vehicle negotiated for 3.2L vehicle and then again reverted to 2.8L vehicle does not appear to be

confidence inspiring as there is no documentary evidence to support such negotiation and further that after placing confirmed purchase order and effecting full payment in consequent to the "vehicle lease agreement" with its customer there cannot be an occasion of negotiation to vary the "Confirmed Purchase Order" and that too orally.

In addition, the plea of the Defendant No.1 that since balance payment was not effected, therefore, order for import of vehicle was not placed is also contradictory to their own record on many counts. Firstly, the Provisional Sale Order Form No.000619 dated 24.04.2008 placed on record by the Defendant No.1 contained the following note:

"Balance payment is paid after arrival of vehicle in Pakistan".

Therefore, there was no occasion for Defendant No.1 to demand such payment even before placing the order. Secondly, per Defendants' own version after negotiations the sale order for 2.8L vehicle was confirmed on 06.06.2008 and the additional duty was imposed on 02.09.2008 but the Defendant No.1 till-date did not place order on their Principal for the import of Plaintiff's 2.8L vehicle. Thirdly the vehicle now offered to the Plaintiff which matches the specification of Plaintiff's vehicle has been imported under "Vehicle Lease Agreement" with M/s. AlBarka Islamic Bank as evident from the Bank letter dated 03.04.2009 without accounting for Plaintiff Rs.44,99,999/- retained by the Defendant No.1 since 25.04.2008.

In view of this position, even if the Defendant No.1 is directed to handover 2.8L vehicle to the Plaintiff pending determination of liability to pay additional regulatory duty such vehicle would carry the encumbrance of M/s. AlBarka Islamic Bank and in case the Defendant No.1 fails to liquidate the liability of Bank it will entitle the Bank to the custody of "2.8L vehicle" and this position has arisen due to misconduct on the part of the Defendant No.1 whereby it wrongfully retained the Plaintiff's money in the sum of Rs.44,99,000/- for almost two years for its own benefit.

In the circumstances to equate the parties on all fours, the Defendant No.1 is directed to handover the custody of the said vehicle after getting it released from Custom bounded warehouse (upon payment of all duties and taxes) to the Nazir of this Court within fifteen-days hereof alongwith no dues certificate from M/s. AlBarka Islmic Bank. In case the defendant No.1 fails to obtain no dues certificate from the said Bank then it shall deposit a sum of Rs.44,99,999/- with the Nazir of this Court in order to secure the financing of M/s. AlBarka Islamic Bank. Nazir upon receipt of vehicle alongwith no dues certificate from M/s. AlBarka Islamic Bank or deposit as directed shall handover the custody of the said vehicle to the Plaintiff after obtaining surety to his satisfaction in the sum of Rs.23,50,000/- in order to secure the amount, if the Plaintiffs ultimately are found liable to pay the custom duties and taxes, etc. **"**

This order of the learned Single Judge was challenged in High Court Appeal No.53 of 2010, and a learned Division Bench in the case of *Dewan Mushtaq Motor Co. (Pvt.) Ltd. v. Umair Bin Zahid and 7 others* reported as **2015 MLD 1251** was pleased to dismiss the said appeal of the defendant.

19. Insofar as the argument that the Plaintiff through listed application is seeking the entire and full relief at this stage of the proceedings which according to the learned Counsel cannot be granted in view of the precedents to this effect is concerned, it may be noted the same is misconceived inasmuch as in this case admittedly the Vehicle has not been delivered and apparently the timeline has not been met or satisfied, and for this reason the Plaintiff is also claiming damages as well as compensation etc. However, this does not entail the Defendant

No.1 to avoid and perform its part of the contract, which apparently has been done almost fully except clearance of the Vehicle and its delivery. Therefore, grant of listed application would not amount to granting the entire relief at the injunction stage as contended.

20. In view of hereinabove facts and circumstances of this case I am of the view that the Plaintiff has made out a prima case for grant of an injunctive relief, and balance of convenience lies in his favor, and if the injunctive relief is not granted, he will suffer irreparable loss and injury, whereas, Defendant No.1, is already enjoying an advantageous position as the entire payment has been made, as against the Plaintiff who is out of pocket as well as the Vehicle. Therefore, this appears to be a fit case to grant mandatory injunction in favor of the Plaintiff in the following terms.

(i) The Defendant No.1 is directed to immediately file GD with Defendant No.4, who is directed to process the same without being influenced with F.E. Circular No.7 of 2018 as the same is not applicable on the import in question for which Bill of Lading has already been issued on 9.4.2018. If needed, Defendant No.4 may also exercise the powers conferred upon the Additional Collector pursuant to Public Notice No.02/2016 for exemption from issuance of EIF.

(ii) The Customs Duty / taxes and all other charges for clearance are to be paid by Defendant No.1 as already agreed in the contract.

(iii) The Defendant No.4 and 5 shall ensure that in any case the Vehicle in question is not delivered to Defendant No.1 or anyone else on its behalf, after the GD is out of charge, or even for the purposes of Re-export, and shall be handed over to the Nazir of this Court once the same is processed and is out of charge and ready for delivery.

(iv) The Nazir of this Court after obtaining delivery as above shall hand over the Vehicle to the Plaintiff upon proper receipt. Nazir's fee is settled at Rs.30,000/- which shall be paid by the Plaintiff.

(v) Before delivery of the Vehicle to the Plaintiff, the Nazir shall obtain a Bank Guarantee for an amount of Rs.1,458,830/- to secure the claim of Defendant No.1 in respect of sale consideration due to

fluctuation of rate of exchange as claimed. The fate of this Bank Guarantee will be subject to final decision of the Suit.

21. Applications bearing CMA Nos.16710 and 16711 of 2018 are dismissed, whereas, CMA No.14489/2018 is allowed in the above terms.

**Dated: 02.07.2019**

**J U D G E**

Ayaz P.S. t