P L D 2015 Sindh 142

Before Muhammad Shaft Siddiqui, J

PAKARAB FERTILIZERS LIMITED.---Plaintiff

Versus

DAWOOD HERCULES CORPORATION LIMITED through Secretary and 8 others---Defendants

Suit No.359 of 2013, decided on 23rd October, 2014.

(a) Civil Procedure Code (V of 1908)---

---O. XXXIX Rr. 1 & 2 ---Specific Relief Act (1 of 1877) S. 12---Suit for specific performance of agreement to sell---Sale-purchase contract-Memorandum of Understanding-Enforceability/specific performance of such Memorandum of Understanding when it fulfilled essential pre-requisites of a valid contract-Scope-Plaintiff/purchaser sought to purchase entire shareholding of defendant company; and executed a Memorandum of Understanding; and thereafter paid a specific amount to the defendants-Contention of plaintiff/purchaser was inter alia that in violation of binding obligations of the said MOU, the defendants refused to transfer shares to the plaintiff and returned the amount paid by the plaintiff---Plaintiff/purchaser through presented application under O.XXXIX, Rr.1 and 2, sought to restrain the defendants from alienating their shareholding in the Company during the pendency of the suit for specific performance-Contention of defendants was that said MOU was not a binding agreement but merely a precursor for which no specific performance could be sought---Held, that the MOU document, when seen on the touchstone of the definition of an "agreement" or contract, provided all material terms which were the pre-requisites in formulating a valid contract---For a valid contract, a consensus of the parties on material terms was a pre-requisite and "acceptance" only had to be unqualified and unconditional-Document in question may have been described as a "Memorandum of Understanding" ("MOU"), however a prescribed form was not a pre- requisite in reaching to a conclusion that a valid agreement had been formulated, therefore, argument to the effect that the MOU was merely an agreement to enter into an agreement, was far stretched-Insofar as arguments in relation to contingent terms of the MOU, such as obtaining permission for "Mushariq" financing and due diligence, were concerned, High Court observed that some of the terms of the MOU may not be independent, but such contingent terms or the contingent contract, could not rule out the application of specific performance---High Court further observed that it was not always the case that a MOU could be considered as a document on basis of which an agreement was to be reached, and the same depended upon its content and the desires of the parties executing such an understanding---Only intention of parties which was to be construed while considering the document relied upon for specific performance---Language of such a document established its status---Intention of drawing a formal agreement subsequent to the MOU which otherwise fulfilled all pre-requisites of an agreement , if existed, then the same did not override the binding nature of the earlier document which may be named as the MOU---High Court held that the plaintiff/ purchaser had a prima facie case, and balance of convenience lay in plaintiff/purchaser's favour, and that in case a temporary injunction was refused, the plaintiff/purchaser would suffer irreparable loss---Application for temporary injunction was allowed, in circumstances and the defendants were restrained front alienating/transferring their shareholding in the Company.

> Dewan Development (Pvt.) Ltd. v. Messrs Mybank Ltd. 2011 MLD 1368; Pakistan Industrial Development Corporation v. Aziz Qureshi PLD 1965 W.F. Kar. 202 and Ahmad Khan Bhatti v. Masooda Fatimia PLD 1981 Kar. 398 rd.

Bashir Ahmad v Muhammad Yousaf 1993 SCMR 183; Mussarat Shaukat Ali v. Safia Khatoon 1994 SCMR 2189; Panna Lal v. Nihai Chand (AIR 1922 Privy Council 47: Ahmad Khan Bhatti v. Masooda Fatimia PLD 1981 Kar. 398; Fourth Edition 2010 of Aiyar's Major Law Lexicon; Dresser Rand S.A. v. Bindal Agro Chem Ltd. (2006) 1 SCC 751; Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd. [1975] 1 All ER 716 and Elahi Bakhsh v. Muhammad Iqbal 2014 SCMR 1217 ref.

(b) Contract Act (IX of 1872)---

----Ss.2(h) & 37---Specific Relief Act (I of 1877), S.12---Memorandum of Understanding-Enforceability/specific performance of such MOU when it fulfilled essentials pre-requisites of a valid contract---Scope--For a valid contract, a consensus of the parties on material terms was a pre-requisite and "acceptance" only had to be unqualified and unconditional---Document in certain circumstances may be described as a "Memorandum of Understanding" ("MOU"), however a prescribed form was not a pre-requisite in reaching to a conclusion that a valid agreement had been formulated---Some of the terms of a MOU may not be independent, but such contingent terms or the contingent contract could not rule out the application of specific performance--- Was not always the case that a MOU could be considered as a document on basis of which an agreement was to be reached, and the same depended upon contents and the desires of the parties executing such an understanding---Only intention of parties was to be construed while considering the document relied upon for specific performance---Language of such a document established its status---Intention of drawing a formal agreement subsequent to the MOU which fulfilled all pre-requisites of an "agreement", if existed, then the same did not override the binding nature of the earlier document which may be named as the MOU.

Dewan Development (Pvt.) Ltd. v. Messrs Mybank Ltd. 2011 MLD 1368; Pakistan Industrial Development Corporation v. Aziz Qureshi PLD 1965 WP Kar. 202 and Ahmad Khan Bhatti v. Masooda Fatimia PLD 1981 Kar. 398 rel.

Khalid Anwar along with Mustafa Ali for Plaintiff. Kazim Hassan for Defendants Nos. 1 to 6.

Dates of hearing: 3rd and 9th October, 2014.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---This application under Order XXXIX, Rules 1 and 2, C.P.C. is in respect of interim relief to restrain the defendant No.1 from selling, disposing, alienating, creating third party's rights or otherwise dealing with 100% shares of the defendant No.2.

Brief facts of the case are that the plaintiff, which is a public limited company dealing in manufacturing/marketing of compound fertilizers, decided to purchase the shares/entire shareholding of defendant No.2 held by defendant No.l. Defendant No.1 is a public limited company and is also holding shares in various companies including the defendant No.2.

It is the case of the plaintiff that the defendant No.1 has agreed to sale 100% shares of defendant No.2 to the plaintiff and in this regard in order to show the seriousness the plaintiff had paid a sum of Rs.500 Million and further a sum of Rs.600 million was also deposited in an account, which is claimed to be an escrow account opened and maintained by defendant No.7 for the purpose of the transaction under consideration. However, learned counsel for the plaintiff submits that in violation of such binding obligations, the defendant No.1 refused to transfer the shares to the plaintiff and further that without any lawful

justification the said amount of Rs.500 Million was transferred back to the plaintiff. It is the case of the plaintiff that since the plaintiff and defendants Nos.1 and 2 operate in the same industry, therefore, after acquiring such shares they would have increased their output/ profitability and other related advantages and since the setup of defendant No.2 is such which could have catered to supplement such goals, therefore, the plaintiff entered into such negotiations and transaction.

Learned counsel for the plaintiff in support of above understanding and negotiation submitted that it took them several months to agree upon the sate consideration, which was agreed to be Rs.7,500,000,000 only. It is further contended that out of above amount a sum of Rs.2,700,000,000 was to be paid in cash subject to adjustment, if any, and the remaining was the assumption of financial facilities (Musharika financing) availed by defendant No.2 which at that point of time was Rs.4,800,000,000. It is further contended by the learned counsel that a syndicated facility in the sum of Rs.2,070,000,000 was agreed to be cleared by defendant No.1 in terms of clause 4.1.

Learned counsel further argued that once such material terms were concluded, the parties held' a meeting which included but not limited to the Chairman and other directors of the plaintiff and chairman, CEO and other directors of defendant No. 1. It is the case of the plaintiff that defendant No.3, who in fact is the principal owner (if at all veil of incorporation is lifted) of the company, has agreed to all material terms, referred above.

Learned counsel further submitted that in pursuance of such negotiations and agreement of the material terms, defendant No.1 demanded a sum of Rs.500 million towards sale consideration. It is claimed that since there was a concluded contract came into existence and further steps for implementation were to be taken in this regard, therefore, a Memorandum of Understanding was executed whereby the defendant No.1 was to receive an amount of Rs.500 Million upon signing of MoU and the plaintiff would be entitled to conduct a thorough due diligence of the defendant No.2. Learned counsel submitted that such recourse of due diligence was taken only as some material documents relating to the accounts were to be scrutinized for adjustment, if required, however no material adverse matters were discovered, which of course otherwise was the prerogative of plaintiff only.

Learned counsel further submitted that such MoU was signed on 15-9-2012 by the authorized representative of defendant No.2 including defendant No.5 who is the Chief Executive Officer of defendants No.1 and defendant No.4 being director of defendant No.1 and the son of the Chairman of defendant No.1.

Learned counsel submitted that this MoU though described as a Memorandum of Understanding but in fact in terms of its contents is a concluded contract as not only material terms were agreed upon but the same also contains specific binding clauses which are mentioned in ° clause 9.4 i.e. payment of Rs.500 million towards sale consideration, to conduct due diligence of defendant No.2 and the circumstances highlighting the situation when such MoU could-be terminated i.e. either at the time of execution of sale/purchase agreement or in the absence of such agreement by Sale/Purchase expiry date which in terms of all subsequent amendments is December 15, 2012 (second amendment Annexure 'E' at page 1217). Learned counsel, thus, contended that this Memorandum of Understanding could not have been terminated either by the buyer or seller at their discretion and it could have happened only in one of the two situations, referred above.

Learned counsel further submitted that the sale purchase agreement was made un-executable only on the condition if the buyer would have discovered serious irregularities during the process of due diligence in which case the buyer had an option to re-negotiate the price on discovering such irregularities to the tune of Rs.150,000,000.

Learned counsel submitted that the plaintiff claims that since it did not find any irregularity after due diligence, therefore defendant No.1 could not opt to refuse to transfer the shares in derogation and in disregard of the concluded contract. Learned counsel further submitted that this MoU contains, amongst others, many binding clauses which are:--

(a) the seller will not solicit any interest or engage in discussion with any other party for the transaction;

(b) dividends as contemplated under clauses 4.1 and 9.1;

(c) the seller shall provide to the purchaser a list of all fixed assets;

(d) there shall be no inter company borrowing and lending or any other financial transaction and

(e) that the seller shall continue in a manner consistent with the past practices etc.

Learned counsel further submitted that in response to such conclusion, steps were taken such as escrow arrangement where a sum of Rs.600 Million was transferred in such account on 30-11-2012. The plaintiff assumed the financial risk, after due diligence and that the sale/purchase agreement was finalized which culminated in meeting held on 7-12-2012 attended by the representatives of seller and buyer and defendant No.7 as well as counsel representing them.

Learned counsel further submitted that since earlier the date of expiry of such sale/purchase agreement was expired, therefore, considering this as binding, such amendments were brought about with reference to the expiry date and the date was extended by 15-12-2012. Learned counsel further submitted that in utter disregard and violation of such concluded contract on 11-12-2012 the defendant No.1 sent a letter to all the Stock Exchanges that they do not wish to pursue transaction for commercial reasons. Learned counsel submitted that this was issued prior to the extended date of expiry of SPA i.e. 15-12-2012 when the defendants could not have exercised such powers which in other case/subsequent to 15-12-2012 was also not available. Immediately on acquiring the knowledge the plaintiff on 14-12-2012 sent the executed/concluded version of sale/purchase agreement and also reiterated that an amount of Rs.600 Million was transferred to escrow account hence there is no occasion or justification for such cancellation. Learned counsel submitted that the plaintiff is still willing and is eager to perform all obligations, as required under the law in terms of MoU, and unless the defendants are restrained from dealing with the shares, as prayed for, the rights and interests of the plaintiff shall be seriously prejudiced.

Learned counsel submitted that at this stage the plaintiff is only required to present an arguable case and in terms of the above argument the plaintiff has presented a prima fade case. Balance of inconvenience is also in its favour and it would suffer irreparable loss in case injunction is refused which at this stage is to be calculated and measured in consideration of the fact that the plaintiff has acquired all such rights and interest in the shares and if it would not be done the way it required under the law they would suffer irreparably.

Learned counsel in support of his contentions has relied upon the case of Dewan Development (Pvt.) Ltd. v. Messrs Mybank Ltd. (2011 MLD 1368), Bashir Ahmad v. Muhammad Yousaf (1993 SCMR 183), Mussarat Shaukat Ali v. Safia Khatoon (1994 SCMR 2189), Panna Lal v. Nihai Chand (AIR 1922 Privy Council 47), Pakistan Industrial Develo met Aziz ureshi (PLD 1965 WP Karachi 202) and Ahmad Khan Bhatti v. Masooda Fatimia (PLD 1981 Karachi 398).

On the other hand learned counsel appearing for defendants Nos.1 to 6 has controverted the contention of the learned counsel for the plaintiff and has preliminarily objected to the maintainability of the suit as there is no such

agreement which could be specifically performed. He submitted that plaintiff for the purposes of this suit for specific performance is relying on the MoU which is nothing but a precursor and hence it is an agreement to make an agreement. Learned counsel submitted that clause 3 of said MoU requires execution of sale/purchase agreement on mutually acceptable terms.

It is the case put up by the defendants that there was no sale consideration in real terms settled and that in view of event of non-execution of sale/purchase agreement the amount of Rs.500 Million had to be refunded to purchaser/plaintiff which was done on 17-12-2012. Learned counsel further submitted that the consent of financiers of Mushariqa Financing had to be obtained which has not been done, as required by clause 4.3 of MoU. The ultimate expiry date as amended was 15-12-2012 effected by the second amendment agreement dated 7-12-2012. Learned counsel in support of his arguments has further contended that this MoU could only be considered as a letter of intent which has been defined only as a preliminary engagement between the parties intend to enter into a formal contract and not a formal contract itself. Learned counsel in support thereof has relied upon definitions as available in Fourth Edition 2010 of Aiyar's Major Law Lexicon and has also relied upon following two judgments in the case of Dresser Rand S.A. v. Bindal Agro Chem Ltd. reported as (2006) 1 SCC 751 and Courtney and Fairbairn Ltd. v. Tolaini Bothers (Hotels) Ltd. reported as [1975] 1 All ER 716.

Learned counsel further submitted that the specific performance of this MoU is also hit by Article 102 of Qanun-e-Shahadat which relates to exclusion of oral evidence when terms of contract have been reduced to form a document. In support thereof learned counsel for defendants has relied upon the judgment of Elahi Bakhsh v. Muhammad lqbal reported in 2014 SCMR 1217 and Hazratullah v. District Council Haripur reported in 1997 SCMR 1570.

I have heard the learned counsel for the parties and perused the material available on record and have also gone through the case-law cited by them.

In order to understand the strength and the binding effect of the MoU relied upon by the plaintiff it is necessary to look into its contents and subject. Perusal of this Memorandum of Understanding provides that it was executed on 15-9-2012 in respect of shares of defendant No.2 owned by defendant No. 1. This MoU is signed by defendant No.1 through its CEO Shahid Ahmed Paracha, Abdul Samad Daud, Director in presence of two witnesses whereas on behalf of the plaintiff it was signed by Fazal Ahmed Shaikh. Director and Arif Habib, Chairman along with two witnesses. The binding clauses of the Mot; are specifically described in Clause 9.4 with heading "Binding effect of MoU", which for the sake of brevity is reproduced as under:---

"9.4 Binding Effect of MOU

Clauses 3.2.1, 3.3, 5.1, 5.2, 5.3, 6.2, 6.3, 7, 8, 9.4, 9.5, 9.6, 9.7, 9.8, 9.9, 9.10 and 9.11 shall be legally binding on the Parties hereto. All other clauses of this MOU are not legally binding and simply express the preliminary intentions and understandings of the Parties. The non-binding provisions may (but not necessarily) form the basis on which the SPA in relation to the Transaction is negotiated, including on matters such as adjustment of purchase price and its timing, arrangement for transitional services, representations, warranties, covenants and indemnities that is customary for transactions similar to the Transaction."

While going through the entire MoU some salient features of such MoU were discovered which are as under:--

Clause 2 of this MoU provides what the parties intend to sell and purchase;

Clause 3 provides a sale consideration.

Clause 3.2 onwards provides the details and modality of the payment of such sale consideration

Clause 4 provides divestiture of the investment business and settlement of syndicated facility.

Clause-5 provides due diligence;

Clause-7 provides additional condition that during the terms of this MoU the seller will not solicit any interest or engage in discussion with any other party for the transaction and that another company borrowing and lending shall take effect;

Clause-8 provides terms of termination;

Clause 9.4 provides binding effect of some of the clauses of this MOU.

This transcript when seen on the 'touchstone of the definition of an agreement/contract, it provides that all material terms which are prerequisite or essential in formulating a valid contract are available. For valid contract a consensus of parties on material term is a prerequisite and that the "acceptance" only has to be unqualified and unconditional.

It may have been described as Memorandum of Understanding but then a prescribed form is not a prerequisite in reaching to a conclusion that a valid agreement has been entered into therefore, the arguments of the learned Counsel for the defendant that this is an agreement to enter into an agreement is far stretched. No doubt a sale purchase agreement is to be drawn on the basis of material terms as already agreed upon however the questions which have been raised by the learned counsel for defendant are not significant so as to disentitle the plaintiff for this interlocutory relief and hence Article 102 at this point of time has no application.

Learned counsel for the defendants in his arguments has raised points which could relate to the contingent agreement as for instance obtaining permission of Mushariq Finances, due diligence etc. Some of the terms of this MoU may not be independent but in terms of the arguments of learned counsel for the defendants, could be construed as a contingent terms. Such contingent terms or contingent contract cannot be ruled out of the application of the specific performance.

So far as the arguments with regard to obtaining prior permission/ approval of the Mushariqa finance is concerned, the arguments that in the absence of such approval it cannot be termed as a concluded agreement, is not tenable. Clause 4.3 deals with this issue. Though it is premature to dilate upon such issue at this stage, however it may be pointed out for the reference that as far as Mushariqa Financing is concerned, it is the liability upon the company and that will continue without any obstacle or hindrance.

The question here relates to sale of shares, which any shareholder and/or director is entitled to deal with subject to law, irrespective of liability of the company. The transfer to shares in pursuance of the understanding/agreement under no stretch of imagination could be affected by the liability of the company under Mushariqa Financing.

Another point that has been raised is that such MoU was cancelled prior to cut of date as mentioned in the terms and condition of clause-8. The terms of termination provide that this MoU and the obligations therein shall come into effect immediately upon signature and that could be terminated at the earliest of (a) execution of sale purchase agreement or (b) if the sale purchase agreement was not executed by SPA expiry date which admittedly was extended by 15-12-2012 by virtue of 2nd amendment agreement dated 7-12-2012. In this regard a

letter dated 11-12-2012 is significant which was issued by defendant No.1 to Karachi Stock Exchange Guarantee Limited, Lahore Stock Exchange Guarantee Limited and Islamabad Stock Exchange whereby they were informed that Board of Directors of defendant No.1 in its meeting on 10-12-2012 decided not to pursue subject transaction for "commercial reasons". Two things are significant; a) It has been done not only prior to cut of date i.e. 15-12-2012 but is done "only" three days after the 2nd amendment was recorded, in terms whereof the time was extended mutually; (b). It was allegedly cancelled for commercial reasons. In presence of this document/letter issued to three different Stock Exchanges, the termination letter dated 17-12-2012 does not hold any strength that it was done subsequently. I am of the view that the defence of cancelling the agreement on account of commercial reason was not available on the strength of terms, specified in the MoU.

It is not always that a Memorandum of Understanding could be considered as a document on the basis of which an agreement is to be reached. It in fact depends upon the contents and the desire of the parties executing such understanding. This issue has come up before the learned Division Bench of this Court in the case of Pakistan Industrial Development Corporation (Supra) ,and it is observed as under:-

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplated the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."
>
> The letter of appointment, therefore, was not necessary to bring about the desired relationship between the parties."

Similarly while following the aforesaid judgment learned Single Judge of this Court in case of Major (Retd.) Ahmed Khan Bhatti (Supra) observed as under:---

> "In such circumstances, where a document which is relied upon as a contract, contemplates execution of another document, it is really a question of construction of the document whether the execution of the later document is a condition of the terms of the bargain or is merely an expression of desire on the part of the parties as to the manner in which the agreed transaction is to take place: If the execution of later contract is found to be a condition of the term of the bargain then no contract comes into existence until the later agreement is executed between the parties, but if the execution of the later agreement is held to be only an expression of desire on the part of the parties to state the manner in which the agreed transaction is to go through, then the non-execution of the later agreement may be ignored and the transaction as evidenced by the original document may be given effect to as a binding contract."

Thus, perusal of the above case-laws provides that it is only the intention of the parties which is to be construed while considering the document relied upon for the specific performance. It is in fact the language of the document which establishes its status. If there is any intention of drawing a formal agreement subsequent to the MoU, which otherwise fulfils all prerequisites of an agreement, it does not override the binding nature of such earlier document which may be named as MoU.

In the case of Dewan Development (Pvt.) Ltd. (Supra), learned single Judge of this Court facing the same arguments observed as under:--

"32. The MoU would show that certain reciprocal acts had been visualised to be performed on either side. The record of the file would show that as far as the acts, those were mentioned in the MoU to be performed by the plaintiffs, the same were duly performed by them. However the acts which were to be performed by the defendant still remain to be performed for which present suit for specific performance within the period of limitation prescribed for it was filed.

33. It has come on record that in terms of MoU, which in my opinion, looking at its construction is an independent document qualify to stand on its own and is also capable of specific performance as it is a subsisting and valid document not superseded by subsequent Agreements and Sale-Deeds in respect of the Properties as argued by the learned counsel for the defendant. The reason is simple. The MoU envisaged reciprocal and/or collateral acts. Conditional transfer of the Properties by the plaintiffs in favour of the defendant was one of such acts, to be reciprocated by the defendant by rolling over and restructuring of plaintiffs liabilities. Therefore, it would not be wise or fair to argue that since the Agreements and Sale-Deeds in respect of the properties were made, such superseded the MoU. The acts of the plaintiffs would only show that they performed their part of the contract and are still waiting that the defendant perform its part of the contract, more particularly because the defendant have also received consideration thereof.

34. It is beyond comprehension that any commercial enterprise would enter into an agreement, in the present case, MoU without any consideration. The MoU was reached after much deliberations, to move forward with settling/regularizing Dewan Mushtaq Group (hereinafter Dewan)'s liabilities towards Mybank Ltd." It was with this intention of the parties that MoU came into being. To achieve the purpose of settling/regularizing Dewan's liabilities, Dewan agreed to conditionally part with the Properties and other assets as mentioned in MoU. The consideration on the part of the plaintiffs was roll over and regularisation of their liabilities enable. them to do business, make profits and re-purchase the Properties, within a period of two years, conditionally parted with. However since the defendant failed to honour and/or perform its part of the contract, as envisaged and agreed upon in terms of the MoU, the entire road map chalked out washed away.

35. The argument that the MoU was superseded by the Sale Agreements and Sale-Deeds in respect of the Properties under the facts and circumstances of the case does not hold the field. To my understanding, the Sale Agreements and Sale-Deeds were outcome of the MoU and/or the performance of terms and conditions thereof. Execution of these documents only demonstrate full compliance of the terms of the MoU by the plaintiffs and complete non-compliance of the terms of MoU by the defendant. Not supersession and/or novation of MoU, as argued by the learned counsel for the defendant."

The MoU in hand provides in terms of clause-3 that the sale consideration (based on current estimate) is Rs.2,700,000,000 subject to any adjustment set forth in the MoU. Of course the adjustment required in terms of the modalities of the payments and the due diligence in case any material adverse matter would be unearthed more than the amount 0 of Rs.1,500,000,000 which is not the case here. Although the rest of the sale consideration claims to be assumption of Mushariqa Financing obligation to the tune of Rs.4,800,000,000 however I am of the tentative view that the question of assumption of Mushariqa Financing obligation is immaterial since such obligation for all intent and purposes would remain obligation and liability of company and of course when such price of Rs.2,700,000,000 were negotiated and settled, this obligation of the company was taken into consideration when price of each unit of share or lump sum was determined.

Learned counsel for the plaintiff in para-6 of the plaint mentioned that there is yet another syndicated facility which stood at Rs.2,070,000,000. Para-9 of the affidavit is denied to the extent that the sale of the shares in DH Fertilizer Limited

was never agreed however the MoU itself is not denied. Syndicated facility is defined in Clause 1 of MoU and clause 4.1 provides that it is to be settled as provided therein by defendants. In terms of clause 4.1 it was agreed that both the seller and purchaser shall divest their entire shareholding in Engro Corporation and Hub Power Project and proceeds will be used to settle and pre-pay the syndicated facility and pay the balance amount as dividends to the seller provided that the seller shall ensure that the proceeds are sufficient to fully settle the syndicated facility.

I have also gone through the case-law cited by learned counsel for the defendants and found that the facts and circumstances narrated in the same are such which are not attracted to the present case and are distinguishable.

Considering the above facts and circumstances, I hold that the plaintiff has prima facie case in his favour; balance of inconvenience is also in favour of the plaintiff and in case, the injunction, as prayed for, is refused it would suffer irreparable losses.

As far as deposit of balance sale consideration is concerned, as stated above, apart from assumption of Musharika Finance, the sale consideration was agreed as Rs.2,700,000,000 out of which an amount of Rs.600 Million is lying in escrow account. The MoU also provides that there is syndicated loan of Rs.2,070,000,000, which is to be cleared in terms of Clause 4.1 as being its liability and in the absence of such compliance, the same is to be adjusted. Since it is not the case of the defendants that the said syndicated loan has been repaid/cleared hence after adjusting the aforesaid amount of Rs.600,000,000 Million lying in escrow account and Rs.2,070,000,000, it left only Rs.30,000,000 Million to be deposited out of the total sale consideration, which to be paid in cash. However, in view of peculiar facts and circumstances of the case and since it is one of the binding clauses that Rs.500 Million is to be deposited at the time of MoU, I direct the plaintiff to deposit a sum of Rs.530,000,000 Million, which is a tentative amount, to be deposited with the Nazir of this Court within a period of 30 days from the date of this order. This deposit is irrespective of earlier deposit of amount on 3-4-2013 with the Nazir.

In terms of the above, the application is allowed as prayed.

KMZ/P-28/Sindh Application allowed.