

ORDER SHEET**THE HIGH COURT OF SINDH, KARACHI**

Suit No. 1226 of 2011

Before: Mohammad Abdur Rahman,J

Tariq Ali Durrani

Versus

M/s. Atlas Elektronik GmbH & others

Dated: Order with signature of Judge(s)

1. For hearing of CMA No.287/2012
2. For hearing of CMA No.288/2012
3. For hearing of CMA No.289/2012

Date of Hearing : 11 September 2023 and 2 March 2024

Plaintiff : Represented by Mr. Ayan Mustafa Memon,
AdvocateDefendants No.1-6 : Represented by Mr. Zeeshan Khan Sherwani,
Advocate**ORDER**

MOHAMMAD ABDUR RAHMAN, J. This order will decide three applications bearing CMA No. 287 of 2012, CMA No. 288 of 2012 and CMA No. 289 of 212, which are maintained by the Defendant No. 4, the Defendant No. 5 and the Defendant No. 6 respectively each under Order I Rule 10(2) read with Section 151 Code of Civil Procedure, 1908 seeking that the names of Defendant No. 4, the Defendant No. 5 and the Defendant No. 6 to be struck off. alleging that they are neither necessary nor proper parties to this suit.

2. The Plaintiff has maintained this suit for declaration, recovery, damages, mandatory & permanent injunction seeking the following relief:

“ ... A. Declare that the Defendant No 1 to 5, their successors and/or assigns are jointly and severally liable for the outstanding amounts

owed to and losses suffered by the Plaintiff as a result of the Defendant No (s) 1 to 4's breaches on the basis of their common ownership;

B. Declare that the Defendant Group's attempt to terminate the Plaintiff's agency is unlawful and in breach of their contractual obligations towards the Plaintiff;

C. Declare that the Defendant No(s) 2, 3 & 4's failure to execute the contract for the supply of submarines through the Plaintiff is illegal, malafide & without jurisdiction;

D. Direct the Defendant No 10 to continue to keep the Bank Guarantees submitted by the Defendant No 1 valid;

E. Restrain the Defendant No(s) 1 & 10 from having the bank guarantees released on account of the Defendant No 1's and the Defendant Group's breaches of Contract dated 30-06-2005, 20-07-2006 and outstanding liabilities towards the Plaintiff and/or further restrain the Defendant No 1 from making a claim on the said guarantees;

F. Attach the bank guarantees of the Defendant No 1 before judgment as the same intends to remove them from the local jurisdiction of this Honorable Court in order to obstruct and/or delay the execution of any decree passed herein;

G. Recovery in favor of the Plaintiff from the Defendant Group in the following sums:

i	Balance Agent Fee under Contract dated 30-06-2005	Euro 53,350.80
ii	Remuneration & Expenses Under work-share agreement With Defendant No 1	Euro 9,534,117.1
iii	Remuneration & Expenses Under Contract dated 20-07-2006	Euro 10,850,000
iv	Remuneration at 1.5% of Net value Of submarine supply contract under Contract dated 20-07-2006	Euro 27,000,000
	Total	Euro 47,437,467.90 @Rs 120.5 per Euro

H. Damages in favor of the Plaintiff to be paid by the Defendant Group in the following sums:

i	Loss of profits (agent's fee) for Submarine contract	Euro 9,000,000
ii	Loss of profits amounting to 3.5% of projected Net value Of submarine supply contract Under contract dated 20-07-2006	Euro 63,000,000
iii	Loss of reputation	Euro 20,000,000
	Total Damages	Euro 92,000,000.00 @Rs 120.5/Euro

I. Any other relief that this Honorable Court deems fit and proper in the arising circumstances."

3. The Plaintiff contends that it has a contractual agreement with the Defendant No.1. He further contends that the Defendant No.1 breached

that contractual agreement and which breach was instigated by the, Defendant No. 4 and the Defendant No. 5. The alleged relationship inter se the Defendant No. 1, the Defendant No. 2, the Defendant No. 3, the Defendant No. 4 and the Defendant No. 5 and the basis on which the Defendant No. 4, the Defendant No. 5 and the Defendant No. 6 were allegedly able to influence the Defendant No. 1 to breach their contract is indicated in paragraph 3 and 17 of the plaint and which are reproduced hereunder:

“ ... 3. That the Defendant No. 1 / M/s ATLAS Elektronik GmbH ('Atlas') is a manufacturer & supplier of defense electronic & underwater technology which was previously owned and controlled by M/s British Aerospace Ltd, UK ('BAe'). The Defendant No. 2 / M/s Howaldtswerke-Deutsche Werft GmbH ('HDW') is a manufacturer & supplier of conventional submarines. The Defendant No. 3 / M/s. Marine Force International LLP ('MFI') is a joint venture between Ferrostaal and HDW which was formed in January 2006 for the purposes of marketing, selling and ensuring compliance of various obligations of the Defendant No 2 in relation to defense related projects, interalia including, commercial project management, infrastructure building, financing, investment and fulfillment of counter trade/offset commitments with the MoDP. The Defendant No. 4/M/s. ThyssenKrupp Marine Systems AG ('TKMS') manage the submarine & surface ship portfolio of the Defendant No 5. The Defendant No. 5 / M/s ThyssenKrupp AG ('ThyssenKrupp') is the current parent company and holds majority shareholding of Defendant No(s), 1, 2, 3 (through ownership of Defendant No.2) & 4. It acquired 51% shareholding in the Defendant No.1 in the year 2007 and exercises a controlling stake therein. Accordingly, the Defendant No. 1, 2, 3, 4 & 5 form part of the same Group of Companies, having common ownership and control. The Defendant No. 6 / Dr. Olaf Berlien is a Member of the Executive Board of Directors of Defendant No. 5 and holds senior management portfolios in the Defendant No(s). 1, 2, 3 & 4. The Defendant Group is a signatory to the OECD's regulations on 'Combating Corruption & Bribery' & 'Recommendation on Further Combating Bribery'. A chart explaining ownership in the Defendant Group is reproduced below.”

“ ... 17. That the Defendant No 1's illegal attempt to appoint CSG as its agent before the Defendant No 8 /DGDP vide letter dated 01-04- 2011 has been brought about by its parent companies, the Defendant No 4, 5 under dictation from the Defendant No 6 / Dr Oalf Berlin even though a due diligence research carried out on CSG and its Chief Executive by M/s Control Risk, UK under instructions from Defendant No 3/ MFI and duly vetted by their counsel Simmons & Simmons, London, UK reached overall negative conclusions. The Defendant No 6 has continuously lobbied against the Plaintiff in connivance with CSG for their personal illegal benefits and gains. The actions of the Defendant Group are illegal as they violate the contractual obligations towards the Plaintiff and in particular Clause 13 of Contract dated 30-06- 2005.”

5. The Defendant No.4, the Defendant No.5 and the Defendant No. 6 contended that the contract being as between the Plaintiff and the Defendant No.1 there is no privity of contract as between each of them and the Plaintiff and therefore, they cannot be held to be contractually liable to the Plaintiff for a breach of a contract. Mr. Zeeshan Khan

Sherwani has argued that there was no basis for lifting the veil as between the Defendant No. 1 and the Defendant No. 4, the Defendant No. 5 and the Defendant No. 6 so as to permit a claim for contractual loss to be maintained as against each of those Defendants. In this regard he relied on the decision reported as **Habib Bank Limited vs. Shafiq Textile Mills Limited**¹ where when a Director of a company had been impleaded as a Defendant in a Banking Suit, a learned Single Judge of this Court was pleased to strike off the name of the Director as a Defendant stating that the Director could in no manner be held personally liable for the company's liability. He also relied on a decision of a learned Single Judge of this Court reported as **Mian Asad Omer Maggo vs. Hewlett-Packard Singapore (Sales) PTE Limited and 4 others**² where, in a contractual dispute as between the plaintiff and a company, when an associated company of the contracting company was made a party an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 was granted to strike off the name of the associated company on the ground that there was no privity of contract as between the plaintiff and the associated company. He also relied on a Judgement of a Learned Division Bench of the Lahore High Court, Lahore entitled **Pak American Fertilizers Ltd., Mianwali vs. Amir Abdullah Khan**³ and on a judgement of a Learned Division Bench of this Court reported as **Sultan ul Arfeen vs. District Officer (Revenue) City District Government Karachi and 5 others**⁴ wherein it was held that two companies even if associated companies would be separate legal entities and could not be held liable for a breach of the others contractual obligations. He concluded by relying on judgements of a Learned Single Judge of this Court reported as **Mari Gas Company Ltd. vs. Byco Petroleum Pakistan Ltd.**⁵ and **Hamza Haneef Awan vs. Sher Ali Mengal**⁶ in which it was held that where a defendant was neither a necessary nor a proper party and where there was no cause of action as against a defendant, the Court could strike that defendant out as a party to a suit.

6. Mr. Ayan Mustafa Memon has entered appearance on behalf of the Plaintiff and has conversely contended that as specific relief has been claimed as against the Defendant No.4 the Defendant No. 5 and the Defendant No. 6 in the prayer clause of the suit and on account of the explicit allegations made as against the Defendant No.4 the Defendant

¹ 2000 CLC 787

² 2022 CLD 918

³ 1984 CLC 2170

⁴ 2013 CLD 1280

⁵ PLD 2013 Sindh 314

⁶ 2019 CLC 292

No. 5 and the Defendant No. 6 in paragraph 3 and 17 of the Complaint, this Court at this stage cannot grant such an application as to do so would in effect be to dismiss the prayer clause as against the Defendant No.4 the Defendant No. 5 and the Defendant No. 6 without adducing evidence. He hence contended that on account of the prayers being maintained as against the Defendant No.4 the Defendant No. 5 and the Defendant No. 6 the applications were not maintainable and were liable to be dismissed. He relied on a decision of a Learned Division Bench of this Court reported as **Porsche Middle East and Africa FZE and another vs. Akbar Adamjee and others**⁷ where in a dispute regarding the breach of a contract regarding the purchase of a motor vehicle as between a company incorporated in Pakistan and the purchaser of that vehicle and wherein various associated companies, which were incorporated outside of Pakistan had been impleaded as parties, this court considered them to be “proper and necessary” parties holding that as the ultimate responsibility to deliver the vehicle was with the associated companies they were correctly arrayed as Defendants to

7. I have heard Mr. Zeeshan Khan Sherwani and Mr. Ayan Mustafa Memon and have perused the file. I have no cavil with the proposition advanced by Mr. Zeeshan Khan Sherwani that a company is a separate legal entity and that ordinarily no person, other than the company itself, can be liable on its obligations under a contract. Indeed, such a proposition is well established since the decision in **Salomon vs. A Salomon & Co Ltd**⁸ and which clarifies that the liability of a company is distinct from the liability of its members or directors and generally the liability of the members of a company is limited to the extent of their investment in the capital of the company or to the amount that members subscribe as guarantors to the companies liabilities. There are of course exceptions to this rule and which when excepted by a court, involve members or directors of a company being held liable for the obligations of the company and which action is described as “piercing the corporate veil.”⁹ It would seem that in this suit, the Plaintiff in his complaint in

⁷ PLD 2020 Sindh 415

⁸ [1896] UKHL 1, [1897] AC 22

⁹ See **Atlas Maritime Co. SA v Avalon Maritime Ltd (No. 1)** [1991] 4 All ER 769; **Adams v Cape Industries plc** [1990] 1 Ch 443; **Woolfson v Strathclyde Regional Council** [1978] SLT 159; **National Accountability Bureau vs. Murad Arshad** PLD 2019 SC 250; **Water and Power Development Authority vs Administrator, District Council, Swabi** 2005 SCMR 487; **Huffaz Seamless Pipe Industries Limited vs. Sui Norther Gas Pipeline Limited, Lahore** 1999 SCMR 1309; **Union Council Ali Wahan, Sukur vs. Associated Cement (Pvt.) Limited** 1993 SCMR 468; **Printing Corporation of Pakistan vs. Province of Sind** 1990 PLC 176; **Mohammad Ahad Ansari vs. Interlobe Commerce Pakistan (Pvt.) Ltd. and other** 2023 CLD 570; **State Life Insurance Corporation of Pakistan vs. Fazal And Sons (Pvt) Ltd.** 2010 CLC 1895; **Pub Corporation vs. Water and Power Development Authority through Managing Director** PLD 2009 Karachi 139; **Messrs**

Paragraph 3 and 17 is premising his claim as against the Defendants by asking for the veil to be pierced as between the Defendant No. 1 and the Defendants No. 4, the Defendant No. 5 and the Defendant No. 6 and has therefore claimed specific relief as against each of the Defendants. That being the case to grant this application and to strike off the names of the Defendants No. 4, the Defendant No. 5 and the Defendant No. 6 would amount to determining the prayer as against those Defendants and dismissing the suit as against each of them and which cannot be done without an issue first being framed to decide as to whether the veil of incorporation could or could not be "pierced." The issue even if framed, on the basis of the pleadings of the Plaintiff to my mind, would be a mixed question of fact and law and could not be treated as a purely legal issue under the provisions of Order XV Rule 3 of the Code of Civil Procedure, 1908 to be decided without evidence. In this regard I have considered the caselaw that has been relied on by Mr. Zeeshan Khan Sherwani and note that in each of those matters, a prayer had not specifically been maintained as against the defendants who were struck off. I am therefore of the opinion that those decisions cannot be relied on in support of these applications and hence these applications must therefore be dismissed.

8. For the foregoing reasons, CMA No. 287 of 2012, CMA No. 288 of 2012 and CMA No. 289 of 212 being applications under Order I Rule 10(2) read with Section 151 Code of Civil Procedure, 1908 seeking to strike off the Defendant No. 4, the Defendant No. 5 and the Defendant No. 6 from the array of Defendants are misconceived and are dismissed.

J U D G E