

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

Suit No.2651 of 2016

Zohaib Shakoor

Versus

Mahwish Pirzada and others

Dates of hearing : **28.02.1017, 07.03.2017 and 27.03.2017**

Date of Decision : **06.04.2017**

Plaintiff : **Through M/s. Haider Imam Rizvi and
Jamal Bukhari, Advocates.**

Defendants : **Through M/s. Salman Mirza and Muhammad
Rizvan, Advocates.**

Case law cited by the Plaintiff's counsel.

- 1. PLD 2010 Karachi Page-274**
(Digital World Pakistan [Pvt.] Ltd. Versus Samsung Gulf Electronics FZE THROUGH Managing Director/Chief Executive Office and another).
- 2. 2006 CLD 2010**
(Pak China Chemicals through Chief Executive / Director Versus Department of Plant Protection and another).
- 3. PLD 1981 Karachi Page-720**
(Nooruddin Hussain and another Versus Diamond Vacuum Manufacturing Co. Ltd., Karachi and another).
- 4. 2003 MLD 1947 Karachi.**
(Al-Abid Silk Mills Limited Versus Syed Muhammad Mudassar Rizvi)
- 5. 2012 SCMR Page-900 [Supreme Court of Pakistan]**
(Muhammad Sharif and others Versus Nabi Bakhsh and others)
- 6. PLD 2010 Lahore Page 473**
(Rana Khadim Hussain Versus Shahnaz Banoo and another)

7. **PLD 1990 Karachi Page-1**
(Balagamwala Oil Mills [Pvt.] Ltd Versus Shakarchi Trading A.G. and 2 others).
8. **2004 CLD Page 343 [Karachi].**
(Diamond Food Industries Limited Versus Joseph Wolf GmbH & Co. and another).
9. **1989 MLD Page-21 [Karachi]**
(Shama Enterprises [Private] Ltd. Versus Malik Ghulam Sarwar and others).
10. **1997 CLC Page-302 [Karachi]**
(Agha Saifuddin Khan Versus Pak Suzuki Motors Company Limited and another).
11. **2001 CLC Page-69 [Karachi].**
(Syed Shabih Haider Zaidi Versus Shaikh Muhammad Zahoor Uddin).
12. **1993 CLC Page-714 [Karachi]**
(Messrs Merkuria Sucden Versus Rice Export Corporation of Pakistan Ltd and others).
13. **2015 YLR Page-1213 [Sindh]**
(Muhammad Shoaib Versus Jamila Khatoon and others).
14. **PLD 1985 Karachi Page-400**
(S.A. Abbasi Versus Chairman, District Council Guulshan-e-Iqbal, Karachi).
15. **2007 SCMR Page-1005 [Supreme Court of Pakistan]**
(Pervaiz Hussain and another Versus Arabian Sea Enterprises Limited).
16. **2009 CLD Page-1524 [Karachi].**
(Messrs Dada Steel Mills Versus Metalexport and 5 others).
17. **2012 CLD Page-879 [Sindh]**
(Ahmed Kuli Khan Khattak Versus Creek Marina [Singapore] Pvt. Ltd., through Chief Executive Office and 5 others).

Case law relied upon by Defendants' counsel.

1. **PLD 2002 Page-141**
(Lips Records [Private] Ltd Versus Ms. Hadiqa Mahmood Kiani and two others).
2. **2010 MLD Page-800**
(Lahore Stock Exchange Ltd. through Managing Director and another Versus Messrs Hassan Associates through Managing Partner).

3. **2003 YLR Page-1450**
(*Zawar Petroleum Versus OGDC and others*)
4. **2015 YLR Page-2141**
(*Bank Al-Falah Ltd Versus Neu Multiplex and Entertainment Square Company [Pvt.] Ltd.*)
5. **AIR 1951 Page-426**
(*Dewan Chand Sabbarwal Versus Union of India & another*)
6. **AIR 1960 Allahabad Page-72**
(*Union Construction Co. Versus Chief Engineer, E.C.*)

- Law under discussion:
- (1). Sale of Goods Act, 1930.
 - (2). Specific Relief Act, 1877.
 - (3). Contract Act, 1872.
 - (4). Code of Civil Procedure, 1908.

ORDER

Muhammad Faisal Kamal Alam, J: Through this order, two different Injunction Applications being CMA No.122 of 2017 and CMA No.17709 of 2016 will be disposed of. It is further clarified that any observation(s) contained in the order is purely of tentative nature and will not influence the trial followed by the Judgment to be given in present cause.

2. Relevant facts for deciding the above mentioned interlocutory applications are that undisputedly the Plaintiff who is sole proprietor of a Textile Industry under the name and style of “Al-Zohaib Textile” has entered into an Agreement dated 01.04.2016 (Page No.65; **subject Agreement**) with Defendants No.1 and 2 for, *inter alia*, designing of Textile Products of Plaintiff.

3. It is also not disputed that the agreement was for years 2016, 2017 and 2018 as mentioned in Clause 21 of the subject agreement itself and the same was successfully acted upon for the year 2016.

4. As per the pleadings of Plaintiff, there was initially some reluctance and later refusal on the part of Defendants to continue the contractual relationship for the years 2017 and 2018. Plaintiff apprehends that Defendants have entered into a contract with some other competitors of Plaintiff, which in turn will not only ruin the reputation and goodwill of Plaintiff, but will cause the latter (Plaintiff) colossal losses as after entering into an agreement, the Plaintiff made substantial investment in promoting the products of Plaintiff's textile in collaboration with Defendants. As a supporting evidence, the Plaintiff has appended catalogs / Booklets, (at Page-283 of Part-1 of Court File), containing the names of both Plaintiff and Defendants as well as separate introductory messages from the above mentioned parties.

5. Mr. Haider Imam Rizvi, learned counsel for Plaintiff has strenuously argued and referred to various Clauses of the Agreement to highlight the contractual obligations of Defendants, which they are not performing and as a result whereof, purported losses being suffered by the Plaintiff. He has also referred to other documents relating to expenditure incurred on Foreign Travelling, Billboards, Media Campaign and purchase of raw material.

6. To augment his arguments, he has also relied upon afore mentioned Judgments.

7. It is also necessary to mention here that initially Mr. Salman Mirza, the learned counsel for Defendants has raised a preliminary legal objection, which is also mentioned in his Counter-Affidavit to these injunction applications, about non-invoking of Alternate Dispute Resolution Mechanism {**ADR**} by Plaintiff. Since it was a reasonable request having statutory recognition as envisaged in the amended Section 89-A of Civil Procedure Code, 1908, I provided an opportunity to both the parties and

their counsel to have a recourse to the Mediation for bringing forth some amicable solution. On 09.02.2017 Plaintiff's counsel Mr. Haider Imam Rizvi, filed a Statement dated 30.01.2017 (Page-223 IInd Part of file), which was a proposal from his side for Defendants, but that was not acceptable to Defendants and the above exercise could not yield fruitful result. Relevant portion of the said Statement is reproduced herein below_

“(a). Letter of Regret if desired by Defendants.

(b). An undertaking to withdraw the above suit after the settlement.

(c). Instead of Rs.5 Million for the year 2017 the Plaintiff is willing to pay Rs.8 Million and

(d). Instead of Rs.8 Million for the year 2018 the Plaintiff is willing to pay Rs.12 Million to the Defendants.”

8. The submissions of Plaintiff's counsel were vehemently controverted by legal team of Defendants and much emphasis was laid by learned counsel for Defendants on Section 21 of the Specific Relief Act, 1877 (SRA) and its Clauses “a” to “d”, to advance his arguments that since the subject contract is not enforceable in terms of Section 21 of SRA, therefore, no injunctive relief can be granted as envisaged by Section 56 (f) of SRA. It was argued that in effect the subject agreement is a contract for providing services by Defendants to Plaintiff; that is, services relating to textile designing, which after the breach committed by Plaintiff is not possible to continue and that is why the Defendants have terminated the Agreement on 01.01.2017 in terms of Clause-21 of the subject agreement. The contention of Plaintiff's counsel with regard to Section 58 of Sale of Goods Act, 1930, has also been specifically refuted by the Defendants' side. It has been stated that another *lis* being Suit No.946 of 2016 as referred to by the Plaintiff's counsel in support of his plea, relates to the dispute of present Defendants with the Provincial Tax Authorities and the

stance of present Defendants in the above suit is that the goods and business of present Defendants does not fall within the ambit of Sales Tax on Services Act, 2011.

9. Afore mentioned case law has been referred to by the learned counsel representing the Defendants in support of their arguments.

10. The arguments of learned counsel representing the respective parties have been taken into consideration and with their able assistance the present case record is perused.

11. The main question that requires the determination for the purposes of these interlocutory applications is that (i) whether the subject agreement is hit by Section 21 of Specific Relief Act, or not and (ii) whether any breach has been committed by Plaintiff.

12. In their Counter-Affidavits, the Defendants have primarily agitated two breaches, which according to them, have been committed by Plaintiff; (i) that without resorting to the Alternate Dispute Mechanism (ADR), the present proceeding was filed as apparently there was no dispute between the parties, (ii) payment for the year 2017 was not made as per the schedule of subject agreement and particularly Clauses 8 and 15 have been violated.

13. With regard to the first question, it has already been mentioned in the preceding paragraphs that an attempt of Mediation failed and the proposal of Plaintiff to enhance the yearly charges upto Rs.8,000,000/- (Rupees Eight Million Only) has been rejected by Defendants. This brings me to decide the second purported breach said to have been committed by Plaintiff.

14. The payment schedule as mentioned in the agreement is covered by Clauses-7, 8 and 15 as per arguments of Defendants. I have perused these

Clauses; total payment which Plaintiff is liable to pay to Defendants for year 2017 is rupees Five Million as per Clause 7 and initial part of Clause-8 is not applicable as it pertains to year 2016 and for the years 2017 and 2018 this stipulation / clause states that 50% advance is to be paid prior to the 'submissions deadline' and balance amount at the time of submission of the CD of approved designs. This payment/price is to be divided equally between the Collections of that year, that is, total per collection split into two payments of Rs.833333/= each in year 2017. However, the plea of Plaintiff appears to be correct that the term 'deadline' is not defined or explained anywhere in the entire subject agreement, but the same has been interpreted by the Defendants themselves in Paragraph-7 of High Court Appeal No.121 of 2017, which was filed assailing the order dated 09.01.2017, whereby, this Court has granted an ad-interim injunctive relief. Copy of Memo of Appeal was placed on record by the Plaintiff's counsel. In Paragraph-7, the Appellants, that is, the present Defendants have mentioned the date for submission of designs against 50% advance payment as 15.12.2016, which payment schedule was not adhered to by the present Plaintiff that resulted in the purported termination of the subject agreement by the impugned letter dated 01.01.2017.

15. M/s. Haider Imam Rizvi and Jamal Bukhari learned counsel for Plaintiff controverted the above contentions about default in making payments on two grounds; firstly by pointing out that till 4th week of December, 2016, both Plaintiff and Defendants were participating in the year 2016 Collection, that is, launch and sale of various seasonal subject products/goods, and secondly on 01.01.2017, that is, same date when a termination letter was addressed by Defendants to Plaintiff, the Defendants were called upon to submit designs for the upcoming year 2017 season. This correspondence is available on Page-77 second part of the Court file

along with a TCS receipt showing that the same was received on 03.01.2017. However, on this correspondence, there is a noting on behalf of Defendants that the agreement has been terminated. It was further argued by Plaintiff's side that even otherwise this short delay in making payment has been cured when the Plaintiff under the order dated 09.01.2017 has deposited the entire payment for the year 2017 with the Nazir of this Court; though against such payment till date no designs have been submitted by the Defendants.

16. Mr. Salman Mirza, the learned counsel for Defendants also argued that the injunctive relief, if any, for enforcement of the subject agreement would also be against Section 27 of the Contract Act (1872), that is, restraint of trade as Defendants would be compelled to provide designing service to Plaintiff though the business relationship between the Plaintiff and Defendants has become sour and it would be difficult to provide such nature of services, which runs into minute and numerous details, *inter alia*, and in order to damage Defendants, the Plaintiff will keep rejecting the designs for their textile products and each time the parties will approach this Court for redressal of their respective grievances. The arguments from the Defendants' side have been controverted and the learned counsel for Plaintiff submits that the nature of subject agreement is not that of "Master" and "Servant", but both contracting parties; Plaintiff and Defendants have independent status and both have collaborated for promoting each other's business. It has been categorically mentioned by the Plaintiff's side that neither Article 18 of the Constitution of Pakistan nor Section 27 of the Contract Act, can be invoked in the present case for the reasons that firstly as per Clause-18 of the subject agreement, the Defendants are permitted to continue with their business and secondly very recently an exhibition was arranged by said Defendants under their own brand name '**TENA DURRANI**'. Not only this, the Defendants have given ample media

coverage to this exhibition. As an evidence, different Photographs of the exhibition have been filed under the Statement at Bar dated 26.02.2017 by the Plaintiff's side.

17. At this stage, it is not necessary to discuss each and every cited case law except for the few, which are relevant for deciding the titled interlocutory applications.

- (i). **PLD 1981 Karachi Page-720**
(Nooruddin Hussain and another Versus Diamond Vacuum Manufacturing Co. Ltd., Karachi and another).

This Judgment is on the scope and import of negative covenant in an agreement. After discussing number of Judgments of our and foreign jurisdiction, Mr. Justice Saleem Akhtar, as his lordship then was, has held that the agreement containing negative covenant are also enforceable when the agreement was entered into by the parties out of freewill and with open eyes.

- (ii) **2009 CLD Page-1524 [Karachi].**
(Messrs Dada Steel Mills Versus Metalexport and 5 others).

It is a Division Bench decision of this Court, wherein, *inter alia*, scope of Section 19 of Specific Relief Act (SRA) and Section 73 of the Contract Act, were discussed, but on the issue that in case the contract is not specifically performed, can compensation is an adequate remedy; a very pertinent observation has been made in this case that if the parties to the contract knew that raw material is to be used by the purchaser / vendor for using in his business of re-rolling and not for merely onward sale, then it was held, that monetary compensation is not an adequate remedy.

- (iii). **1989 MLD Page-21 [Karachi]**
(Shama Enterprises [Private] Ltd. Versus Malik Ghulam Sarwar and others).

In this case, the learned Division Bench of this Court has laid down the Rule that the objective of directing the Plaintiff, who is seeking Specific

Performance, to deposit balance sale consideration in Court is to see that whether or not Plaintiff is ready and willing to perform his part of obligation.

18. Case Law cited by Defendants is also analyzed_

In the first reported case of *Lips Records [Private] Ltd Versus Ms. Hadiqa Mahmood Kiani and two others* (Supra), there was a specific clause in the Agreement between the parties that if the timely payment is not made to the artist (Ms. Hadiqa Mahmood Kiani), the latter will be at liberty to get her second Album release from some other recoding Company. The other factor that weighed with the learned Judge in the above case was that the time frame was mentioned in the agreement, hence justifying the application of Section 55 of the Contract Act, that covers those contracts wherein time is of the essence. Similarly, in other reported Judgment of *Zawar Petroleum* (supra) the injunction was refused on the ground that non-performance of contractual obligation by Defendants could have been easily quantified and considering certain other factors, the learned Lahore High Court was of the view that the grant of injunction would be an oppressive relief. However, facts of the above case (**Zawar Petroleum**) are altogether different from the present one. In that case, a concession agreement was entered into between the Plaintiff and Government of Pakistan through its State Enterprise-OGDCL and the contract had certain complex, technical and minute details, which in effect become impossible to be acted upon.

In the third case of *Lahore Stock Exchange Limited* (supra), the above provisions of Specific Relief Act, for refusal of grant of injunction and specific performance were invoked for the simple reason that the construction contract between the Lahore Stock Exchange Limited and its building contractors clearly contained the remuneration / consideration

against which the Respondents' contractors had to complete the task. Learned Lahore High Court has taken the view and rightly held that if the monitory compensation is determinable from the contract itself and where the contract, on the other hand, runs into minute and numerous details, then the monitory component of the contract is taken as adequate compensation in lieu of refusal of relief of specific performance and that of injunction.

Similarly, reported decision in Bank Al-Falah Limited-2015 YLR Page-2141, also does not lend any support to the case of Defendants as distinguishable feature of the above case law is that the basic agreement was in dispute, as Defendants took a plea that the terms of the purported agreement were yet to be finalized and in that context and peculiar facts, the above judgment was handed down.

19. Though in their Counter-Affidavit, the Defendants have disputed the investment and expenditure figures of Plaintiff, but the factum of incurring costs and expenditures in launching the products /goods has not been refuted, rather the Defendants have acknowledged that one of their partners was available at various locations of the shoot. It is also one of the grounds mentioned in the Counter-Affidavit of Defendants that they also intended to continue the agreement to the benefit of both the parties till it was terminated. In Paragraph-17 of Defendants' Counter-Affidavit, it has been mentioned that they had neither rescinded the agreement "nor had any such intention to do so".

As already mentioned in the preceding paragraphs, the Defendants are at liberty to hold exhibitions exclusively for promotion, marketing and sale of their own products and even under subject contract, the Defendants' role is not only confined to that of making and providing designs, but also Defendants have been assigned a role of brand ambassador for textiles of Plaintiff. There is substance in the submissions of Plaintiff's counsel that if an

injunctive relief is granted then no complication will arise, as Defendants will not submit sub-standard designs merely to strangle the present proceedings, as it will also damage the goodwill of Defendants, which obviously the latter would not venture upon. The other reason that the Defendants will not provide sub-standard goods is the indemnification Clause-38 of the subject agreement, *inter alia*, highlighting the liability of Defendants to indemnify the Plaintiff in case of defective designs.

20. If the record and documents for the purposes of deciding the interlocutory applications are taken into consideration then it appears that it is not a disputed fact that through various catalogs and brochures and other advertising material, the costs whereof was borne by Plaintiff, names of both Plaintiff and Defendants have been marketed. More so, at the costs of Plaintiff foreign trips were arranged, where at Defendants were present, *inter alia*, with the object of promoting Lawn Collection. The advertising material available on record conspicuously mentions the name of “TENA DURRANI”, which means that brand name of Defendants is also getting promoted along side the Plaintiff's, besides the fact that for Defendants this was first such venture, whereas, it has been pleaded by Plaintiff that latter (Plaintiff) in the past have successfully completed such arrangements/ventures with other well-known designers and in this regard a brochure is also appended as Annexure “P” with the Plaintiff.

Secondly, the subject matter of the present dispute is ascertainable, as evident from one of the recitals of the subject agreement itself, wherein, the scope of the business activity has been outlined and designing of textiles of Plaintiff, that is, Cotton Lawn, Silk print, Embroidery, raw and use Fabrics etc., has been termed as goods. Thus, the subject contract, in my considered view, does not fall within the ambit of Section 21 of Specific Relief Act (SRA), as Defendants are not merely providing such

services to Plaintiff, which can attract Section 21 or, Section 56 (f) of **SRA**, but the scope of services is multifaceted. Thirdly, the term of subject contract is not extending beyond three years in order to attract even Section 21 (g) of **SRA**. Decisions relied upon by the learned counsel for Defendants are thus distinguishable. I, therefore, hold that the subject contract/agreement is not only for providing services, which can attract Sections 21 and 56 of **SRA**, but also of providing goods as mentioned in one of the recitals of the Agreement itself and hence, Section 58 of the Sale of Goods Act, is applicable to the facts of present case.

21. It appears that whole controversy and grievance of Defendants revolves around non-payment of the amounts due for the year-2017 to Defendants by Plaintiff. However, neither any Clause of subject agreement nor the present record of the case show that any specific deadline for making payments for the year-2017 is mentioned/exists.

22. It is not necessary that every agreement, which is revocable in nature cannot be specifically enforced, as in my considered view what should weigh with the Courts for granting or refusing any injunctive relief is the assessment though sometimes of tentative in nature, that whether, if the relief of injunction is refused then can Plaintiff be compensated monetarily? If the discussion of forgoing paragraphs is taken into account and particularly considering the fact of costs and expenses incurred by Plaintiff in launching lawn Collection of the year-2016, which the Defendants have pleaded as a success, is seen together with the facts that the Plaintiff has agreed to enhance the payment figure from Rs.8 Million (Rupees Eighty Lacs Only) for the year 2017 and Rs.12 Million (Rupees One Crore Twenty Lacs Only) for the year-2018, at least in my view, the Plaintiff has shown his willingness to continue the business and contractual relationship and in absence of any specific deadline for making payment for the year-2017,

even if there is a delay of few days or at most couple of weeks, the same is now cured by making payment in Court, therefore, for the time being, the Plaintiff is able to show that he has a good arguable case; a *prima facie* case. Now coming to the other basic ingredient of balance of convenience; it is also a settled Rule that balance of convenience of Plaintiff is to be weighed against the balance of inconvenience of Defendants. In view of the facts mentioned hereinabove, it is the Plaintiff who is facing inconvenience, as his other competitors in the market would be launching their lawn collections (products) within the seasonal timelines as against the Plaintiff, who at present is being ousted from the market. More so, Clause-9 of the subject contract further safeguard the interest of Defendants, where under, even if the Plaintiff does not purchase the full set of designs prepared by Defendants at the start of the year, the latter (Plaintiff) is liable to pay the full fee of that particular year to the Defendants, unless there is *force majeure* operating in that particular point in time.

With these observations, the third basic ingredient of suffering irreparable loss is not difficult to decide. The forecasting done by Plaintiff while entering into the subject agreement and making investment in relation to that is bound to be frustrated and jeopardized if the injunctive relief is refused. Hence, Plaintiff cannot be compensated in monetary terms; whereas, the Defendants will not suffer any loss as they will be getting their agreed payments, rather now the enhanced payments as per Plaintiff Statement dated 30.01.2017. This I am saying on the basis of the stance taken by the Defendants in their Counter-Affidavit, that they have not entered into any agreement with any of the competitors of Plaintiff. If this is the fact then the Defendants would continue to receive monetary benefits, while carrying out their own business as envisaged and permitted under the subject Agreement (Contract).

23. The upshot of the above is that both the injunction applications are granted subject to the interim orders already holding the field in the above mentioned High Court Appeal No.121 of 2017 and subject to payment in Court the balance enhanced amount as mentioned in the Statement of 30.01.2017; **it means** that the Plaintiff is liable to pay Rs.8,000,000/- (Rupees Eight Million Only) for the year 2017 to Defendants and will deposit the same with the Nazir of this Court within three (03) weeks from today after adjusting/deducting the amount already deposited by Plaintiff under the aforementioned Court's order of 09.01.2017.

Dated: 06.04.2017

M.Javid.P.A.

JUDGE

