IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 412 / 2019

Plaintiff:	**M/s. Emfore Corporation through Mr. Muhammad Arif Advocate.**
Defendants: No. 1 to 3.	**M/s O.T.I.S. Elevator Company & others through Mr. Khalid Rehman a/w Dr. Adeel Abid Advocates.**
Defendant: No. 4.	**M/s. Greavas Pvt. Limited through Mr. Rashid Anwar Advocate.**

1) For hearing of CMA No. 3418/2019.
2) For hearing of CMA No. 4786/2019.

Date of hearing: **06.05.2019.**
Date of order: **06.05.2019.**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Permanent Injunction and through CMA No.3418/2019 at S.No.1 Plaintiff seeks a restraining order against the Defendants from marketing, installing and distributing O.T.I.S. lifts and equipments and from appointing Defendant No.4 as their new Distributor, whereas, through CMA No.4786/2019 at S.No.2 filed subsequently on 26.03.2019, the Plaintiff seeks an ad-interim injunction restraining Defendant No.4 or any other person acting on their behalf from distributing and interfering in the under process business of the Plaintiff being handled on behalf of Defendant No. 1.

2. Learned Counsel for the Plaintiff submits that Plaintiff was appointed as an exclusive Distributor of Defendant No.1 through Agreement dated 3.7.1992 and on 2.9.2018 a Letter was issued alleging non-participation of the Plaintiff in some Tender floated by Indus Hospital Projects, Karachi and Lahore, which was replied on 6.9.2018. According to him, thereafter, on 18.2.2019 a notice of default under the Distribution Agreement was issued which was responded satisfactorily; but instead of withdrawing it, on 28.2.2019 notice of termination of the Agreement has been issued hence, instant Suit. Per learned Counsel Article XVIII (B) of the Agreement provides for a period of 90 days for issuing a termination notice, but instead of exercising this option,

Article XVIII (C) has been invoked on the ground that Plaintiff has failed to observe and perform the provisions of the Agreement; however, it is the case of the Plaintiff that since 1992 the Plaintiff has been performing satisfactorily and has sold numerous lifts / equipment of the Defendant No.1; hence, the notice in terms thereof is malafide and against the spirit of the Agreement. According to him, Defendant No.1 had in fact already entered into some arrangements with Defendant No.4 and has now appointed them as their Distributor, whereas, for termination of Plaintiff's Agreement, a false allegation has been attributed; hence, the same is liable to be set aside. He has further argued that without prejudice, even if Defendant No.4 has been appointed as a Distributor, the Plaintiff during validity and subsistence of the Agreement, had initiated 73 projects for selling the equipment of Defendant No.1, and therefore, Defendant No.1 be directed to allow and permit completion of these projects, notwithstanding the appointment of Defendant No.4 as its new Distributor. According to him, huge investment has been made by the Plaintiff and serious prejudice would be caused if the relief so requested is denied.

3. On the other hand, learned Counsel for Defendant No.1 submits that the Agreement does not create any vested right in favour of the Plaintiff who was in fact an independent purchaser of the goods being sold by Defendant No.1, and it was only to the extent of exclusive rights for selling the goods within Pakistan, whereas, the Plaintiff after purchase of the goods was selling the same by charging profits and as soon as the goods were shipped / supplied, the transaction between Plaintiff and Defendant No.1 stood completed, whereas, Defendant No.1 has already supplied the equipments for all confirmed orders and no case is made out. According to him, insofar as the contracts and negotiations entered into by the Plaintiff with prospective buyers are concerned, Defendant No.1 is not responsible for any such efforts of the Plaintiff as no confirmed purchase orders have been executed. He has further argued that in similar circumstances, at the time when Plaintiff was being appointed as a Distributor, the then Distributor had filed Suit bearing No.697 of 1992 on identical facts and ground and in respect of an identical Agreement; however, this Court vide order dated 10.02.1993 was pleased to dismiss the injunction application. He has further argued that the Suit is barred under Section 12 and 21 of the Specific Relief Act, whereas, the only relief the Plaintiff can seek is for

loss of business through damages and no injunction can be granted. In support he has relied upon ***Worldwide Trading Company Ltd. V. Sanyo Electric Trading Company Ltd. (P L D 1986 Karachi 234), Muhammad Farooq & Company (Pvt.) Limited V. Messrs Pakistan Tobacco Company Limited and another (1997 C L C 520), Muhammad Riaz V. Federal Construction Limited and 4 others (1987 C L C 345), Messrs Time N Visions International (Pvt.) Ltd. V. Dubai Islamic Bank Pakistan Limited (P L D 2007 Karachi 278), Muhammad Yousuf V. Messrs Urooj (Private) Ltd. (P L D 2003 Karachi 16), Messrs Business Computing International (Pvt.) Ltd. V. IBM World Trade Corporation (1997 C L C 1903), Bolan Beverages (Pvt.) Ltd. V. Pepsico. Inc. and 4 others (P L D 2004 SC 860). Phalippine Airlines Inc. V. Paramount Aviation (Private) Limited and others (P L D 1999 Karachi 227) and Abdul Habib Rajwani V. Messrs Brothers Industries Ltd. and others (2007 Y L R 590).***

4. Learned Counsel for Defendant No.4 submits that the Suit is barred under Section 21(d) and Section 56(f) read with Section 12 of the Specific Relief Act and therefore, no injunction can be granted. Per learned Counsel insofar as the 73 projects as contended by the Plaintiff are concerned, the same does not create any vested right as in the business in question until request for purchase (RFP) is issued, the negotiations keep on continuing, but no orders are placed; hence, no case is made out. Per learned Counsel after being appointed as Distributor of Defendant No.1 they have conducted some inquiries and the stance of the Plaintiff is not corroborated in any manner with their claim as there are not concluded or confirmed orders in field. Insofar as permission to continue with these prospective projects is concerned, learned Counsel submits that Defendant No.4 would be seriously prejudiced if any such request is granted, as even after termination of the Agreement Plaintiff intends to procure business and this in fact amounts to a back door extension of their Agreement which cannot be granted. In support he has relied upon ***Bank Alfalah Ltd. V. Neu Multiplex and Entertainment square company Pvt. Ltd. (2015 Y L R 2141), and Messrs Universal Business Equipment Pvt. Ltd. V. Messrs Kokusai Commerce Inc. and others (1995 M L D 384).***

5. I have heard all the learned Counsel and perused the record. The Agreement dated 3.7.1992 is an admitted documents and it appears to

be an admitted position that the Agreement already stands terminated by invoking Article XVIII (C) by Defendant No.1 which was so done on violation of the said sub Article as according to Defendant No.1, conditions of the Agreement have been violated and Plaintiff is not performing its part of the Agreement. Reliance in this regard was placed by Defendant No.1 on their letter dated 18.2.2019, wherein it has been alleged that Plaintiff is also involved and engaged in selling competitive products. It further appears that when this Suit was filed, the Agreement already stood terminated, whereas, Defendant No.4 has already been appointed as a new Distributor. What the Plaintiff is now seeking is in fact a mandatory injunction and amounts to *status-quo ante* which requires a very high degree of fulfillment of the pre-conditions for grant of an injunction in terms of Order 39 Rule 1 & 2 CPC. Moreover, in terms of Section 21(d) of the Specific Relief Act, 1877, Contracts which are revocable in nature cannot be specifically enforced. Similarly in term of Section 56(f) ibid, the Court may refuse injunction to prevent beach of a contract the performance of which would not be specifically enforced. Therefor all in all, the injunction being sought by the Plaintiff in this matter on the facts so stated is a rarity and an exception to the general rule. It is settled law in respect of Agency Agreements that until and unless a case is made out in clear and express terms to the effect that the Agency is coupled with interest; no relief of an injunction can be granted. There is a plethora of case law in this regard and need not be reiterated; however, the order of the learned Single Judge of this Court in respect of the present Defendant No.1 in Suit No.697 of1992 dated 10.02.1993 is relevant and a complete answer to the arguments raised by the learned Counsel for the Plaintiff inasmuch as it has dealt with, and dilated upon identical facts and is on the interpretation of the identical Articles of the Agreement now being relied upon by the Plaintiff. It would be advantageous to refer to the relevant findings of the learned Single Judge in this regard which is as under:-

> "In the instant case the agency agreement sets out the reciprocal obligations of the parties. It is obvious from this agreement that the Plaintiff was granted exclusive purchasing rights of defendant's equipments in Pakistan not due to any interest of the Plaintiff then existing in such equipments or defendant organization but in consideration of the obligations the Plaintiff undertook upon itself. A brief reference to some of the provisions of the agreement would show that Plaintiff's financial involvement in the agency was incidental to and part of its obligations under the agreement and for its own benefit.

The recital of the agreement provides……..

Under Article I the Plaintiff is appointed exclusive 'Representative' for "furnishing and installing of OTIS equipment in Pakistan" and the Plaintiff agreed "to give careful and energetic attention to promoting the sale, installation and servicing of OTIS equipment." Third Para of Article I reads…….

Article IV provides for execution of work by the plaintiff for its customers, the standard to be maintained in such work, the profits to be earned by the plaintiff in the sale and installation of equipments etc. The article is to the following effect:-……

Article V provides for submission by the Defendants direct quotation to customers in certain circumstances. Under Article VIII the Plaintiff is to adhere to the rules, procedures and standards of the defendants in installation and servicing of defendants' equipments. Under Article IX the Plaintiff, inter alia, is required to "solicit and undertake contracts, for the repair and servicing of OTIS equipments" and to maintain reasonable minimum supply of necessary spare parts. Article X which contemplates the assignment to the contracts at the time of termination of the agreement and for the resale to the defendant the spare parts lying with the Plaintiff, reads as follows:-……

Article XIII regarding Plaintiff's expenses in connection with the agreement provides:…….

Article XIX restrains the Plaintiff for period of three years, after termination of the agreement, from being concerned with any business in Pakistan relating to the manufacture, furnishing installation etc. of elevators or escalators or related to activity covered in the agreement.

From the agreement between the parties it would thus appear that expect for the price of the equipments, that the Plaintiff had to pay to the Defendant when purchasing these, there was no financial involvement of the defendant. All profits and all expenses under the agreement had to be on Plaintiff's account exclusively. As regards furnishing of performance bonds and bank guarantees by the Plaintiff to its customers, the agreement does not require this. As such it was entirely a matter between the Plaintiff and its customer and cannot be made a basis for setting up plaintiff's right against the defendant. Insofar as the money still payable to the plaintiff by its customers for work done, is concerned, the Plaintiff will exclusively be entitled to the same and this position Mr. Nomani does not dispute. Obviously, this again is a matter between the Plaintiff and its concerned customer having nothing to do with the defendant. Similarly, the mere restrain placed on the plaintiff under Article XIX, even if similar to restriction contained in partnership agreement, would not confer any right or interest on the Plaintiff.

The last point that needs consideration relates to the Plaintiff's on going installation work. It was alleged that the plaintiff had in hand several assignments for installation of elevators involving large amount of about Rs. 4.5 crores, and as work on these was in progress, termination of the agreement would result in heavy losses to the plaintiff. A reading of the agreement between the parties would show that the obligations of the plaintiff thereunder included promotion of sale of defendant's equipments, its installation and undertaking the repair and servicing of the equipments. For instance, under Article I of the Agreement between the parties, the plaintiff was obliged to promote the sale, installation and servicing of defendant's equipments, under Article IV the plaintiff was required to undertake erection of equipments sold by it to its customers and Article IX provided for undertaking repair and servicing of installed equipments by the plaintiff. Now, on termination of the agreement, Article X thereof provides for the taking over of the "then existing service, repair and inspections" contracts by the defendant but no such provision appears to have been made, at least none was pointed out to me, in respect of sale and installation assignments then in the hands of the plaintiff. The reason for the absence of such provision cannot possibly be attributed to parties' intention to abandon

> such work in the midway, for, that would adversely affect both, the plaintiff in money, the defendant in reputation. In my view, therefore, in the absence of any provision to the contrary it can reasonably be assumed that all such deals / agreements for supply and installation of equipments as had already been concluded between the plaintiff and its customers before the termination notice, would continue to be executed by the plaintiff within the notice period and even thereafter, if necessary, notwithstanding the termination of the agreement and to that extent the defendant would be expected, in the mutual interest, to extend its cooperation, particularly in relation to the supply of equipments for such assignments."

6. Insofar as the argument that since the Plaintiff had entered into negotiations with prospective buyers, and notwithstanding the fact that now a new Distributor has been appointed, the Plaintiff be permitted to continue with such business and Defendant No.1 be directed to supply such equipment is concerned, I am of the view that this cannot be granted by this Court. If the contention of the Plaintiff is accepted that because of this, relationship continues as it is, then it would seriously prejudice the interest of Defendant No.4. It may have an effect on the customers as well. It is but settled that the authority of the agent goes away with the termination or expiry of the Agreement. And by usage in some trades, which the Courts have recognized as a lawful usage, the authority of a broker to sell expires with the day on which it is given, and as all parties dealing in that trade are presumed to be cognizant of the usage, the principal is not bound by a contract of broker after that day[1].

7. As to the argument to the effect that huge investment has been made, it would suffice to observe that firstly this is not an agency Agreement but even if it is, again it is not a case whereby, Section 202 of the Contact Act could be made applicable. It is to be appreciated that the Agreement itself does not provide or caters to any such investment by the Plaintiff and in response creating any agency which could be termed as coupled with interest. For the purposes of procuring business, if any amount has been spent, this does not create a right for all times to come.

8. A learned Division Bench of this Court was also seized with somewhat similar facts in the case of ***FOSPAK (Pvt.) Ltd. V. FOSROC***

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[1] Dickinson v Lilwall (1815) 4 Camp. 279

International Ltd. (**PLD 2011 Karachi 362**) wherein it was being pleaded that the contract was an Agency coupled with interest and therefore, it cannot be cancelled and terminated. The learned Division Bench of this Court was pleased to repel this contention, and observed that since the Agreement specifically provided for a termination clause, which was available to both the parties, therefore, no injunctive relief could be granted. It was also observed that if the contention of the Appellant is accepted, this would lead to the conclusion, that in no manner the termination clause could be invoked against the Appellant, and in that way such a termination would not be possible by reason of Section 202 of the Contract Act, which would, in effect, give the Appellant a virtual carte blanche to violate the contract with impunity. It is to be noted that in that case the issue was violation of the contract and invoking of the termination clause, whereas, in the instant case, it is the automatic termination of the contract upon its expiry, and therefore, it could be safely said that facts of this case are even on a lower pedestal than the case of *FOSPAK (Supra)***.** The relevant finding reads as under;

> 16. Notwithstanding the foregoing, we must consider the case sought to be made out by the appellant. Even when placed at its highest, it is no more than that of an agency coupled with an interest. However, for the following reasons, we are not satisfied that, prima facie, the appellant has been able to make out such a case. Firstly, as noted in Roomi Enterprises, section 202 itself provides that if there is an express provision which allows for the termination of a contract to which it applies, the contract can be terminated. That is precisely the situation at hand. Clause 14.1 of the 2003 Agreement expressly confers a right on either party to terminate the contract. Furthermore, this is not a right limited to one party. It applies equally to both. Therefore, even if section 202 were to apply to the 2003 Agreement, clause 14.1 would still permit its termination. Indeed, if the submission made by learned counsel for the appellant were accepted, that would lead to the result that even on the occurrence of an event to which clauses 14.2 and/or 14.3 applied, the respondent would still be unable to terminate the contract. Clause 14.2 (which is a standard form provision, to be found in virtually every contract of a similar nature) enables the respondent (the licensor) to terminate the contract on breach of its provisions by the appellant (the licensee), subject to fulfilment of the conditions provided in the said clause. *On the appellant's submission, such a termination would not be possible by reason of section 202, which would, in effect, give the appellant (and every other licensee in a similar position under a similar contract) a virtual carte blanche to violate the contract with impunity. That could hardly be a proper interpretation and application of both section 202 and the contract itself.*
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> 17. Secondly, it was held in both Bolan Beverages and Roomi Enterprises that the fact that the putative agent made investments for purposes of the agreement between the parties does not bring the matter within the ambit of section 202. Indeed, in Roomi Enterprises, the learned Division Bench expressly approved earlier single Bench decisions of this

Court to this effect. It is also to be noted that this issue was not one of the questions that the Supreme Court formulated in Egypt Air while concluding that the agent therein was entitled to the grant of interim relief. The claim therefore that such investments were made by the appellant (even if accepted correct for present purposes) does not advance the latter's case in relation to section 202. In this context, it is also to be noted that learned counsel for the respondent was correct, in our view, in asserting that the respondent was not under any obligation, under any of the agreements, to make any investment, whether by way of equity or otherwise. The submission by learned counsel for the appellant that the respondent's failure or inability to do so put the entire burden on the appellant does not therefore have any foundational basis in either the 1997 or the 2003 Agreements. The appellant itself entered into those licensing agreements, whereby it obtained the benefit of the right to manufacture the respondent's products in Pakistan and sell them under the Trademarks, and it was incumbent on the appellant to have the necessary facilities available for such purposes.

18. Thirdly, when section 202 is itself examined, it is clear that it is not, prima facie, applicable in the facts and circumstances of the present case. Section 202, and its illustrations, provide as follows:--

> 202. **Termination of agency where agent has an interest in subject-matter**.--Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
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> Illustrations
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> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority nor can it be terminated by his insanity or death.
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> (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

For section 202 to apply, the following three conditions must be fulfilled; (a) there must be an agency; (b) the subject matter of the agency must be some property; and (c) the agent must himself have an interest in such property. Thus, for section 202 to apply, the court must ask itself the following sequential questions: (a) is the contract in the nature of an agency? If so, (b) what is the subject matter of the agency, i.e., does it involve some property? If so, (c) does the agent himself have an interest in such property? A negative answer to any one of these questions would negative the application of section 202. In our view, for a proper understanding of section 202, it is crucial to keep in mind the word "himself", as used therein. The section requires that the agent must "himself" have "an interest in the property" which forms the subject matter of the agency. *In other words, the "interest" of the agent with which the section is concerned must be an interest that he has in his own right or capacity, i.e., a capacity other than that of simply being the agent. The point is reinforced by the concluding words of the section: if the agent "himself" has such an interest, then the agency cannot (in absence of an express provision) be terminated to the prejudice of "such" interest. The word "such" obviously relates back to the nature of the interest*

> *that the agent must have, which is an interest in his own right, and not simply an interest on account of his position as agent*.

9. The other cases relied upon by the learned Counsel for Defendants also on somewhat similar facts and support the contention of the Defendants.

10. In view of hereinabove facts and circumstances of this case, the Plaintiff has failed to make out a prima facie case for any indulgence, whereas, neither the balance of convenience lies in its favour nor any irreparable loss would be caused if the injunctive relief is declined therefore, by means of a short order on 06.05.2019 listed applications were dismissed and above are the reasons thereof.

J U D G E

ARSHAD/