IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 2685 / 2017

Plaintiff:	**System Company through M/s. Haider Waheed, Uzma Farooq and Sufiyan Zaman Advocates.**
Defendants:	**MTU Middle East FZE & another through Mr. Umar Akram Choudhry Advocate.**

1) **For hearing of CMA No. 3000/2018 (Under Order 7 Rule 11 CPC)**
2) **For hearing of CMA No. 11263/2018. (Under Order 6 Rule 17 CPC)**
3) **For hearing of CMA No. 17856/2017. (Under Order 39 Rules 1&2 CPC)**

Date of hearing:	**06.09.2018, 04.10.2018, 17.10.2018 & 18.10.2018.**
Date of order:	**20.11.2018.**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction, whereas, through application at Serial No.3, (**CMA No. 17856/2017**), the Plaintiff seeks restraining order against the Defendants from discontinuing support and other obligations pursuant to Article 2.1.2(c) and 5.1.7 of Agreement dated 01.14.2014 for the works and warranty claims with a further restraining order from awarding a service partner contract to any third party during pendency of the Suit.

2. Briefly stated, the facts are that Plaintiff operates in supply of high speed diesel engines, installation and provision of after sales service since last more than 30 years, whereas, Defendants No.1 & 2 are manufacturers and distributors of diesel and gas engines in industrial, commercial and maritime use ("MTU" Brand of Rolls-Royce Power Systems AG) and an Agreement was entered into on 01.04.2014

whereby, Plaintiff ("Partner") became a partner in selling the products of Defendants ("Distributor") and so also providing warranty, after-sales repair, maintenance and support services. Admittedly, the Agreement in question was for a period of three years (valid till 31.12.2017). Instant Suit has been filed on 28.12.2017 and being aggrieved vide notice dated 03.07.2017 to the effect that it will not be renewed any further, instant proceedings have been initiated and vide order dated 28.12.2017 ad-interim orders were granted as prayed for in the listed application by a learned Single Judge of this Court.

3. Mr. Haider Waheed, ably assisted by Ms. Uzma Farooq, Counsel for the Plaintiff have contended that pursuant to the Agreement in question the Plaintiff is properly qualified as a partner to conduct specified service operations with further authorization and permit to sell products and spare parts; that the partner shall be fully responsible for all warranty claims made with regard to the sales made pursuant to the supplement to the Service Partner Agreement; that the Agreement further provides that partners orders are not binding, until accepted by the distributor, whereas, no order may be modified or cancelled by the partner after its acceptance by the distributor without written consent; that it further provides that the distributor will pay to the partner for replacement of parts, payment of labor and for purpose of warranty services; that the obligations of parties upon termination or expiration shall not release either party from any obligation to pay the other any sum which may be due or owed to the other; that similarly the acceptance of orders after termination of this Agreement shall not be construed as a renewal or a waiver of termination; that the Agreement further provides that the partner has no express or implied right to create responsibilities on behalf of the distributor and

lastly, it also provides that partner shall be solely responsible for any and all expenditure made, incurred, or assumed by the partner in preparation for performance of partner's responsibilities and obligations under this Agreement; that pursuant to impugned communication dated 3.7.2017 to the effect that no further renewal of the Agreement would be made there was a suggestion that meeting would take place to ensure an amicable separation and a phase-out procedure / off boarding process, including the availability and methodology in respect of Daisy's Software which is crucial for communication with the engines already sold; that during this period and before the expiry of the Agreement dated 31.12.2017 various purchase orders were either accepted, delivered or request were being received from customers for warranties and continued support for, including but not limited to, Work Contract of Pakistan Petroleum indicating delivery date of 31.12.2017; Karachi Shipyard & Engineering Works, request for support including warranty dated 07.12.2017; Asia Petroleum Service Order dated 21.11.2017; Pakistan Navy specific warranty requests; China Ship Building Trading Company Ltd., request dated 18.12.2017 stating that it needs services for startup, commissioning, Harbor Acceptance Trial and Sea Acceptance Trial, and Warranty; that these documents clearly reflect that notwithstanding the expiry of the Agreement on 31.12.2017, these services in respect of supply of spare parts and warranty related services are to be provided by the Plaintiff; that through listed application the Plaintiff is neither seeking a new Agreement or the extension of the expired Agreement; but only support for those engines which have been serviced / installed during subsistence of the Agreement in question; that if any new Agreement is signed with third

party, this would result in reputation damage as well as loss of goodwill which is unquantifiable; that as per the Agreement, Plaintiff is not an agent and it logically follows that contracts entered into with third parties, are that contracts of the Plaintiff and therefore, further services cannot be entrusted to a third party; that the only support which the Plaintiff requires is access to the Daisy's Software and supply of parts for which appropriate compensation is being paid; hence, the balance of convenience lies in favor of the Plaintiff; that pursuant to the Agreement in question, the Plaintiff has entered into independent obligations on the assurance of the Defendants, and if no further support is provided the Plaintiff will be forced to withdraw from providing such services which will have a very negative impact on the goodwill and reputation of the Plaintiff besides legal actions by the contracting parties; that the loss the Plaintiff will suffer in this regard cannot possibly be compensated in monetary terms / damages; that the Defendants on the other hand, do not risk any loss on account of having to continue support only for those projects which were contracted by the Plaintiff within the validity of the Agreement in question; that in the alternative the Plaintiff's argument is that this is a case of Agency coupled with interest inasmuch as the Plaintiff has invested heavily in setting up a service and support workshop and if the injunction is refused, the Plaintiff's investment for providing and running such services would not be compensated and therefore, under Section 202 of the Contract Act, 1872, the Plaintiff is entitled for the relief prayed for. In support of his contention he has relied upon ***Muhammad Areef Effendi V. Egypt Air (1980 SCMR 588), Zubair Ahmed V. Pakistan State Oil Ltd. & another (PLD 1987 Karachi 112), Ansys Inc V. Khee and another (1999 Mr. Justice Parke 19***

May), Evans Marshall & C. Ltd V. Bertola SA & Another [1973] 1 All ER 992, Digital World Pakistan (Pvt.) Ltd through Chief Executive V. Samsung Gulf Electronics FZE and another (PLD 2010 Karachi 274), SDI Retail Services Limited V. David King, Paul Murray, The Rangers Football Limited, Rangers Retail Limited [2018] EWHC 1697 (Comm), Molasses Export Co. Ltd. V. Consolidated Sugar Mills Ltd. (1990 CLC 609), Jamil Ahmed V. Provincial Government of West Pakistan and 4 others (PLD 1982 Lahore 49), Umar Farooq V. Attock Petroleum Ltd. and 3 others (2015 MLD 1494) and Messrs Business Computing International (Pvt.) Ltd. V. IBM World Trade Corporation (1997 CLC 1903).

4. On the other hand, Mr. Umar Akram Choudhry, learned Counsel for the Defendants has contended that Plaintiff was never appointed as an agent; but was only a partner for a specified term which already stands expired on 31.12.2017; whereas, under the garb of an interim order, which was obtained just three days prior to the expiry of such period, is still continuing and pretending to be the partner of the Defendants which is impermissible in law; that when the Agreement was executed, the Plaintiff was well aware of the terms and conditions and so also the expiry and its consequences, and therefore, the plea now taken on behalf of the Plaintiff is nothing but an attempt to keep continuing with the Agreement for an unspecified period; that even otherwise, the Agreement in question has not been signed by Defendant No. 2; that there is no exclusivity given or granted to the Plaintiff, whereas, the arrangement which is supposed to continue after termination and or expiry is only in respect of the payments to be made or received by the parties for the concluded contracts, and this, in no manner can be termed or used to continue

with all obligations arising out of the Agreement; that Defendants are manufacturers of a renowned brand of engines, whereas, the goods have and are being sold by them, and not by the Plaintiff, whereas, the responsibility in respect of warranties, wherever applicable, is the look-out of the Defendants and not of the Plaintiff; that the Defendants were and will be honoring such warranties in accordance with the Agreement with the parties; that the Plaintiff was never supposed to offer any warranty or parts guarantee on its own, but was only on behalf of and through the Defendants; that insofar as the contracts entered into after serving of Notice dated 3.7.2017 are concerned, no protection can be sought on this ground at least in favor of the Plaintiff as contended in the listed application; that the Agreement in question was for a specific term and provided for automatic termination, hence, no rights are created in favour of the Plaintiff; that it was never the intention of the Defendants to have any exclusive relationship with the Plaintiff, and it clearly provided a non-exclusive right within the Agreement; that insofar as the purchase orders are concerned, the Defendant No.1 expressly reserves right under the Agreement to reject any, or all of the Plaintiff's orders for purchase of products or parts; that the Agreement in question never created any agency relationship; therefore, question of invoking Section 202 of the Contract Act, 1872, or the doctrine of Agency coupled with interest does not arise; that Article 6.5.2 of the additional provisions further provides that any sale of products or parts after the termination by Defendant No.1 would not be construed as a renewal of the Agreement in question; that it was never agreed that after termination of the Agreement, the Plaintiff would have any right to engage itself or acknowledge any warranty services for the engines sold by Defendant No.1 in Pakistan; that all

sales in Pakistan, including the sales to Pakistan Navy and Pakistan Maritime Security Agency were direct sales of Defendants No.1 and 2 and were not sales of Plaintiff in any manner, whereas, the role assigned to the Plaintiff was for a limited purpose, and could only be performed or rendered during validity of the Agreement, and not thereafter; that all engines have been purchased by the customers of the Defendants and not of the Plaintiff; that the Defendants are a well-renowned company and has always been very serious about its warranty services to its customers in Pakistan as well as worldwide, and for that the Defendants are well equipped to provide any such warranty service and supply of parts without engaging the Plaintiff; that there is no clause in the Agreement to grant any first right of refusal to the Plaintiff after expiry of the same and at the time of engaging some other service partner; that insofar as fresh transactions entered into by the Plaintiff after letter dated 3.7.2017, whereby, the Plaintiff was informed that the Agreement is expiring on 31.12.2017, are concerned, they were done while holding discussions with the Defendants in respect of the phase out process, hence, the Defendants are not bound by such action of the Plaintiff, and cannot be made basis to continue with an Agreement which already stands expired; that insofar as the signing of Agreement with any third party is concerned, the Plaintiff has no right to seek any injunction to this effect after expiry of the Agreement in question, whereas, despite this, interim orders have been obtained as prayed and also includes restraining order against the Defendants from entering into any such Agreement; that no vested right has accrued to the Plaintiff in the given facts; that it is apparent that the relief(s) being sought by the Plaintiff are beyond the scope of the Agreement, therefore, this Court

cannot grant the same. In support he has relied upon ***FOSPAK (Pvt.) Ltd. V. FOSROC International Ltd. (PLD 2011 Karachi 362), Bank of America V. Miraj Sons Ltd. (1989 C L C 2106) and Syed Ali Asghar Shah V. Pakistan International Airlines Corporation (2016 C L C 189).***

5. I have heard all the learned Counsel and perused the record. The precise case of the Plaintiff as reflected from the pleadings as well as arguments raised before this Court is to the effect that Defendants are obligated to provide necessary support as well as access to a software enabling the Plaintiff to perform its job in respect of sales made by it during the validity of the Agreement dated 01.04.2014. The Agreement in question is not in dispute, whereas, it is the outcome of a distributor Agreement between Defendants No.1 & 2 which is effective from 01.02.2014 and is valid till 31.12.2017 and through this Agreement Defendant No.1 has been authorized to conduct complete distributorship operations in connection with specified products marketed by Defendant No. 2 in a specified area of responsibility. This Agreement between Defendants No.1 & 2 authorizes Defendant No.1 in order to fulfill its responsibility to engage partners for conducting specified service operations. Pursuant to this arrangement the Plaintiff and Defendant No.1 executed an Agreement dated 01.04.2014 which is called as “Service Partner Agreement” and pursuant to Article 6 of this Agreement, it has incorporated the terms of the additional provisions applicable to “Service Partner Agreement”. There is also a supplement to the “Service Partner Agreement” dated 23.6.2014, which incorporates certain other terms and conditions. It is also pertinent to note that Defendant No. 2 is not a signatory either to the “Service Partner Agreement” or the Supplement Agreement. Article 7 of

this Agreement provides that it will expire without any action by either the partner (Plaintiff) or Distributor (Defendant No.1) on 31.12.2017. Similarly, the supplement Agreement also has the same date of expiry. Now the precise issue for consideration of the Court is, that whether even after expiry of the Agreement in question on 31.12.2017, Defendant No.1 or for that matter even Defendant No.2, can be compelled through any restraining order not to enter into further Agreement with a third party, or a mandatory order to provide the requisite support services to the Plaintiff as is being prayed for through listed application. Time and again, learned Counsel for the Plaintiff made reference to various correspondence, emails, and so also placement of orders in respect of engines as well as its maintenance and providing of warranty services to make an impression on the Court that if such services are not continued after the expiry of the Agreement, then Plaintiffs' goodwill and reputation would be seriously prejudiced and will cause irreparable loss, which ultimately, if the Suit is decreed would not be compensated. On the other hand, the stance on behalf of the Defendants is that firstly it was not an Agreement which could give any vested right; or for that matter, any interest in the goodwill and reputation of the Defendants products. Their contention is that it was a time bound Agreement of which the Plaintiff had enough notice, whereas, at least six months prior to the agreed date of expiry the Plaintiff was approached to go through a phase out procedure. Though extensive arguments have been made by the learned Counsel for the Plaintiff, however, in my view, it is only in this context that the listed application has to be decided.

The Agreement itself does not specifically deals with the present situation; however, at various places the Agreement stipulates that the

Plaintiff has no exclusive rights; rather it only confers a non-exclusive right to buy products from Defendant No.1 and offer other services to its customers. Reference in this regard may be made to Article 1(A) (2). Similar provision exists in Article 1(3) and reads that subject to the terms and conditions and for the term of this Agreement, distributor hereby grants partner a non-exclusive right of displaying at its approved location(s) the various trademarks, service marks and the several other word and design marks which the distributor uses in connection with such products, parts and rendering of services thereof. On an overall perusal of the Agreement in question it appears that it does not entitle the Plaintiff in any manner to seek any such relief as is being sought through listed application after expiry of the Agreement in question. Therefore, how could this Court go any further and grant a relief which is beyond the agreed terms and conditions as settled by the parties themselves. The question that the Plaintiff has invested heavily and has developed a huge customer base, and if the relief as prayed for is not granted, will seriously prejudice and cause irreparable loss to the Plaintiff, does not appear to be a convincing argument. Firstly, it is to be appreciated that the product in question is well known as a product of Defendants. It has got nothing to do with the Plaintiff at least as to the reputation and good will of the product itself. The Plaintiff was engaged as a service partner for sale and to render services of repairs for the products of Defendant No.1. There may be a case that Plaintiff was performing its job satisfactorily vis-à-vis. the Defendants as well as the customers; but this in no manner creates any vested right to seek such relief as prayed for. The Defendants have come before the Court and have candidly undertaken and admitted that insofar as the warranties of their products are

concerned, they are there to honor them, and hence, to this effect it is not a case for the Plaintiff to worry about. No document has been shown to the Court firstly, so as to draw an inference that any warranty was on their account; secondly, even if so, whether that was given by the Plaintiff with the concurrence of the Defendants. Therefore, if there could be a concern in this respect, it should be of the customers and for that they can have recourse to whatever they choose. As to the supply of parts as well as access to the software; again it is the Defendant's headache to cater to the needs of their customers failing which they would be losing their business, besides damaging their reputation, goodwill and brand name. The terms of the Agreement in question do not permit compelling the Defendants to continue with the Plaintiff as their service partner in respect of the products already sold through the Plaintiff and at the same time not to appoint another service partner for future sales activities. If that had been the case, then firstly the Agreement in question would not have been time bound; and secondly, a specific provision would have been provided to cater to the present situation. There is none to this effect; hence, the Court cannot read anything into the Agreement between the parties which is by way of mutual consent only. The terms were agreed upon conjointly which included the validity; hence, no extension can be claimed unilaterally as a matter of right. At the most it could have been by mutual agreement of both the parties as contemplated in clause Seventh ("Term") of the Agreement in question. It is not even a case of any premature termination or cancellation of the Agreement. Rather it is a case of expiry of the Agreement. Both situations are different altogether and this must be kept in mind. Moreover, the Defendants, as an abundant precaution, wrote as back

as in July, 2017, to the Plaintiff that the Agreement is expiring and they must enter into a phase out procedure as provided in the Agreement. This clearly reflected on the part of the Defendants that at the end of the Agreement, they had some other ideas and were not interested to continue with the Defendants. And even if they wanted, it could only be with their consent and not otherwise. This Court must not delve into an exercise of reading something in the Agreement, at least at this injunctive stage, when the Agreement already stands expired. It is needless to mention that it is settled law, that where the contracts are freely entered into by the parties, there is no scope of invoking any doctrine or anything which is not provided or agreed upon by the parties. The terms of the contract cannot be altered, varied or added at the desire and intention of any one of the parties or by invoking the doctrine of fairness and reasonableness. At least, it has to be mutually agreed. In these type of cases the mutual rights and obligations are governed by the express terms of the contract, whereas, it is not the case of the Plaintiff that there was any compulsion for agreeing to the terms of the Agreement and its fixed tenure. It was a voluntary act. Moreover, in clause 6.5.2 (Effect of Transactions After Termination), it has been provided *that the acceptance of orders from Partner or the continuance of sale of Products and Parts to Partner, or any other act of Distributor after termination of this Agreement shall not be construed as a renewal of this Agreement for any further term nor as a waiver of the termination*. This hardly leaves any further discussion on this aspect of the matter that what is to happen on such works and orders as well as warranties after termination of the Agreement. Again in clause 6.6.3 there is a complete procedure provided for between the parties for going ahead with post termination issues. There is another aspect of

the matter which must also be looked into. If the contention of the Plaintiff is accepted and relationship continues as it is, then it may have an effect on the customers as well. It is but settled that the authority of the agent (partner) goes away with the 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].

6. Insofar as the alternative argument of the Plaintiff's Counsel to the effect that after having invested heavily in establishing workshop as well as a customer base, their interest amounts to an agency coupled with interest is concerned, 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. It is but natural that for providing maintenance services and supply of spare parts as well as products, the Plaintiff was required to invest for providing such services and to that during subsistence of the Agreement the Plaintiff has and must have earned enough money to cater for such investment, expenses and profits. After all no one enters into such kind of business to make losses only. The concept of agency coupled with interest of an agent has been explained in Para No. 868

---

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

of ***Halsbury's Laws of England in Fourth Edition Volume-I, to the following effect (page 2036).***

> "868. Authority coupled with interest. ---Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to security or to secure the interest of the agent, the authority cannot be revoked. Thus, if an Agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is irrevocable on the ground that it is coupled with an interest. So, an authority to sell in consideration of forbearance to sue for previous advances, an authority to apply for share to be allotted on an underwriting Agreement a commission being paid for the underwriting, and an authority to receive rents until the principal and interest of a loan have been paid off or to receive money from a third party in payment of a debt, have been held to be irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates, the authority not being given for the purpose of securing the claims of the agent."

7. The same has been incorporated through Section 202 of the Contract Act, 1872 and reads as under:-

> "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."

8. A learned Single Judge of this Court in the case reported as ***World Wide Trading Company v. Sanio Trading Company (PLD 1986 Karachi 234)***, while dilating upon the concept of Agency coupled with interest has been pleased to observe as under:-

> "The interest of the agent, forming subject-matter of the agency, is to be some sort of an adverse nature qua the principal. So, according to the true construction and scope of section 202 the agency can be said to be coupled with interest where the authority of an agent is given for the purpose of effectuating a security or of securing an interest of the agent. This can be inferred from documents forming the basis of agency or from the course of dealings between the parties and from the other surrounding circumstances."

9. Similarly, in the case reported as ***Messrs Farooq and Co. v. Federation of Pakistan and 3 others (1996 CLC 2030)***, a learned Single Judge of the Lahore High Court has been pleased to observe as under:-

> "As regards the contention that the petitioner had invested colossal amount of funds in setting up of office and necessary infrastructure and so the agency was irrevocable, suffice it to say that setting up of office and employment of necessary staff was essential for carrying on the business of the agency. These acts were not anterior to the contract. These were not consideration to any right of petitioner. Under no circumstances they can be considered as security for any interest of the agent under the Agreement of agency. On this state of affairs, it is quite clear to me that the conditions postulated in section 202 of the Act are not attracted to the facts and circumstances of the case in hand. Reference be profitably made to Palani Vannan v. Krishnaswami Konar (AIR 1946 Madras 9)."

10. Insofar as the present case is concerned, it has two aspects which are linked with each other. The first and foremost is that admittedly the Agreement in question stands expired, and despite this the Plaintiff seeks the relief as noted hereinabove. The second is in respect of the alternative prayer in respect of Agency coupled with interest. As to the first part, in somewhat similar circumstances in the case reported as ***Syed Asghar Ali Shah supra*** I had the occasion to examine the effect of an Agreement which stood expired and Plaintiff was seeking relief beyond such period of validity. The following observations in that case are relevant and reads as under:-

> "I am afraid such an attempt on the part of the learned Counsel for the Plaintiff does not appear to be based on any sound principles of equity and justice and to me amounts to an absurd proposition. It appears not only contrary to good sense, but also to good law. The plaintiff is required to establish some right in its favour for grant of an injunctive relief on the basis of an instrument, deed or even a Letter of Intent. In the instant matter, the Letter of intent stands expired admittedly, hence no further relief by way of an extension in the contract period can be granted by this Court. Even if it is assumed that the Plaintiff had been allowed to complete the entire period as mentioned in the letter of intent after signing of an Agreement as contended by the learned Counsel for the plaintiff, could the plaintiff come to this Court after expiry of such period, to seek an injunctive relief by way of restraining the defendants from calling any fresh tenders? To me the answer is no. The period mentioned in the letter of intent, impliedly means that after expiry of such period, the contract stands revoked, hence no vested right accrues to the plaintiff and no relief could be sought in terms of Sections 21 and 56(f) of the Specific Relief Act 1877 as the contract (letter of intent) cannot be specifically enforced any more. The injunction in such matters can only be granted where the terms of contract are free from doubt or are not in dispute, whereas, in the instant matter, the letter of intent stands expired. It must also be noted that an order for temporary injunction under Order XXXIX, Rule (2) C.P.C., (as is the case here) can only be sought in aid of the prospective order for a permanent injunction, whereas,

> even otherwise, such relief being discretionary in nature, the same has to be exercised in a judicial manner. It is also settled law that even if the contract or license is revoked without reasonable notice and during the subsistence of an Agreement or license, at best the aggrieved party can claim damages but no injunctive relief as is being sought in the instant matter.
>
> 6. It would not be out of place to mention, and without prejudice to the fact, that whether any vested right accrues on the basis of Letter of Intent or not, even otherwise if an Agreement had been in field, the plaintiff could not have sought specific performance or enforcement of the Agreement/contract, beyond the period stipulated in the Letter of intent/contract. Therefore, if enforcement of the said Agreement cannot be sought, the necessary corollary is that no injunctive relief can be asked for. At the most the plaintiff may have a case of damages, owing to the alleged cancellation/modification of Letter of intent. However, the plaintiff cannot be allowed to continue and keep working on the basis of interim orders, even beyond the period stipulated in the Letter of Intent/contract. The plaintiff cannot establish a vested right on the basis of interim orders passed by this Court. Insofar the case law relied upon by the learned Counsel for the plaintiff is concerned, the same are not relevant as the facts of the instant case are entirely different and even otherwise the learned Counsel for the plaintiff has failed to establish or justify the contention with regard to continuous validity of the Letter of Intent beyond the period specified therein."

11. A learned Division Bench of this Court was also seized with somewhat similar facts in the case of ***FOSPAK (Supra)*** 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.*
>
> 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.
>
> Illustrations
>
> (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.
>
> (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*.

12. Now coming to the case law relied upon by the learned Counsel for the Plaintiff, it may be observed that none of the cases are identical and or similar in facts with the present case. It may be appreciated that what is in question in all these cases is the interpretation of a

particular contract. Courts as a matter of routine, deprecate in general the attempt to enunciate decisions on the construction of agreement as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract. But, however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in light of the material circumstances of the parties in view of which the contract is made. Notwithstanding this, even otherwise the general rule is that the authority of an agent may be revoked by the principal, even if it is agreed by their contract to be irrevocable. The revocation is effective to terminate the agent's authority, but gives rise to claim for damages. The first case relied upon is of ***Muhammad Aref Effendi (Supra)*** which was in respect of protection under S.202 of the Contract Act, ibid, and with utmost respect, the case of the present Plaintiff does not fall within the contemplation of S.202 ibid; hence not relevant. The case of ***Zubair Ahmed (Supra)*** besides being a Single Judge decision, and only persuasive in nature, is in relation to appointment of agent and dealer for running of a Petrol Station; hence of no help. The case of ***Ansys Inc.*** is also peculiar in its facts inasmuch as it relates to the entitlement of the License fee between the contesting parties; hence not relevant. Again this was a case of termination of a contract and not of its expiry after the agreed date. Hence it is to be understood in this context primarily. Moreover, this matter went into Appeal which is reported as ***Ansys Inc. v Lim Thuan Khee and Tan Tiat Eng [2001] ECDR 34.87***. The Appellate Court partly agreed and partly differed from the decision of Parker.J. It needs to be appreciated that in this case there was a question of tripartite Agreements, between Ansys,

Structures and Computers Ltd ("SCL") and so also companies who had bought the software Licenses of Ansys from SCL. The question was that after termination of the Agreement, who would be entitled to claim and receive the License Fee from third parties, and it was held that SCL was though entitled for such fee, nevertheless, an obligation did exist for SCL to continue to make license payments to Ansys on that basis (i) an implied form, i.e., the continued collection of the license fees by SCL carried with it an ongoing obligation to make the license payments required in the Agreement; or (ii) Ansys being entitled to a restitutionary remedy to prevent SCL from being unjustly enriched. Therefore, it becomes clear that even this case is of no help to the case of the Plaintiff. The case of ***Evans Marshall & Co Ltd., (Supra)***, is also different in material particulars, and is more relevant for the purposes of principles governing grant of an injunction, for which there is plethora of case law from our own jurisdiction, and therefore, this case need not be considered. The case of ***Digital World (Supra)*** is also a Single Bench decision and is persuasive only, whereas, in High Court Appeal No.94/2010, the injunctive order was suspended vide order dated 28.05.2010. The case of ***SDI Retail Services (Supra)*** from the Chancery Division, is again completely out of context in that in this case the Agreement had a matching right clause which could be exercised by the Agent if the Agreement was being awarded to a third party. There is nothing of that sort in this case. The case of ***Molasses Export (Supra)*** is also materially different in facts, hence of no assistance. Similar is the case of ***Jamil Ahmed (Supra)***. Insofar as the case reported as ***Umer Farooq (Supra)*** is concerned, the same was challenged in High Court Appeal and was set aside and is reported as ***Attock Petroleum Limited v Umer Farooq & Others (2017 CLC***

860). Lastly, the case of ***Business Computing International (Supra)***, is another Single Judge decision, wherein, the learned Single Judge has though explained the entire history and case law on the implication of S.202 ibid; however, even in that case, the injunction was refused. Therefore, all these cases are of no help to the case of the plaintiff.

13. In view of hereinabove facts and circumstances of the case, I am of the view that since the Agreement in question was time bound and stands expired on 31.12.2017, whereas, this term was agreed upon by the Plaintiff on its own volition, knowing the consequences of and in respect of supply of spare parts, warranty and Software access for the products already sold during subsistence of the Agreement, the Plaintiff has failed to make out a prima facie case, whereby, any discretion could be exercised in its favor for granting the injunction application, whereas, the balance of convenience also does not lie in its favor. Insofar as irreparable loss is concerned, it is the Defendants who will be suffering losses if the injunctive relief as prayed for is granted. Accordingly, ***CMA No.17856/2017*** is hereby dismissed. Resultantly, the ad-interim orders passed on 28.12.2017 stands recalled.

14. Applications at Serial No.1 & 2 are adjourned to a date in office.

Dated: 20.11.2018

J U D G E

ARSHAD/