

IN THE HIGH COURT OF SINDH, KARACHI**Suit No. 378 of 1987****Habib Jute Mills Limited****Versus****The Islamic Republic of Pakistan and another**

Date of hearing : 26.01.2016

Plaintiff : Through Mr. Rajendar Kumar Chhabria,
Advocate.

Defendant : Through Mr. Peer Riaz Mohammad,
Standing Counsel.

JUDGMENT

Muhammad Faisal Kamal Alam, J: This is a suit, filed by the Plaintiff-Habib Jute Mills Limited, for Recovery of Rs.31,92,413.90 (Rupees Thirty One Lac Ninety Two Thousand Four Hundred Thirteen and Ninety Paisas Only) against both the Defendants.

1. The claim of Plaintiff is that it submitted a bid in response to a tender enquiry, issued by the Defendant No.2 (The Director General, Department of Investment Promotions) on 10.01.1985, in respect of 93000 Bales of 100 Bags each of category "B" Twill Gunny Bags of the specifications contained in the said tender enquiry. This tender document is an undisputed one and has been exhibited in evidence as Exb 1/A. Following reliefs have been claimed by the Plaintiff:-

“It is therefore prayed that this Hon’ble Court may be pleased to pass a judgment and decree jointly and severally against the defendant for: -

A. Rs.31,92,413.90 along with interest at 16% from the date of suit until realization of the decretal amount.

B. Costs of this suit, and

C. Such other relief as this Hon’ble Court Deems just and proper in the circumstances of the case.”

2. The Plaintiff gave the bid/offer to supply 4700 bales of 300 bags each at price of Rs.1963/- for 100 bags FOR ex-mill for 2000 bales and Rs.2055/- for 2700 bales. The other terms and conditions of the offer were also contained in the bid dated 27.1.1985 of Plaintiff, which has been exhibited as Exb 2/A and is available at Page-21 of the Evidence File. It is averred that the Defendant made a counter offer vide their correspondence of 05.02.1985 (Exb 5/4), wherein, they reduced the rate to Rs.1678/- (Rupees One Thousand Six Hundred and Seventy Eight Only) per hundred Bags. Besides mentioning a time frame for acceptance of such an offer, the following line was also added at the end of the correspondence; *“This is, however, without any commitment on the part of this Department.”*

3. The Plaintiff accepted the counter offer of the Defendant vide their letter dated 07.02.1985-Exb 4/A and called upon the Defendants to issue “**ATs**” (Acceptance of Tender Documents). After this Letter [of 7.02.1985], no further correspondence was exchanged between the parties, except almost after sixteen months, that is, in July, 1986, on Plaintiff Complaint against the Defendant, the Wafaqi Mohtasib (Federal Ombudsman), passed an order dated 22.07.1986, inter alia, directing the Defendants to take disciplinary action against their officials.

4. The grievance of the Plaintiff is that the Defendants did not purchase the Jute Bags from Plaintiff in pursuance of their above mentioned correspondence of 07.02.1985 and committed breach of contract and are liable to compensate Plaintiff for damages suffered by them.

5. The Defendants filed their Written Statement and controverted the claim of the Plaintiff. The main defence as pleaded is that there was / is no concluded contract in place and the entire claim of the Plaintiff in this regard is not tenable.

6. The Defendant has emphatically relied upon the above quoted lines mentioned in their above referred correspondence of 05.02.1985 to argue that for all intents and purposes it simply meant that the said correspondence should not be taken as any commitment on the part of Defendants. It is further averred that Other 28 (twenty eight) participants were also issued the same type of correspondence / letter to get the best rates / quotations. It was further argued that rates quoted / offered by the Plaintiff were not in conformity with the subject tender.

7. By order dated 21.08.1988, following issues were framed, which are reproduced herein below:-

“1. Whether the suit is not maintainable?”

2. Whether a binding contract came in existence between the plaintiff and the defendants?

3. To what damages, if any, is the Plaintiff entitled to?”

8. From the Plaintiff side one witness was examined, namely, Mr. Jawed Mahmud Paracha son of Muzaffar Din Paracha, (the then Director of Plaintiff company), whereas, Mr. Javed Saleem son of Muhammad

Saleem, (the then Deputy Director Ministry of Industries, Department of Supplies)-Defendant No.2 had adduced evidence on behalf of Defendants.

9. Findings on the issues are as follows:

FINDINGS

ISSUE NO.1.	Accordingly.
ISSUE NO.2.	In Negative and against the Plaintiff.
ISSUE NO.3.	In Negative and against the Plaintiff.

REASONS

ISSUE NO.2.

10. This is the prime issue and therefore, is to be determined first.

11. Learned counsel Mr. Rajendar Kumar Chhabria, representing the Plaintiff, has argued the matter and cited number of Judgments in support of his arguments. Earlier written arguments were also filed by along with research material.

12. Primarily, the case of the Plaintiff is that when it (plaintiff) accepted the counter offer of the Defendant vide its correspondence of 05.02.1985 (Exb. 5/4), through its letter dated 07.02.1985 (Exb 4/A, page 25 of the Evidence File), a binding contract came into existence between the parties hereto and in pursuance thereof the Defendants should have purchased the said Gunny Bags from Plaintiff, but they did not, resultantly the latter was compelled to dispose them of, though at the risk of the Defendants, to third parties.

13. To a question, Mr. Rajendar Kumar Chhabria, learned Advocate, replied that the reason Plaintiff took steps to supply gunny bags without

receiving “ATs” (Acceptance of Tender Documents) was, that under Clause-31 of the Conditions for the Submission of the Tenders, which forms part of the subject tender enquiry and has been exhibited as Exb 1/A, relevant page-19 of the Evidence File, issuance of acceptance of tender documents was a mere formality and tenderers / Plaintiff in the instance case, should have acted upon immediately.

14. To augment his above arguments, the learned Advocate, has relied upon the following case law_

- (i). PLD 1965 (W.P.) Karachi Page 202
(Pakistan Industrial Development Corporation Versus Aziz Qureshi)
- (ii). PLD 1981 Karachi Page 398
(Major (Retd.) Ahmad Khan Bhatti Versus Mst. Masooda Fatimi)
- (iii). PLD 1976 Karachi Page 458
(Province of West Pakistan through the Secretary Versus Gammon’s Pakistan Ltd, Karachi)
- (iv). PLD 1967 Karachi Page 38
(Punjab Vegetable and General Mills Ltd. Versus Hussain Brothers and another)
- (v). 1992 SCMR Page 19
(House Building Finance Corporation Versus Shahinshah Humayun Cooperative Housing Building Society and others)
- (vi). PLD 1997 Karachi 627
(Messrs Arif Builders and Developers Versus Government of Pakistan and 4 others)

15. The position that emerged after appraisal of the evidence is that_

- (i). the Letter of Intent as a standard procedure used to be issued to the successful bidder was never issued to the Plaintiff.
- (ii). The Plaintiff’s witness PW-1 has acknowledged the fact that the Plaintiff being a registered supplier of Defendant knew all the procedural requirements for award of tender.

- (iii). It was acknowledged by PW-1 that the Plaintiff did not submit any performance bond because the contract was not awarded to them.
- (iv). It was admitted by PW-1 that though it is a standard procedure that in such type of Government Tender, Security or Bank Guarantee had to be furnished, but the Plaintiff was never called upon to furnish the same.
- (v). Part of Plaintiff's claim of Rs.16,02,825/- (Rupees Sixteen Lac Two Thousand Eight Hundred Twenty Five Only) towards interest and carrying charges on the said goods, was disproved by Defendants.

16. Relevant portions of the cross examination of PW-1 are reproduced herein below_

- (i) *“I did not receive any letter accepting our tender in response to our counter offer. We deal with the Government tenders regularly. I am aware of all the procedure in connection with it. As a rule the Government always ask for security or Bank guarantee but I do not remember whether in this particular case, Government asked for this or not.”*
- (ii) *No performance bond was asked for from us because the contract was not awarded to us. Since we were struck with stuff which was ready we had sold it of in the market but to our knowledge it went to the Government but through other suppliers because the contract had not been awarded to us.”*

17. PW-1 in his deposition has admitted that other participants were called for negotiations. However, PW-1 refuted the suggestion that claim for damages is exorbitant. Plaintiff has placed on record its various credit

memos to prove the fact that gunny bags were sold to third parties, as the Defendant did not purchase the same and thus third parties supplied the said gunny bags / jute bags to Defendant as product of the subject tender enquiry.

18. On the other hand, DW-1, the above named Javed Saleem, categorically stated that no letter of intent, was issued to Plaintiff. This assertion of the above witness went un-rebutted.

19. The above referred Exh: 4/A-letter dated 07.02.1985 was the last correspondence exchanged between the parties hereto. The very basic fact cannot go un-noticed that after this last correspondence, the Plaintiff had never corresponded / communicated in writing with the Defendants for purchase or lifting of jute / gunny bags from the premises of Plaintiff, nor there is any document on record to show that the Plaintiff had demanded from Defendant to make payments in respect of subject goods. What next happened after the above referred last correspondence, was a Complaint of Plaintiff to learned Wafaqi Mohtasib (Ombudsman)'s Secretariat, a copy whereof was never produced, except that it was decided by the Order dated 22.07.1986 (Exb. 5/A, page-27 of the Evidence File), that is, after almost sixteen months from the last correspondence (dated 07.02.1985 of Plaintiff). The learned Wafaqi Mohtasib had Recommended disciplinary action against the officials of Defendant, while observing that no relief could be provided to the Complainant as the entire quantity of Jute Bags under dispute had already been disposed of either by negotiation or through re-tendering.

20. The next written communication between Plaintiff and Defendants, as per Plaintiff's own version, is a Notice under Section 80 of Civil Procedure Code dated 19.01.1987 (Exhibit-16 at Page 163 of the

Evidence File), that is, almost after two years of the transaction in question.

21. The other segment of Plaintiff's plea is that due to arbitrary and illegal acts of Defendant, the Plaintiff was compelled to dispose of / sell the Jute Bags to different suppliers including one Shakeel Enterprises, which later supplied the same product / Jute Bags to Defendant at a lesser price, that is, Risk Sale. Plaintiff has built this structure of its claim primarily on the basis that if the same quantity that was supplied to other parties, would have been supplied to Defendant, then the Plaintiff had received the 'agreed' price for the same, that is, Rs.1678/- per 100 Bags as mentioned in the above referred letter dated 05.02.1985 of Defendants. Thus the price difference between the two modes of sales, that is, the one which could not be made to Defendants on the above agreed price and the other, which was actually made to third parties and is termed as Risk Sale by Plaintiff, is Rs.15,70,744.90 (Rupees Fifteen Lac Seventy Thousand Seven Hundred Forty Four and Nineteen Paisas Only). The other portion of the claim is insurance charges amounting to Rs.18,844/- (Rupees Eighteen Thousand Eight Hundred and Forty Four Only) and Rs.16,02,825/- (Rupees Sixteen Lac Two Thousand Eight Hundred and Twenty Five Only) on account of interest and carrying charges on the said goods. It has already been discussed hereinabove that Plaintiff has failed to prove this interest claim of Rs. 16,02,825/-. With regard to the said Risk sale claim, the Plaintiff would have succeeded, if there was an enforceable agreement entered into between the parties, that was subsequently breached by Defendants. I am of the considered view that no contract came into existence between the Plaintiff and Defendants, therefore, plea/claim of the above risk sale of Rs.15,70,744.90 (Rupees Fifteen Lac Seventy Thousand Seven Hundred Forty Four and Nineteen Paisas Only) is also not tenable and

consequently, the second part of claim Rs.18,844/- (Rupees Eighteen Thousand Eight Hundred and Forty Four Only) towards insurance charges is also without any basis.

22. There is nothing on record and particularly Plaintiff did not lead any evidence to the effect that what measures Plaintiff took to mitigate its losses before arranging or manufacturing the requisite goods / gunny bags for Defendants, if at all, the Plaintiff was under an impression or understanding that it had been actually awarded the contract. Any prudent businessman or a corporate entity like Plaintiff would have addressed a notice or any other type of communication to Defendants about the fact that the Plaintiff was about to make preparation or commence production of subject goods / jute bags, in order to supply them to Defendants within the given time frame. As far as the contention of learned counsel with regard to Clause-31 (supra) mentioned in Conditions of Tender Enquiry is concerned, the same, with deference to the counsel, is without merits. The first line of this Condition-31, which is being reproduced herein below, explicitly mentioned that if the Defendants accept the offer then the same will be communicated accordingly. The above referred counter offer dated 05.02.1985 **contained an explicit rider about non-commitment** on the part of the Defendants and said communication cannot be construed as an acceptance by the Defendants, but, at best, a conditional counter offer, therefore, this very Clause-31 also does not salvage the case of Plaintiff.

(II) **“Acceptance by the Purchaser** will be communicated by telegram, express letter of acceptance or formal Acceptance of Tender in PS form No.15. In cases, where acceptance **is communicated by telegram or express letter, the formal Acceptance of Tender will be forwarded to the successful tenderer** as soon as possible, but the instructions contained in the telegram or express letter, shall be acted upon immediately. The tenderer must always give his tender for brand new goods of latest design, robust

construction and made according to the modern manufacturing practiced.” (emphasis added)

23. Adverting to the above mentioned case law, cited by Mr. Rajendar Kumar Chhabria, learned counsel representing the Plaintiff, there cannot be a different view about the law laid down in the above judicial pronouncements with regard to contractual obligations, but these decisions do not apply to the instant case for a very basic reason, that in the above reported Judgments undisputedly the existence of a contract and relationship arising there from was not an issue. In PLD 1967 Karachi Page-83, the offer of Appellant to supply vegetable ghee was confirmed by Respondent No.2 with certain subsequent modifications and even delivery schedule was not in dispute, besides, partly the contract was also acted upon. Similarly, in another Division Bench Judgment of this Court-PLD 1976 Karachi Page 458; relating to execution of Civil Works at Gudu Barrage on the basis of letter of intent, the Respondent contractor already carried out part of the work against a payment of Rs.12 ½ lakhs though subsequently the Appellant-Government withdrew this letter of intent and encashed the Bank guarantee furnished by Respondent contractor. *Ex facie* this case is distinguishable, as admittedly neither any payment was made to present Plaintiff, nor any letter of intent was issued, as, testified by DW-1, nor the Plaintiff submitted any Bank guarantee to Defendant in connection with the subject tender. In House Building Finance Corporation case, (ibid), the claim of the Appellant was that loans granted to different Respondents were diverted to other use in violation of the terms and conditions upon which the loans were given. Again in this case, relationship between House Building Finance Corporation (HBFC) and Respondent's Societies as customers of former (HBFC) was not in dispute and with this factual background the Hon'ble Supreme Court has

laid down the exceptions to the general rule, that when the plain and ordinary meaning while construing deeds / contracts may lead to inconsistency with other expressions and results in absurdity, only then the Court may adopt a reasonable construction by which the intention of the parties can be spelt out. In my considered view, the intention of the parties can also be determined either through covenants or by the conduct of the parties and especially when such conduct is not objected to by either of the contracting parties. A long gap or silence in the present case between the Parties hereto without any written communication, particularly, from the Plaintiff's side to Defendants, calling upon the latter to lift the jute bags, only persuades me to believe that even the Plaintiff Management knew that a contractual obligation was not there, particularly when the Plaintiff was a registered supplier of Defendants and had complete knowledge about the working of Defendants. This is yet another reason to reject the claim of Plaintiff.

24. A guidance can be taken from a reported Judgment of the Hon'ble Supreme Court handed down in Syed Saeed Kirmani Versus Muslim Commercial Bank (MCB) case, reported in 1993 SCMR page 441; two principles were laid down, which are squarely applicable to the present case (i); a claim of damages suffered due to breach of contract must establish the contract, (**underlining for emphasis**), the breach thereof and the extent of damages (ii), another principle to be kept in mind while assessing the damages, that whether the Plaintiff was in a position to mitigate the damages and has neglected to avail of it.

25. In the instant case, neither any binding contract came into the existence nor Plaintiff took tangible measures / steps to mitigate its losses, (as claimed). It is a matter of common knowledge that contracts of the nature are not handled in the way the Plaintiffs have done. Contracts,

which are awarded under tender enquiries, have definite time lines and prescribed set of rules regulating the award of tender, inter alia, it is followed by a couple of other documents, most importantly, a performance bond and a work order, or, in the present case “ATs” (Acceptance of Tender Documents). All these factors are conspicuously absent in the instant suit. It is also matter of record that the Plaintiff did not participate in the re-tendering process and that was one of the reasons that Federal Ombudsman did not give a finding / recommendation on the merits of the case in terms of the relevant law viz. Presidential Order No.1 of 1983, Establishment of the Office of Wafaqi Mohtasib (Federal Ombudsman).

26. Mr. Peer Riaz Mohammad, the learned Standing Counsel, while controverting the submissions of Plaintiff counsel, laid much emphasis on the language of the above mentioned conditional counter offer. Mr. Peer Riaz argued that evidence as led by Plaintiff about sale of goods to third parties even for the argument's sake is not shattered, it still does not corroborate Plaintiff's present claim, as all such sale/purchase transactions between Plaintiffs and third parties are in connection with Plaintiffs ordinary course of business and has no nexus with the subject tender enquiry or dispute in question. This argument of learned Standing Counsel is not without force.

27. From the pleadings and evidence of the parties, it can be deduced that even the Plaintiff did not suffer any loss that can be attributable to Defendants, as it is Plaintiff's own case that the Jute Bags were sold to various parties against payments. The upshot of the above is, that I answer this issue in Negative and against the Plaintiff.

ISSUES NO.1 AND 3.

28. As far as maintainability of suit is concerned, the concept of legal character has undergone a considerable change specially after reported decision of Arif Majeed Malik Versus Board of Governors, Karachi Grammar School- 2004 CLC Page 1029. The expression 'legal character' is to be liberally construed and even otherwise, as held in the above Judgment, the expression is not exhaustive in nature. Consequently, in suit of the nature, particularly, a distinction can be made between maintainability of the suit and entitlement to grant of reliefs as claimed. For certain reasons a suit may be maintainable, but after evaluation of the evidence it can be concluded, which is the present case, that the Plaintiff is not entitled to any of the reliefs claimed. Issue No.1 is answered accordingly.

29. With regard to Issue No.3, pertaining to damages, the outcome of the above discussion is that the Plaintiff is not entitled for any damages. Issue No.3 is replied in Negative and against the Plaintiff.

30. Consequently, the instant suit is dismissed, with no order as to costs.

Dated: 26.02.2016

J U D G E

M.javaidpa