

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 818 of 2003

M/s. Won International Est.----- Plaintiff

Versus

**Sayed Muhammad Israr ul Haq
& another ----- Defendants**

Date of hearing: 27-10-2016

Date of judgment: 27.10.2016.

**Plaintiff: Through Mr. Aftab ahmed G. Nabi,
Advocate.**

Defendant No.2: Through Mr. Naved-ul-Haq, Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a suit for Declaration, Recovery and Damages against the defendants with the following prayers:-

- a) Decree for recovery of the amount against defendant No. 1 of Rs. 19,54,533 with interest / mark up @ 15% bank rate from date of withdrawal of the amount till realization.
- b) Decree of compensation against both the defendants jointly and severally of Rs. 80,00,000 being the business loss caused due to no supply of consignment.
- c) Decree for Rs. 30,00,000 against both defendants for damages caused by them due to mental torture and agony.
- d) Declaration that loan of Rs. 2,400,000/-disbursed by M/s Askari Commercial Bank Ltd. which was misappropriated by the defendant NO. 1 in collusion with defendant No. 2 and was utilized by defendant NO. 1 other than purpose it was granted i.e. shipment of consignment to the foreign buyers, thus the loan so granted although in the name of plaintiff but was usurp by the defendant in collusion with each other with malafide intention accordingly the plaintiff is not under any obligation for this loan in any manner as the acts, deeds of the defendants are malafide having ulterior motives and having no legal sanctity in the eyes of law.

- e) Permanent injunction restraining the defendants not to harass and pressurize the plaintiff for achievement of their illegal goal, in derogation of plaintiff's right both legal and equitable.
- f) Any other and further or better relief which this Hon'ble Court may deem fit and proper under the circumstances of the case.
- g) Cost of this Suit may also please be awarded to the plaintiff.

2. Briefly, the facts as stated in the Plaint are that the plaintiff entered into a Partnership with defendant No.1 and agreed upon to obtain as finance an amount of Rs.2.4 Million from Askari Commercial Bank Ltd. and paid a 5% commission amounting to Rs.1,20,000/- to defendant No.1. Thereafter the defendant No.1 mortgaged his property with defendant No.2 to obtain a guarantee in the name of Askari Commercial Bank for obtaining pre-shipment finance facility for export purposes. On 04.11.2002 an amount of Rs.23,27,000/- was disbursed in the account of partnership firm and it is the case of the plaintiff that defendant No.1 with ulterior motives withdrew a total amount of Rs.16,00,000/- from the said account and utilized the same for its own benefit. It is further stated that due to such withdrawal and utilization, the partnership firm could not honour its export commitments and suffered losses. It is further stated that thereafter the plaintiff paid a further amount of Rs.200,000/- in the aggregate to defendant No.2 in respect of repayment of the pre-shipment finance facility, whereas, the defendant No.1 in collusion with defendant No.2 got the property documents redeemed, hence instant Suit for recovery and injunction.

3. Pursuant to issuance of summons, written statement has been filed by defendants No.1 & 2 whereafter the following Issues were settled on 04.02.2008:-

- i. Whether the suit as framed is not maintainable?
- ii. Whether the suit is filed without any cause of action and the plaintiff is not entitled for relief claimed?
- iii. Whether the plaintiff has paid 5% commission amounting to RS. 120,000/- to the defendant No. 1 for giving the security of his flat?
- iv. Whether defendant No. 1 has paid the entire outstanding amount to defendant NO. 2 and the property documents held by way of collateral security for pre-shipment export guarantee have been released to defendant No. 1?
- v. Whether there was any collusion between defendants Nos. 1 & 2?
- vi. Whether the plaintiff is entitled for the damages caused to him, due to the withdrawal of amount by the defendant No. 1 and due to his acts and omission of the defendants?
- vii. What should the decree be?

4. The evidence was recorded through Commissioner, wherein the plaintiff led its evidence as P.W-1 and produced documents as Ex.P-5/1 to Ex.P-5/5 and certain copies of the documents Marked as O/1 to O/20 as the plaintiff did not produced any originals of such documents. The defendant No.1 led its evidence as D.W-1 and produced his affidavit-in-evidence and documents as D.W-1/1 to D.W-1/16 and certain documents as O/1 & O/2, due to non-availability of their originals. Whereas defendant No.2 did not led any evidence through any witness.

5. Counsel for the plaintiff submits that defendant No.1 induced the plaintiff for having entered into an agreement and for payment of 5% commission of Rs.1,20,000/- and thereafter obtained pre-shipment finance facility by depositing his property documents and usurped the amount of Rs.16,00,000/- from the partnership account. Per Counsel this resulted into shortage of finance and the plaintiff could not honour its commitments, hence

suffered losses and therefore, the plaintiff is entitled for the relief as claimed through instant Suit.

6. Learned Counsel for defendant No.2 submits that they only acted as guarantor to the plaintiff's firm for obtaining pre-shipment finance facility from Askari Commercial Bank Ltd. against mortgage of property of defendant No.1. He further submits that upon payment of their dues the documents were released to defendant No.1, who had mortgaged the same and therefore the plaintiff has no case against defendant No.2, whereas, nothing has been brought on record to suggest any collusion between defendant No.1 and 2 as alleged.

7. After going through the record and with the assistance of the learned Counsel for the parties my issue wise findings are as under:-

ISSUE No.1: Whether the suit as framed is not maintainable?

Suit is maintainable

ISSUE No.2: Whether the suit is filed without any cause of action and the plaintiff is not entitled for relief claimed?

Plaintiff is not entitled for relief as claimed.

ISSUE No.3: Whether the plaintiff has paid 5% commission amounting to RS. 120,000/-, to the defendant No. 1 for giving the security of his flat?

Not proved. Negative.

ISSUE No.4: Whether defendant No. 1 has paid the entire outstanding amount to defendant NO. 2 and the property documents held by way of collateral security for pre-shipment export guarantee have been released to defendant No. 1?

In Affirmative.

ISSUE No.5: Whether there was any collusion between defendants No. 2 & 2?

In Negative.

ISSUE No.6: Whether the plaintiff is entitled for the damages caused to him, due to the withdrawal of amount by the defendant No. 1 and due to his acts and omission of the defendants?

Negative.

ISSUE No.7: What should the Decree be?

Suit dismissed.

8. I have heard both the learned Counsel and perused the record, whereas, Counsel for defendant No.1 is called absent. It appears that the precise case of the plaintiff is that initially he paid Rs.1,20,000/- as 5% commission to defendant No.1 for obtaining loan/finance facility of Rs.24,00,000/- against exports from Askari Commercial Bank Ltd. and for which defendant No.2 stood as a guarantor. The crux of the plaintiff's case is that defendant No.1 by fraudulent means withdrew an amount of Rs.16,00,000/- in aggregate from the partnership account, which resulted in severe financial crunch and the export orders could not be executed. For such purposes the plaintiff claims amount so allegedly usurped as well as business losses. However, on perusal of the evidence led by the plaintiff through his affidavit-in-evidence and the documents placed on record, it appears that the contention of the plaintiff is not corroborated with the evidence on record. In his cross-examination he has categorically stated that **"It is correct that both the cheques mentioned in Para-8 of my affidavit-in-evidence were signed by me and by defendant No.1."** In Para-8 of the affidavit-in-evidence, the two cheques bearing No.04214455 dated 04.11.2002 for Rs.11,00,000/- and Cheque No.04214459

dated 05.11.2002 for Rs.500,000/- have been referred. Once the plaintiff admits that cheques were signed by him and defendant No.1, therefore, the allegation to the effect that defendant No.1 withdrew the amount fraudulently is not established. No voluntarily statement has been made by the plaintiff so as to suggest that after withdrawal, the money was usurped by defendant No.1. Though, in the written arguments it has been stated that he had signed blank cheques, while going abroad, however, such assertion is not corroborated with the evidence led on behalf of the plaintiff. Whereas no further evidence has been led by the plaintiff so as to suggest that defendant No.1 after withdrawal of Rs 16,00,000/- on behalf of the plaintiff firm had utilized the same for his personal benefit and not for the benefit of the firm itself as claimed by defendant No.1.

9. Insofar as the claim for sustaining losses is concerned the plaintiff has relied on two documents marked as "O-4" and "O-5" filed along with his affidavit-in-evidence and perusal thereof reflects that these are two proforma invoices issued by a foreign company suggesting placing of orders of export to the partnership firm. However, it can hardly be termed as evidence of suffering losses by the plaintiff. It further appears that defendant No.1 pursuant to agreement between the parties was entered into as a partner in the plaintiff's firm, and therefore, even if any losses were suffered it is the defendant No.1 also, who has suffered losses as 25% partner of the plaintiff's firm. On the overall examination of the evidence led on behalf of the plaintiff, I am not convinced that the plaintiff has been able to justify any of its claims in the instant

Suit, whereas, the allegation to the effect that the defendant No.2 was in connivance with defendant No.1 has also not being proved.

10. It is also relevant to observe that finance facility was obtained for the partnership firms business and even if for a moment it is assumed that defendant No.1 had withdrawn the amount of Rs. 16,00,000/- as alleged, the fact that subsequently the entire liability of defendant No.2 was paid by defendant No.1, has not been denied, rather admitted by the plaintiff. After all the finance facility so obtained for export purposes had to be repaid by the plaintiff firm. It is not the case of the plaintiff that the partnership firm had settled the account in respect of the finance facility and defendant No.1 had redeemed the mortgaged property on such basis. Insofar as payment of Rs. 120,000/- as commission is concerned, it is the case of defendant No.1 that he acted as a consultant to the plaintiff firm initially to arrange finance facility and was paid such fee, whereas, subsequently he invested in the partnership business by mortgage of his property and was made partner for 25% share. The plaintiff has not been able to controvert or prove it otherwise. In such circumstances there is hardly any substance in the claim of the plaintiff that defendant No.1 owes any money.

9. In view of hereinabove facts and circumstances of this case, the plaintiff has failed to make out any case for indulgence. Accordingly, the Suit is dismissed.

JUDGE