

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.1564 of 1998**

Date	Order with Signature of Judge
Present: <b>Mr. Justice Nazar Akbar</b>	
Plaintiff	: M/s. Sardar Muhammad Ashraf D. Balouch, (Pvt) Ltd., Through Mr. Farhatullah, advocate.
Defendant No.1	: City district Government Through Mr. Muhammad Bin Abdul Malik, advocate.
Defendant No.2	: Province of Sindh Through Ms. Leela Kalpana, AAG.
Date of hearing	: 16.02.2018
Decided on	: 16.02.2018

**JUDGMENT**

**NAZAR AKBAR, J.** Plaintiff has filed this suit for declaration and injunction on **7.12.1998** with the following prayers:-

- 1) *Declaration that various terms and conditions mentioned hereinabove are unconscionable, as a result of inequality of bargaining power, economic duress, unfair and unreasonable.*
- 2) *Permanent Injunction restraining the Defendants and their agents from enforcing the said unconscionable terms in the circumstances and not to invoke any punitive action of cancellation of Contract or recovery of surcharge and also **to amend the terms of contract equal to the last year's contract** and to recover installments accordingly by adjusting 10% security amount towards payment of installment and only keep 1% as security.*
- 3) *Declare that by not recovering Octroi on Reti Bajri, by the defendants employees have deprived the Plaintiff of legitimate income of Rs.12,00,000/- for one year as per the statement prepared and that plaintiff is entitled for reimbursement to the extent of Rs.12,00,00,000/- from the contractual amount and that the plaintiff is entitled to adjust this amount from installments/contractual amount.*
- 4) *A decree that at least the Plaintiff is entitled to pay the installment by 25 of each month and not in advance.*

- 5) *Declaration that on account of payment of salary to employees who did not perform any duty on account of Defendant No.1's keeping with itself forfeited security amount, the plaintiff is entitled to a reimbursement in the sum of Rs.2,00,00,000/-.*
- 6) *Such other reliefs as the Hon'ble Court deems fit in the circumstances and the interest of justice and in regard to the circumstances of the case.*
- 7) *Cost of the suit.*

2. Brief facts of the case are that the plaintiff is a private limited company and is carrying on business of Octroi Collection Contractors. Defendant No.1 is a Municipal body and Defendant No.2 is the supervisory authority over all the Municipal Bodies/ Institutions of the province of Sindh. The Defendant No.1 published an advertisement whereby its Octroi Collection Contract known as ROAD & RAIL SIDE Contract for the year 1998-1999 was put to auction. The Plaintiff being interested in obtaining Octroi Collection Contract of Defendant No.1 participated in the auction, wherein the official upset price was fixed at Rs.65,69,00,000/-. The Plaintiff bid of Rs.66,04,00,000/- was declared as highest bid and the contract was awarded to the Plaintiff, vide letter No.SO.VI/15-9/1998 dated **29.06.98** for the period of **361 days** i.e 05.06.1998 to 30.06.1999. It is averred that with the approval of highest bid the Plaintiff was called upon to pay Rs.7,26,44,000/- as 11% of the bid amount and Rs.6,00,36,360/- to Defendant No.1 as advance instalment for the month of July, 1998. It is urged that, besides the contractual amount as afore-said the Plaintiff, is required to pay advance income tax @5% of the bid amount as well as about Rs.10,00,000/- per month as salary for the staff of KMC, who is placed under the Plaintiff for carrying out Octroi Collection; Besides Salary, other fringe benefits are also to be provided by the Plaintiff, to the staff of KMC. In spite of

the fact that in the contract for the year 1998-99 the Octroi income from the PORT QASSIM is excluded which only would have fetched over Rs.40,00,00,000/- the Plaintiff's bid is some Rs.10,00,000/- above the amount of Contract for the year 1997-98, in which contract PORT QASSIM was included and the entire Octroi recovered from the goods emanating from PORT QASSIM, was income belonging to the Contractor of 97-98. It is contended that, from perusal of both these agreements the some disparities are evident for reasons best known to Defendant No.1.

3. Rule 225 of the Octrai Rule 1964 provides retaining of security of 10% till the conclusion of the contract but the amount of 10% security is provided to be equally adjusted in the installments i.e. all the 11 installments should be allowed to adjust proportionately from the security deposit of 10% which means that 1% from the security amount is to be adjusted in every installment by defendant No.1. Anything which is contrary to rules will not be upheld by the Courts of law, and further more as per rules the plaintiff be allowed to pay installment by 25<sup>th</sup> of each month instead of paying it in advance on 1<sup>st</sup> day of every month. As the plaintiff have to recover Octroi from parties and only thereafter to pay to defendant No.1. It is urged that Reti Bajri is an item on which Octroi is payable, as per Octroi Schedule but right from **05.07.1998** till today not a single penny is recovered for the same then why should the plaintiff be coerced to pay for the salary of staff as they are not performing any beneficial job for the plaintiff. The rates of Octroi on poultry products fixed by the Defendant were reduced by the Government of Sindh, on account of which the plaintiff's income was reduced considerably, but the plaintiff could not claim remission as the agreement speaks of increase but no provision is prescribed for decrease in the

contractual amount on account of reduction by defendants. The plaintiff in law and equity is entitled to remission to the extent of reduction of poultry rates. It is also averred that right from the beginning of the contract the attitude of the defendant was hostile and very adverse to the interests of the plaintiff. The whole transaction including the Contract of Collecting Octroi is contrary to the principles of fairness as recognized by Islamic Jurisdiction as well as by Contract Act.

4. Defendant No.1 (KMC) filed written statement wherein it is stated that under **clausue-4 and 6(17)** of the contract agreement the plaintiff has to pay income tax and salary to the octroi staff placed under his control. It is further stated that the plea of the Plaintiff that Port Qasim source has been excluded from the preview of the road / rail side Octroi collection is totally misconceived. In terms and conditions and also in the agreement executed between the parties the names of the Octroi posts from where the contractor was authorized to collect Octroi were specifically given in the contract and the plaintiff after going through such details of the Octroi posts had participated in the open auction and now plaintiff cannot claim inclusion of Port Qasim source or any less payment in consequence of exclusion of such source. It is stated that goods emanating from Port Qasim and entering into municipal limits for use, sale or conjunction are a part of sea dues collection of KMC. KMC had excluded Port Qasim source from the rail/road side upon pronouncement of judgment by this Hon'ble Court in **CP No.1878/97**, relevant part of judgment is reproduced below:-

*“There was a prima facie case as would be seen below, for drawing an inference with the contractor did not have a lawful right to collect octroi from sea dues in respect of goods which*

*issued from the referred source. It was not our intention at any stage of the proceedings to deprive the contractor of any of its lawful rights. All that was intended to be ensured was that the revenue collected from the PA-QICT source stood clearly and definitely identified and besides a mechanism had to be devised whereby if, in the final reckoning. It was found that such recoveries did not lawfully belong to the contractor, the same were protected for such a one as was found to be entitled to the same”.*

5. It is contended that after aforesaid pronouncement by the Hon’ble Court in the above referred C.P the Port Qasim source was taken out from road / rail side and was linked with Sea dues collection. It is averred that contract for collection of octroi through road/rail side octroi posts for the year 1998-99 was awarded in open auction to the plaintiff being the highest bidder. Thereafter and a contract agreement was executed between the plaintiff and KMC and the plaintiff after going through all the clauses of the contract agreement minutely executed the same and the plaintiff cannot be allowed to frustrate the same. It is urged that plaintiff after going through the terms and conditions have participated in the open auction and again after going through the terms and conditions have executed the contract agreement and were making payment of contractual amount to KMC. The contention raised by the plaintiff is totally misconceived and based upon the same malafide intention.

6. The interruption of Rule 225 of Octroi Rules as contended by the plaintiff is totally incorrect. It is stated that the plaintiff is enjoying the powers of transfer and postings as evident from the order issued by the plaintiff. It is stated that plaintiff is legally authorize to recover octroi on any goods meant for use, sale or consumption within the KMC limits as per rates specified in octroi schedule. It is further averred that Government of Sindh through a

Gazettee Notification had revised the octroi on poultry products in the month of June, 1998, whereas the plaintiffs have taken over the charge of octroi on 5.7.1998. Any reduction on octroi rates respecting poultry products had taken place prior to taking over the charge of octroi post by the plaintiff. It is stated that terms and conditions had been drawn strictly in accordance with instructions of the Government of Sindh and thereafter the contract was put to public auction. The plaintiffs after having been understood the terms and conditions, participated in the auction and thereafter executed the agreement. The instructions of the Government of Sindh relating to 10% security deposit and also regarding advance payment of the monthly installments are validly incorporated in the contract agreement. All the staff pertaining to rail/road side octroi posts have been given in the administrative control of the plaintiffs and plaintiffs have fully entitled to utilize the services of such staff for collection of Octroi. It is averred that defendant No.1 has not demanded anything from the plaintiff outside the purview of lawfully concluded contract.

7. This Court from pleadings of the parties on 28.01.2000, framed the following issues:-

- (i). *Whether the agreement executed between plaintiff and defendant No.1 dated **05.7.1998** suffers from **discrimination** and lack of substantive fairness?*
- (ii). *What is the quantity of **Reti and Bajri imported** within the limits of defendant No.1 for use, consumption and sale during 1998-99? **Whether this item was subject to octroi?***
- (iii). *What would be the **amount of octroi** payable on Reti and Bajri imported during 1998-99?*
- (iv). *Whether the defendant No.2 have recovered salary for staff who did not perform any duty or who were **dead** at the time of execution of agreement in question?*

- (v). *Whether it was the sole duty and responsibility of the plaintiff to collect octroi on all the goods imported within municipal limits?*
- (vi). *Whether there was any order from KMC or the Government of Sindh restraining plaintiff not to charge octroi on Reti and Bajri?*
- (vii). *Whether an amount of Rs.4,55,82,767,64 is payable by the plaintiff to KMC on account of short payment of the contractual amount on expiry of contract period?*
- (viii). *Whether the cause of action has accrued to the plaintiff for filing the above suit?*
- (ix). *What should the decree be?*

8. The evidence of the parties was recorded through commissioner. The plaintiff examined one witness namely: Kh. Ahtesham-ud-Din as Ex.5, who produced several documents as Exh. 5/1 to Exh.5/27 and Exh.5/27-1 to 5/27-26 and relevant exhibits are as follows.

- i. Photocopy of extract of minutes dated 3.12.1998 as Ex.5/2.
- ii. Original Resolution dated 1.06.2007 as Ex.5/3.
- iii. Photocopy of letter dated 8.8.1998 from defendant No.1 as Ex.5/4.
- iv. Photocopy of agreement dated 5.7.1997 as Ex.5/5.
- v. Photocopy of the letter dated 7.9.1998 written by defendant No.1 to defendant No.2 as Ex.5/7.
- vi. Photocopy of letter of dated 7.9.1998 written by defendant No.1 to Defendant No.2 as Ex.5/7.
- vii. Photocopy of letter dated 18.11.1998 addressed to Administrator KMC by plaintiff as Ex.5/8.
- viii. Photocopy of the letter dated 11.02.1999 written by defendant No.1 to Administrator KMC as Ex.5/9.
- ix. Photocopy of the letter dated 24.02.1999 by plaintiff, addressed to Director Octroi, KMC as Ex.5/10.
- x. Photocopy of the letter 3.4.1999 addressed by Director Octroi, KMC to the plaintiff as Ex.5/11.
- xi. Photocopy of note sheet dated 15.04.1999 as Ex.5/12.

- xii. Photocopy of letter dated 4.5.1999 written by defendant No.1 to the Plaintiff as Ex.5/14.
- xiii. Photocopy of Notification dated 4.11.1993 as Ex.5.15.
- xiv. Photocopy of the list of Reti Bajri trucks with registration numbers as Ex.5/16.
- xv. Photocopy of the statement of details **about losses** sustained due to non-recovery of Octroi on Reti Bajri as Ex.5/17.
- xvi. Photocopy of the minutes of meeting held on 11.08.1998 as Ex.5/18.
- xvii. Photocopy of the plaintiff's letter dated 29.08.1998 as Ex.5/19.
- xviii. Photocopy of the Defendant's letter dated 24.07.1998 as Ex.5/20.
- xix. Photocopy of the letter dated 27.08.1998 as Ex.5/21.
- xx. Photocopy of the plaintiff's letter dated 1.9.1998 as Ex.5/22.
- xxi. Photocopy of the plaintiff's letter dated 21.9.1998 as Ex.5/23.
- xxii. Photocopy of the defendant's letter dated 12.9.1998 to the plaintiff as Ex.5/24.
- xxiii. Photocopy of the plaintiff's letter dated 17.9.1998 to Defendant No.1 as Ex-5/25.
- xxiv. Photocopy of the defendant's letter dated 26.11.1998 to the Plaintiff as Ex.5/26.
- xxv. Photocopy of the statement of payments made to KMC against Road / Rail side Octroi Contract 1998/99 as Ex.5/27.
- xxvi. Photocopies of Twenty Six payment challans paid by the plaintiff as Ex.5/27/1 to Ex-5/27/26.

One Naseemuddin Asstt: District Officer Recovery Department, on behalf of the Defendant/KMC filed affidavit-in-evidence as Ex.6/1, who also produced his service card as his identification Exh.6/2.

9. I have heard learned counsel for the parties at length and perused the record and evidence. My findings on the above issues with reasons thereon are as under.



**Issue No.(i) to (vi)**

10. The burden of first six issues was on the plaintiff. The plaintiff has entered into the contract after offering the highest bid for the year 1998-1999. It was for the plaintiff to explain and identify the nature of discrimination and lack of substantive fairness in the agreement with the defendant. Learned counsel for the plaintiff has not been able to identify from the record that which clause of agreement was unfair. It was for the plaintiff to identify the flow of Reti and Bajri within the limits through the Octroi posts under his contract and he should have collected the Octroi on Reti and Bajri like another item covered under the contract, since it was mentioned in the schedule. It is not for the Court to first calculate the quantity of Reti and Bajri for the plaintiff and then determine loss in the earning in Octroi charges on Reti and Bajri. There is no dispute that what would be the amount of Octroi payable of Reti and Bajri entered into limits of Karachi through Octroi posts during 1998 and 1999. In fact it was for the plaintiff himself to have collected the same after having successfully acquired the Octroi collection rights if the Octroi has not been collected it cannot be considered as failure of the defendants. To a direct question from the Court that where is the order from the KMC or Government restraining the plaintiff from collecting the Octroi on Reti and Bajri, he has referred to correspondence but not a single correspondence constitutes an order from the Government functionaries to the effect that the plaintiffs have been restrained. The plaintiff has not identified just one dead person whose salary was paid by him. There is no tangible evidence that how many and who were the dead persons for whom the salary has been paid by the plaintiffs. Not only this, the agreement has been executed between the parties on **4.7.1998** and the suit was filed on

**7.12.1998** and he continued to pay salaries to the staff who were under their supervision in accordance with the terms of contract. The attendance of staff was to be mentioned by the plaintiff since the staff was under their administrative control. If there was any complaint, the plaintiff could have taken action against the delinquent staff at plaintiff's disposal. How is it possible that even after filing of the suit the plaintiff continued to pay salary of dead persons? The terms and conditions of the agreement dated 4.7.1998 clearly spells out the responsibility of the parties and it was admittedly the duty of the plaintiff to collect the Octroi since the subject matter of the agreement was collection of Octroi. It does not appeal to the senses that after having acquired right of collection of Octroi the responsibility has not been shifted on the plaintiffs. Since the plaintiff has failed to discharge his burden to prove these issues, all these issues are decided against the plaintiff.

**Issue No.(vii)**

11. The burden of this issue was on the defendants to show that how and why an amount of Rs.4,55,82,767,64/- is the short payment of the contractual amount. In the first place for this issue the defendants were required to file a separate suit against the plaintiff or if the defendants were interested in claiming this amount as set off or otherwise, they should have affixed Court fee on the written statement for the relief of recovery of dues under the agreement. I do not find any Court fee affixed on the written statement, therefore, this issue is not justiciable for want of jurisdiction. The jurisdiction of a Court in civil suits is dependent on payment of Court fee only when the parties come to the Court for a judgment and decree, they have to pay Court fee. In this case no Court fee has been paid by the defendant (KMC) and, therefore, this issue is decided in the negative.

12. The learned counsel for the plaintiff, in fact, has conceded all these issues, however, he has contended that the plaintiff's prayer clause No.3 has to be granted by this Court, which is reproduced below:-

3. *Declare that by not recovering Octroi on Reti Bajri, by the defendants employees have deprived the Plaintiff of legitimate income of Rs.12,00,000/- for one year as per the statement prepared and that plaintiff is entitled for reimbursement to the extent of Rs.12,00,00,000/- from the contractual amount and that the plaintiff is entitled to adjust this amount from installments/contractual amount.*

In the first place it was not an issue framed by the Court that whether an amount of Rs.12,00,00,000/- was payable by the defendant to the plaintiff for breach of contract or otherwise for this sole reason that staff of defendants had not recovered Octroi on Reti and Bajri. There is no evidence to this effect, however, the plaintiff's counsel has claimed that the plaintiff's witness in para-14 of his affidavit in evidence has claimed this amount. When asked to explain how the figure of **Rs.12 crore** has been calculated, the learned counsel stated that number of trucks passed through Octroi have been noted by the staff and the same were produced in evidence such statements. It is indeed very strange that the suit was filed on **7.12.1998** and by that time it was only six months and the plaintiff has calculated the loss of full one year. However, the perusal of the plaint shows that neither registration number of trucks nor the number of trips per day by such trucks of Reti and Bajri have been mentioned in the plaint. The detail of losses said to have been sustained due to non-recovery of Octroi showing vehicle numbers spreading over 20/25 in Ex: P/5/16 has been summed up in Ex.P-5/17. These documents were not part and parcel of the suit as the same were not filed with the plaint. The record does not show that

the plaintiffs have filed any list of documents or the documents itself even after framing of issues on **20.01.2000**. All these documents are photocopies on the basis of which claim of Rs.12,00,00,000/- has been allegedly proved. Admittedly the plaintiff's witness was not an author of these documents nor he was physically present to note the number of vehicles plying on the road with Reti and Bajri during the period from **July, 1998 to June, 1999**. The plaintiff has not examined a single Reti Bajri truck Driver. To substantiate the claim, in the first place, the plaintiff should have filed original documents. Each and every document is a photocopy. The plaintiff should have at least examined one or two more witnesses to substantiate, that Ex: P-5/16 was prepared by him when posted on the Octroi post. In view of the above discussion, in absence of evidence even the above prayer for which no issue has been framed, cannot be granted.

13. In consequence of the above discussion, the instant suit was dismissed by short order dated **16.02.2018** and these are the reasons for the same.

JUDGE

*Karachi*

Dated: .03.2018

Ayaz Gul/PA\*