

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.110 of 1985**

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Date	Order with Signature of Judge
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Present: **Mr. Justice Nazar Akbar**

Plaintiff : M.S Khan (Since deceased) through LRs.  
through Mr. Adil Mustafa Baig Advocate.

Defendant No.1 : Islamic Republic of Pakistan, through the  
Secretary, Ministry of Housing and Works.

Defendant No.2 : Executive Engineer, K.C.C Division-V  
through Mr. Abdul Qadir Leghari, Assistant  
Attorney General alongwith Mr. Imran  
Shams, Executive Engineer for Pak. PWD.

Date of hearing : 14.3.2018

Decided on : 21.05.2018

**JUDGMENT**

**NAZAR AKBAR, J.** The Plaintiff, a contractor, had filed this suit on **06.8.1983** as pauper against the Public Works Department and others for recovery for **Rs.59,56,034/=**. It was registered on **20.2.1985** after his application to sue as pauper was allowed. However, after almost 13 years, the plaintiff on **27.8.1998** filed amended plaint and increased his claim to **Rs.1,90,42,000/=**.

2. Brief facts of the case are that the plaintiff was carrying on a business as a Contractor by the name and style of M/s. International Construction Associates at Karachi. On or about **26.8.1976** the then Chief Engineer, Pakistan Public Works Department invited tenders for the work of construction of 70,500 tons capacity grain godowns at Landhi, Karachi and after negotiations awarded the work in four parts to four different contractors at the rate of 68% above the schedule of rates as tendered and mentioned in the Schedule of Rates to the contract. Plaintiff's offer was accepted by defendant by letter

dated **14.10.1976** and his main assignment was to provide manpower (labour) to construct GRA/H GODOWN of 16000 TONS CAPACITY within eight months' time from **20.10.1976** as the material at site was to be provided by the defendant. It is averred that the construction was to be carried out in accordance with the designs, drawings specifications to be provided by the defendants, however the specific and detailed working drawings were not provided and the plaintiff was directed to proceed on verbal instructions at site of work supplemented by free hand sketches deviating from the standard typical drawings approved for constructions of grain Godowns of various types and capacities which drastically hampered the progress of work at site as variations took place right from the start of work and the site being low-lying called for extra excavations and filling resulting the extra volume of work. Under the terms of contract the defendants had to provide water at site and construction materials i.e cement and steel. However, the supply of water commenced after a long time of the start of work after lying of pipe lines and even then the water supply line was laid in such a manner that the two other contractors viz M/s. Akbar Sons and M/S Shaukat Engineering Enterprises got control of the water as the main valve was provided at their site to which the plaintiff had no access and thus deprived. It was averred that non-supply of water greatly hampered the progress of work and the plaintiff had no alternate but to purchase water from outside sources incurring heavy expenditure and tremendous losses of labour, time and money which greatly attributed to delay and the plaintiff was entitled to recover the cost of water amounting to Rs.3,82,000/- from the defendants alongwith the cost of water illegally deducted amounting to Rs.47,493.21 total amounting to Rs.4,29,493.21 which the plaintiff was entitled to

recover from the defendants. The plaintiff made several requests verbally and in writing to restore the water supply but all efforts failed. Supply of cement which was to be provided by the defendants was also inadequate and far below the actual requirement with the result that the plaintiff was restrained from their work off and on resulting in idle labour and the plaintiff was entitled to recover the wages so paid from the defendants amounting to Rs.12,15,000/- while the other two contractors finding favour with the defendants got more cement than their due shares and this position was also admitted by defendant No.3 in his letter dated 15.6.1981. The supply of steel was much less to the plaintiff as compared to other two contractors M/s Akbar Sons and Shaukat Engineering which hampered the progress of work. The roof of all the buildings were of the same length, same width and same size and design and the difference 21.25 tons steel was short provided to the plaintiff thus caused a net loss of Rs.2,16,184.00 in one item alone. Due to the delay in the construction resulting from failure of the defendants to meet their contractual obligations the plaintiff had to bear increased overhead costs in addition to the fact defendant No.1 during the period of the contract raised prices of various items including petrol and the rise in wages and materials due to various orders and inflation and to provide the necessary relief defendant No.1 also constituted an escalation committee which paid escalation to one of the contractors working on the same site and for an even shorter period. The plaintiff was entitled to the payment of the amount of escalation amounting to Rs.19,00,000/- upto the date of final bill being in conformity with the standard graphs based on the price index of the relevant period prepared by the escalation committee and approved and adopted by the defendants. All the actions of non-

supply of materials in stipulated period of contract caused breach of contract. Therefore, the plaintiff filed instant suit with the following prayer:-

- i) *A declaration to the effect that the delay was due to the non-supply of the materials by the Defendant No.1 and 2.*
- ii) *A decree against the Defendant for a sum of Rs.59,56,034.60 in favour of the Plaintiff.*
- iii) *Interest/loss of profit on the amount withheld from 20.7.1980 till the date of payment.*

3. On **12.5.1985** defendants filed their written statement wherein they stated that all the drawings and designs of the work as required were furnished to the plaintiff by defendant No.3. It was averred that as per terms of agreement the defendant was obliged to give supply of water through the connection from the line passing near the area where the work was to be carried out. In this regard the provision of additional terms and conditions to the contract vide clause-6 were binding on the plaintiff and the water supply was not delayed by the defendant but the delay was caused by the plaintiff. The progress of work put up by the plaintiff was not in proportion to time given in the agreement. The material i.e cement and steel supplied to the plaintiff according to the progress of the work and the work was required to be completed within 8 months as per terms of agreement but due to slow progress of the work, plaintiff failed to complete the same for which the plaintiff was penalized under clause of the agreement. As per clause 10 of the agreement the plaintiff was required to adjust labour according to the availability of material which they avoided to do and thus it was breach of agreement on their part.

4. After filing of written statement the case was supposed to be listed for framing of issues but issues could not be framed until **09.9.1992** as both the parties were apparently willing to get the suit

decreed without evidence on the basis of reports of commissioner as is evident from the issues No.3 and 4. The following issues were framed after several reports were filed by the commissioner appointed by consent of the parties. The issues were:-

1. *Whether the parties have performed their respective part of contractual obligation” if not so, its effect?*
2. *Whether the Measurement Books (M.Bs) prepared and maintained by the defendants properly? If not so, its effect?*
3. *What is the effect of Commissioner’s Final Report admitted by the Hon’ble Court on 11.10.1988?*
4. *Whether the plaintiff is entitled for Escalation in prices to be calculated by the commissioner appointed by this Hon’ble Court on 16.5.1993?*
5. *Whether the plaintiff is entitled for damages? If so, to what extent?*
6. *What should be the final decree?*

5. Since the issues No.3 and 4 are about the effect of commissioner’s reports, I think it is necessary to know how these issues were formulated. Obviously none of the reports of commissioner were filed by plaintiff with plaint nor there was any occasion for the defendants to admit or deny the same in the written statement. The background of these issues is that even prior to filing written statement, the plaintiff has filed an application under **Order XXVI Rule 9 CPC** read with Section 151 CPC (CMA No.1627/1985) for appointment of commissioner with the following prayer:-

*This Honourable Court may be pleased to order the **Commissioner to submit his report revealing the amounts recoverable by the plaintiffs** for the entire work executed by the plaintiff **and to ascertain the amount of escalation on the basis of the price index and Government Circulars issued from time to time.***

In my humble view the application was collusive and even unwarranted in law. Yes, unwarranted as the plaintiff is not

supposed to request the court to appoint a commissioner to submit a report **“revealing the amount recoverable by the plaintiff”**. It was for the plaintiff to “reveal” to the Court and prove it. The plaintiff himself has disclosed the exact amount **“recoverable”** in the prayer clause reproduced in para-2 above and para-17 of the plaint as under:-.

17. *That for purpose of court fees the suit is valued at **Rs.59,56,034.60** but the Applicant has no means to make payment of the amount of court fee, a true statement of all moveable and immovable properties valuing about Rs.3,000/- is shown in the schedule hereto.*

Similarly, the prayer to order the commissioner **“to ascertain the amount of escalation on the basis of the price index and Government Circulars issued from time to tome”** was also unwarranted since the plaintiff himself in para-13 of his plaint has calculated **“escalation amount”** in conformity with the standard graphs based on the price index and relevant portion from the plaint is reproduced below:-

*The plaintiff is entitled to the payment of the amount of **escalation amounting to Rs.19,00,000/= upto** the date of final bill **being in conformity with the standard graphs based on the price index** of the relevant period **prepared by the escalation committee** and approved and adopted by the Defendants.*

6. The application was collusive since such an application was consented by the defendants for an order dated **16.5.1985** whereby apparently as already planned, one Mr. Mushtaq Ahmed, Chief Engineer (Retd.), KPT was appointed as commissioner. The commissioner on **21.12.1985** as stated in the report **“at the request of the parties to form part of the main report to be submitted after further proceedings”** filed **first interim report** in which an amount of measurement said to be calculated was a sum of **Rs.7,17,267/=**.

There was no finding/recommendation of the commissioner in the said report. The next step of joint venture was that the plaintiff immediately on **24.12.1985** filed an application under **Section 151 CPC** requesting the Court to direct the defendant to deposit the amount mentioned in the said report in Court. On **16.3.1986** by consent of both the parties the said application (CMA No.4782/1985) was allowed and the innocent defendant on **01.9.1986** obediently deposited a sum of **Rs.7,70,267/=** instead of **Rs.7,17,267/=** in Court. Then as planned in the joint venture, the plaintiff filed an application under **Order XII Rule 6 CPC** (CMA No.4215/1985) requesting the Court that the amount deposited by the defendant in Court may be disbursed to the plaintiff and even the said application by consent of the defendant was allowed by order dated **27.10.1987**. The plaintiff collected cheque No.212212 dated **29.10.1987** from the Nazir of High Court. This is how the plaintiff got a partial decree of his claim to the extent of an amount of **Rs.7,17,267/=** and got the decree executed even before framing of issues and/or even recording of his own evidence to prove his entitlement. All this has happened by consent and connivance of the defendants in the name of Court orders.

7. The learned commissioner then on **24.11.1987**, within a month of payment of amount to the plaintiff mentioned in first report, filed **second interim report** in which he reported the work done was to the extent of **Rs.13,94,744.41**. However, this time on **14.12.1987** the defendants filed a comprehensive affidavit of objections. On **12.4.1988**, the commissioner filed a final report in which he declared that whatever was reported in Second Interim report be treated as final report. The plaintiff made an attempt to realize the said amount through the Court as it was done in case of first interim report.

Therefore, he again filed an application under **Order XII Rule 6 CPC** (CMA No.4790/1989) for preliminary decree for the sum of **Rs.13,94,744.41** on the ground that the amount shown by the commissioner in his second/final report dated **12.4.1988** has been duly signed by both the parties. However, the Court by order dated **31.5.1989** held that the plaintiff has not brought his case within four corners of **Order XII Rule 6 CPC** and dismissed the said application. Since the defendants have filed their objections to the final report of the commissioner dated **12.4.1988**, the case was again and again listed for final arguments on the final report which was ultimately taken on record on **22.5.1990** and during course of arguments on the Final Report, the plaintiff's counsel again attempted to obtain a decree on the basis of second/ final report of the commissioner by relying on the order dated **27.10.1987**. Order dated **22.5.1990** is very material as in the said orders the Court has discussed the background of the case and it also reveals how the order dated **27.10.1987** was obtained by consent. It is reproduced as under:-

**Order dated 22.5.1990.**

*Plaintiff's advocate Mr. Zaheeruddin has orally requested the Court to pass a preliminary decree for the sum of **Rs.19,64,732.25/-** on admitted facts and documents as shown in Commissioner's **second interim report dated 24.11.1987** as was previously ordered by my learned brother Mr. **Justice Dr. Tanzilur-Rahman** on **27.10.1986** in respect of the first report of the commissioner.*

*The facts in the backgrounds are as under:-*

*By C.M.A No.1630/1989, plaintiff prayed that Mushtaq Ahmed Chief Engineer (Rtd) K.P.T. be appointed as a commissioner to physically verify the quantity of work done at site pertaining to the work of construction of 70 thousands tons godown at Landhi on the basis of measurement recorded in Measurement Book, physical Measurement and verification, Drawings, contour plans, record of payment made to all contractors and issue of*



materials and by other relevant record. The application came to be granted by order dated **16.5.1985**, by my learned brother Mr. Justice Zahoor-ul-Haq, with the consent of the advocate for the defendants **Mr. Samiuddin Sami**. The commissioner has submitted his interim report on **19.12.1985** which deals with the construction from the ground level upto the plinth level. This report was accepted by my learned brother Mr. Justice Saleem Akhtar by his order dated **16.3.1986** in Suit No.110/1985 observing that no objections have been filed by the parties against the same and that it seems to have been passed on admitted documents and facts. The defendant was therefore, directed to deposit in Court **Rs.7,70,267.86**. Same order was passed in Suit No.511/1983 CMA No.2031/1086 was filed by the defendant for **re-calling the orders dated 16.3.1986** but the defendant was directed by order dated **27.4.1986** by my learned brother Mr. Justice Saleem Akhtar first to make the deposit within 2 weeks thereafter this application would be considered. Accordingly the defendant deposited the amount of **Rs.7,70,267.86** in Suit No.110/1985 and **Rs.11,87,156/-** in Suit No.511/1983. The plaintiff then made applications CMA No.3842/1986 and CMA No.3843/1986 for allowing him to withdraw the amount of **Rs.10,7,837** plus **Rs.52,999** deposited in excess by the defendant in **Suit No.110/1985** against an insurance guarantee. The plaintiff also made an application dated **3.9.1986 (CMA No.3843/1986)** in Suit No.110/1985 requesting for payment of Rs.7,17,267.86 deposited by the defendant as per **order dated 16.3.1986** as against an insurance guarantee. **All these three applications came to the dismissed** by separate orders dated **28.9.1986** passed by my learned brother **Mr. Justice Saleem Akhtar** in both these suits on the ground that **no decree has been passed so far and this amount was ordered to be deposited as security and therefore, cannot be paid at this stage.** (Then again) On **30.9.1986**, CMA No.4215/1986 was filed in Suit No.110/1985 by the advocate for the plaintiff under **Order XII Rule 6 C.P.C.**, praying that a preliminary decree be passed to the extent of admitted sum of **Rs.7,17,267.86** deposited by the defendant in pursuance of the order dated **16.3.1986**. Similar application CMA No.1416/1986 was filed in suit No.511/1983, for a preliminary decree to the extent of admitted sum of Rs.11,87,156/-.

Both these applications came to be granted with the **consent** of defendant's counsel Mr. Samniuddin Sami by my learned brother Mr. Justice Tanzilur-Rahman on **27.10.1986**.

*After taking into consideration all the above applications and orders I am of the view that so far as the amount mentioned in the second interim report of the commissioner dated **24.11.1987**, which was finalized by his report dated **12.4.88** is concerned it is distinguishable from that of the first report. **No order was passed by court calling upon the defendant to deposit this amount in the Court nor any decree has been passed on admission or otherwise for this amount. The defendant has disputed the amount. The question of payment of the amount found in the second report to be due from the defendant to the plaintiff does not arise.** Hence I order that the report of the commissioner be taken on record and the parties be given an opportunity of contesting the same if they so desire.*

*I, therefore, order that the case be fixed for recording of evidence on a date in office.*

8. The perusal of above order shows that on **28.9.1986**, Hon'ble Mr. **Justice Saleem Akhtar** (as he then was) had dismissed the plea of the plaintiff to disburse the amount of first interim report lying in the Court. And yet when the plaintiff filed second application with the same prayer before another bench the defendants on **27.10.1986** consented to the payment by the Court to the plaintiff and both of them suppressed the order dated **28.9.1986** whereby the second application was hit by principle of resjudicata. By the order dated **22.5.1990** reproduced above the parties were compelled to adduce evidence but until that dates issues were not framed. Therefore, the plaintiff filed an application under **Section 151 CPC** (CMA No.1368/1992) and proposed six issues annexed with the said application. The said application was allowed by consent on **09.9.1992** and, therefore, the plaintiff was required to lead evidence. However, the plaintiff despite framing of issues on **09.9.1992** kept on delaying production of his evidence and the commissioner, who has already filed a **final report** way back on **12.4.1988** which was taken on record on **11.10.1988**, without any fresh mandate after more than six years, filed one more report dated **10.5.1993**. The

defendants filed their objections to this report as well which were taken on record on **17.10.1993** after contest.

9. Then after more than five years of Commissioner's last report dated **10.5.1993**, the plaintiff on **27.8.1998** filed an application for amendment in the plaint bearing **CMA No.7383/1998** which was also allowed again by consent and the plaintiff filed amended plaint on **15.3.1999**. In the amended plaint the plaintiff changed/ substituted prayer clause No.(ii) without disclosing what was earlier prayer clause (ii). The prayer in the amended plaint filed on **15.3.1999** is reproduced below:-

*ii. A decree against the Defendant for a sum of Rs.1,90,42,000/- in favour of the plaintiff.*

Then on **10.5.1999** again by consent of the defendants and in view of commissioner's report dated 10.5.1993 the Court restructured **issue No.4** to be read as;

*“Whether the plaintiff is entitled for escalation in the Prices as calculated in the Commissioner's report dated **10.5.1993**?”*

10. The plaintiff then ultimately on **27.9.1999** filed his own affidavit in evidence as Ex:P and produced various documents as Ex;P/1 to P/59. He was cross examined by defence counsel and learned counsel for the plaintiffs closed their side for evidence. Defendants examined one Shahdin Shaikh, Executive Engineer, Karachi Central Civil Division V, Pak PWD, Karachi. The plaintiffs' counsel cross examined him and their counsel closed the side of defendants for evidence.

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

**Issues No.1 and 2**

12. Learned counsel for the plaintiff has hardly advanced any arguments on issue No.1 and 2 which otherwise appears to be of no relevance since the plaintiff has not claimed any sum of money on account of short measurements in the record of work done by them. He has filed this suit for recovery of dues on account of delay in the completion of the contract allegedly caused by **non-supply of material by the defendant** (Prayer clause (i)). He has not based his claim on any wrong entry in the measurement book. Strangely enough, the plaintiff has not disclosed/mentioned his own version of measurement which were not allegedly recorded in M.B. The plaintiff has not specified that which piece of work done by his labour was not measured and on what date, if any, measurement of work done by the plaintiff was not correctly entered in the measurement book. Mere vague statement in the plaint that there were incorrect entries in measurement book can lead the plaintiff nowhere. Even otherwise in his evidence the plaintiff has admitted in cross examination:-

*It is correct to suggest that the payment used to be made to me after due measurement by the defendant and I have received the same. It is incorrect to suggest that I was required to submit running bills. Voluntarily says that at our request engineer of the defendant used to visit the site and after measuring, running bill used to be prepared. It is correct to suggest that I have accepted all the payments without any objection.*

These issues are decided accordingly.

**Issues No.3 and 4**

13. The main contest is on issues No.3 and 4 that what is the effect two reports of commissioner dated **12.4.1988** and **10.5.1993** respectively. Learned counsel for the plaintiff contended that in the light of these reports, the plaintiff has already amended the plaint on

**15.3.1999** and this amendment should have retrospective effect from the date of filing initial suit in **1983** as pauper. He was, however, unable to satisfy the Court that how the amended plaint filed on **15.3.1999** in which the plaintiff increased his original claim from **Rs.59,56,034/=** to **Rs.1,90,42,000/=** on the basis of two reports of commissioner prepared after the filing of the suit can relate back to the original date of cause of action which was accrued to the plaintiff on **11.3.1981** (para-16 of plaint). Learned counsel has contended that in fact the plaintiff did not know the exact amount of his claim and, therefore, he has filed an application for appointment of commissioner who has calculated the amount of escalation and the application for amendment in plaint was allowed by consent. The commissioner appointed by the Court has filed interim report on **21.12.1985** in which he has tentatively determined a sum of **Rs.7,17,267/=** and on the application of the plaintiff this Court by order dated **16.3.1986** has directed the defendant to deposit the amount of **Rs.7,17,267/=** in Court and subsequently by another order dated **27.10.1986** it was ordered to be paid to the plaintiff. He further contended that then the commissioner continued the work and filed a final report on **12.4.1988** and escalation report on **10.5.1993** in which the total amount as per calculation of the commissioner comes to **Rs.1,90,42,000/-**, therefore, in view of the court earlier order dated **27.10.1986** the plaintiff is entitled to the said amount determined by the commissioner who was an independent person.

14. There is hardly any comment in rebuttal from the defendants. The defendants, with utmost respect, in my humble view, are just short of giving consent for the decree and they are only hopeful that in view of no contest at the bar a decree may be passed without any

blame on the defendants. At every step, the defendants seem to have facilitated the plaintiff. The contention of the plaintiff that decree may be passed on the basis of two reports in view of the order of this Court dated **27.10.1987** has already been answered by the Court twice in its orders dated **31.5.1989** and **22.5.1990** respectively. I have already examined these orders and reproduced order dated **22.5.1990** in para-7 above. Therefore, this contention is misconceived in view of para-4 and 8 above.

15. On merit, the perusal of evidence shows that the plaintiff has not filed these reports of commissioner on the basis of which he claims a decree to the tune of **Rs.1,90,42,000/=**. As already mentioned, the defendants have filed affidavits of objections on **12.12.1987** and **17.10.1993** respectively on both the reports of commissioner mentioned in the issues under discussion. Relevant paras 2, 5, 9, 11, 13, 14 and 18 of the affidavit in objections on the final report of the commissioner are reproduced below:-

2. *I say that on the Ist Interim Report of the Commissioner the objection was filed as the report was denied to be admitted alongwith other objection of the defendants but this honourable Court vide order dated 27.4.1986 directed first comply with the order passed on 16.3.1986 after which the objection filed was to be considered.*
5. *I say that **contour plan and Building drawings are not the basis of measurements as recorded in the Measurements Books.** Such recording of measurements are based on actual work done as per requirement and nature of work. **Contour Plan are prepared decades before which indicates the visual and physical condition and cross fall of the land.** Such contour plans are subject to variation according to the passage of time. The report is not based on admission. Similarly the building drawings are prepared much ahead for the purpose of preparing the estimate, showing the approximate cost of the Project. **But such cost are subject to variation and with this intention there is provision of Clause 12 in the agreement.***

9. *I say that the Plaintiff during the course of execution of the work have signed the measurements in token of their acceptance and as such they are stopped to agitate subsequently after their such acceptance.*
11. *I say that the idea of the court by appointing Commissioner is to ascertain the final position and not the running position by way of running reports.*
13. *I say that **the Commissioner** as it has come to the knowledge of the defendant **is an Electrical Engineer with no knowledge of Civil Works** and as such his observations may lead to confusion.*
14. *I say that in the Measurement Book under caption instructions references has been quoted paras 209 to 211 of C.P.W.A Code where in it has been strictly mentioned to be followed as under:-*
- “Measurement Book should be considered as very important accounts records and maintained very carefully and accurately as they may have to be produced as evidence in a Court of Law.”*
18. *I say that the learned **Commissioner may be summoned by this Honourable Court** for his cross examination in the interest of justice.*

I am surprised that two officers of defendant No.2 were present in Court but neither of them nor even their counsel has drawn my attention to their objections on the reports of commissioner. In affidavit of objection to the final report, the defendants have alleged that commissioner is guilty of misconduct. I have noticed that in his final report the learned commissioner himself has categorically stated that he cannot ascertain amount of price of escalation and declared that he can only check after it is calculated by the department. Relevant portion from final report of the Commissioner dated **12.4.1988** is reproduced below:-

*In furtherance with reference of this Hon'ble Court, dated 16.5.1985 to **ascertain the amount of price Escalation**, it is submitted that it is a separate identity and **is to be calculated by the Department itself i.e by Pak. PWD as per Rules of the Government** and I can ascertain and check the amount after it is calculated by the Department*

*and submitted to me alongwith graphs, price Index, Rules and Formulas etc.*

And yet the learned commissioner after 5 years of final report at his own filed one more report about “**price escalation**” without permission of High Court and without any authority against his own observation reproduced above from the final report submitted by him. This was commissioner’s **fourth** report and earlier he has filed two interim and one final report. The commissioner was not directed to file interim reports and final report and one more even after final report. Therefore, these reports are not in compliance of order of his appointment dated **16.5.1985**. He was not appointed to file several reports at his own or even at the instance of both the parties. Therefore, the objections of the defendant both on the manner/ conduct of commissioner in preparing reports and the contents thereof were not mere formality.

16. The plaintiff in his affidavit in evidence filed on **27.9.1999** has not even formally stated that the objections raised by the defendants on the said last two reports are denied. The reports of commissioner may be considered as evidence and form part of the record but in the given facts of the case, the commissioner was required to be examined as envisaged in the provisions of **Order XXVI Rule 10(1) & (2) CPC**, reproduced below:-

**10. Procedure of Commissioner— (1)** *The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.*

**(2)** *Report and deposition to be evidence in suit. Commissioner may be examined in person. The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court*



*or, with the permission of the Court, **any of the parties to the suit may examine the Commissioner personally in open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.***

It is admitted position that affidavits of objection were filed on commissioner's reports and the issues under discussions were framed precisely to examine the authenticity and legal status of these reports to pass a decree. The defendants in their affidavit of objections reproduced above have challenged even the capacity of the commissioner to submit a report on civil work since the commissioner himself was Electrical Engineer and not the Civil Engineer. The defendants have also requested that the commissioner may be summoned for his cross-examination. The plaintiff was, therefore, under legal obligation to have tendered these reports in evidence as the initial burden of proof was on him. Had the reports been tendered in evidence by the plaintiff, it could have enabled the defendants to cross examine the witness tendered it in his evidence to establish that the calculation made by the commissioner was wrong beside leading their own evidence to rebut these reports. But it has not been done by the plaintiff. The plaintiff seems to have withheld the best rather the only evidence and, therefore, the plaintiff has to bear the consequences. The commissioner was never appointed as an arbitrator or referee, therefore, even otherwise in presence of serious objections raised by the defendants on commissioner's reports, a judgment cannot be passed on the basis of these reports merely on the ground that reports are part of evidence and form part of the record. These two reports have no evidentiary value or legitimacy for a decree.

17. The legal aspect of the case is that there is no provision of law which allows the plaintiff to keep “cause of action” alive/continue even after filing of the suit for recovery of a definite amount of money due and get **a decree** in the same suit for a different amount of money which was not known to even the plaintiff on the date of filing of the initial suit. In fact on the date of filing of the suit on **6.8.1981** the plaintiff was sure of his exact claim as is evident from the perusal of prayer clause reproduced in para-2 above and reading of para-17 of the original plaint reproduced in para-17 above. In fact the “cause of action” ceases to continue/exist on the date of filing of the plaint by application of **Order II Rule 2 CPC** which is reproduced below:-

- 2. Suit to include the whole claim—** *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
- (2) Relinquishment of part of claim— Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.*

The cause of action has accrued to the plaintiff on **11.3.1981**, whatever plaintiff can claim on the date “cause of action” was already claimed in the plaint and whatever he **omitted** to sue for whatever reason he cannot afterward sue in respect of even any portion so omitted. Therefore, whatever determined by the commissioner afterward means after filing of the suit is hit by operation of Order II Rule 1 CPC which enjoins on the plaintiff that **“every suit shall include the whole claim”**. However, if for the sake of arguments we accept the contention of the learned counsel that on the date of filing of the suit the plaintiff was not aware of the amount “recoverable” by him then on a general principle of jurisprudence the date of cause of action could be the date on which he acquired knowledge and not a

date 15 years prior to even his own knowledge. It precisely mean on **11.3.1981**, the plaintiff had no cause of action to sue the defendants for recovery of a sum of **Rs.1,90,42,000/=**. The plaintiff in his plaint filed on **6.8.1981** has not claimed/averred that for whatever reasons he was unable to calculate his exact/actual claim and he reserves his right to re-calculate his claim through commissioner to be appointed by the Court or otherwise. Then even from the date of knowledge of fourth report of commissioner dated **10.5.1993**, the (amended) plaint was hopelessly time barred. The amended plaint was filed on **15.3.1999** to include the figures which come to his knowledge on **10.5.1993** through the so-called report of commissioner. Therefore, the claim in the amended plaint from the date of knowledge was also time barred. The logical consequence of the discussion is that both the issues are decided against the plaintiff as the two reports of commissioner have no legal effect.

**Issue Nos.5 and 6**

18. In view of the discussion on issues No.1 to 4 above, the plaintiff has not suffered any loss nor he was able to establish any loss in his evidence, therefore, the plaintiff is not entitled to any damage. Consequently the suit is dismissed.

JUDGE

*Karachi,*  
*Dated:21.05.2018*

*Ayaz Gul/PA*