

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No. 335 of 1997**

| Date | Order with signature of Judge |
|------|-------------------------------|
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Plaintiff : Mumtaz Muslim,  
through Mr. Kashif Paracha,  
advocate.

Defendant No.1 : Pakistan Steel Mills Corporation  
Defendant No.2 : Habib Bank Limited  
Defendant No.3 : Schon Bank Limited

Nemo for the defendants.

Date of hearing : 06.03.2018

Decided on : 04.05.2018

**JUDGEMENT**

**Nazar Akbar.J,-** Brief facts of the case are that on or about **05.3.1996**, the Defendants issued a tender in the newspaper for the purchase of a Roll Turning Lathe Machine. The Plaintiff's offer for the machine meeting the requirement of the Defendants was prepared in collaboration with M/s Dalian Machinery Import & Export Corporation, Peoples Republic of China. The Plaintiffs commercial offer incorporated the following conditions in regard to payment:

- (a) 33% Mobilization Advance against insurance guarantee.
- (b) 62% through an immediate inland letter of credit in favor of the Plaintiffs and payable upon delivery of the machine to the Defendants.
- (c) 5% upon installation and commissioning of the machine.

It is also averred in the plaint that during the period from **28.3.1996** the tender opening day to **03.6.1996** several questions were raised by Defendant No.1 and ultimately out of 9 bidders' only 3 bidders were short listed as all other offers were rejected. On **04.6.1996** commercial offers of the 3 equivalent bidders were opened and the Plaintiffs offer for Rs.184,993,930/- was found to be the lowest. It was accepted and the delivery period was 24 months. On **04.9.1996** the Board of Directors of

the Defendants duly approved Purchase Order No. 33351/CP-1/975019/96-97/CT-250 in favour of the Plaintiffs. It is also averred that on or about **24.9.1996** the Plaintiff was informed by Defendant No.1 that they were not willing to pay 33% cash mobilization advance. However, on or about **26.9.1996** the Plaintiff received another communication from Defendant No.1 that 20% mobilization advance would be given against Bank Guarantee of equivalent amount instead of insurance guarantee originally agreed and 80% balance to be paid through issuance of an inland L/C. These changes were accepted by the Plaintiff. On **30.9.1996** Defendant No.1 from the Plaintiff sought bank guarantee equivalent to 10% of the value of the contract and 10% against mobilization advance making a total security of 20% against the mobilization advance. Then Defendant No.1 made another deviation and suggested that instead of cash advance of 20% the Plaintiff should lift their steel products of equivalent value. On **01.10.1996** this proposal of defendant No.1 was also accepted by the plaintiff. Performance Bank Guarantee for Rs. 18,499,393/-by Habib Bank Ltd was deposited with the Defendant No.1 on or about **06.10.1996** and additional Bank Guarantee for similar amount issued by Schon Bank Ltd was also deposited by Defendant No.1. On the same day the plaintiff informed defendant No.1 that the delivery orders for steel products equivalent to 20% of the value of the contract be made in the name of M/s Steel Corporation Karachi and further requested that letter of credit for the balance of 80% may be established urgently. No such letter of credit was provided to the Plaintiffs inspite of reminders of **11.12.1996**, **11.1.1997** and **28.1.1997** and inspite of their obligation for establishing letter of credit. Defendant No.1 has failed to do so and this has created very serious commercial problems for the Plaintiff. The Plaintiff and his engineer had taken several trips to China and elsewhere to meet the requirements of Defendant No.1 but neither the contracted item in

demand in the general market in Pakistan nor can Plaintiff bring it to Pakistan without creating a massive financial burden on his own resources. It is also not known that even if this item arrives in Pakistan, how long it will take to dispose it off to a possible customer other than Defendant No.1 (who are now refusing to accept it) and at what price and at cost to the reputation of the Plaintiff. It is also not known as to what will be the financial burden on the Plaintiffs at the end of such a vast transaction without finances being made available by Defendant No.1, as agreed. In one of the discussions with Defendant No.1, the plaintiff understands that defendant No.1 has decided not to purchase the agreed item. However formal intimation to this effect has not yet been given to the Plaintiff. As the time for making the complete supply is 24 months the Plaintiff will be exposed to serious loss if the Defendant did not open a letter of credit within time. Treating failure of Defendant No.1 to open a letter of credit as breach of contract as also their oral communication of not completing the purchase, the Plaintiff forfeited the advance received and claim damages for expenses incurred, loss suffered, prospective loss on account of failure of Defendant No.1, all in the sum of **Rs.120,500,810,00**. It is averred that the Plaintiffs have option to seek specific performance of the contract which the court may be pleased to order and in the alternative damages which the Plaintiff would stand reduced to the legal extent. Therefore, the plaintiff on **21.3.1997** filed the instant suit.

i. That this Hon'ble Court be pleased to order the defendant to open the internal letter of credit in the sum agreed and assess and decree the additional damages suffered by the plaintiff.

ii. in the alternative this Hon'ble Court be pleased to assess the damages after forfeiture of the advance paid to the plaintiff and to allow them in favour of the plaintiff in the sum of Rs.120,500,810.00 with investment/markup till the date of payment.

iii. That this Hon'ble Court be pleased to issue an injunction restraining the Respondents No.2 & 3 from

making any payment against the Performance Bond/Guarantee for Rs.18,499,393.00 each provided by them to the defendant No.1 in respect of the order in respect whereof the present suit has been filed.

iv. Costs.

2. Defendant No.1 was served and filed written statement and raised a preliminary objection that defendant no.1 has not been fully and properly described. It is averred by defendant No.1, Pakistan Steel Mills (hereafter referred to as PSM) that the plaintiff submitted tenders for CNC Roll Turning Lathe which was not the requirement inasmuch as at one stage Technical Evaluation Committee of the PSM had rejected such type of machine which is meant for mass production and the then Operational Head (Hot Strip Mill) had desired for preparation of the specification as per actual requirement. The file was lying idle for over seven months but all of a sudden with the change of management it was reactivated on **6.12.1995** when Mr. Usman Farooqi took over as Acting Chairman, Pakistan Steel Mills and with the connivance of the then Superintendent (Hot Strip Mill) and General Manager (Purchase) a stage was set for manipulating the tenders and to place purchase orders to a favorite party as confirmed by subsequent developments inasmuch as despite the costs of machine expected to be in millions the tenders were invited on FOR basis. It was the responsibility of the then General Manager (Purchase) to have ensured transparency in the re-tendering by inviting tenders on FOR and C&F basis particularly when such type of machine was neither manufactured nor available in Pakistan, which would have resulted into maximum participation in tenders but the case was processed with utmost haste with ulterior motives so as to pave way for procurement of the CNC Lathe Machine on exorbitant price to serve the vested interests. It is further averred that the Board of Directors was deceived and the facts were mis-represented or / and concealed in order to obtain approval. It is submitted that with the connivance of the

enduser (Hot Strip Machine) and Purchase Department the task of the supplier (plaintiff) was made easier right from the beginning in the shabby, collusive and fraudulent transaction. It is contended that on the one hand the then Chairman had ordered that the payment would be released after two years i.e. after delivery of the Lathe Machine, whereas on the question of mobilization advance, he softened his earlier stand and took "U" turn from his earlier stand, thereby approving 20% mobilization advance amounting to **Rs.3,69,98,786,00** which was paid in the shape of supply of steel products of equivalent value to the plaintiff; with a hefty unauthorized and illegal discount of 8% amounting to **Rs.32,11,372,00** plus **Rs.4,01,698,32** as Commission. As a matter of fact the plaintiff received from the PSM steel products of the value of **Rs.4,01,69,849,85** instead of **Rs.3,69,98,786,00**. The plaintiff received a discount and commission of **Rs.32,11,372,00** and **Rs.4,01,698,32** respectively. It was felt that the procurement of Lathe Machine at such an exorbitant price and release of mobilization advance in the above manner was not justified and it caused loss to public money. Investigations in the matter have been made and it is apprehended that all persons who have acted against the interest of the PSM and have been benefitted will be brought to book and the plaintiff is also liable to make good the loss caused to PSM. It is averred in the written statement that all the steps were being taken in order to help the plaintiff and two Bank Guarantees furnished by the defendant Nos.2 and 3 respectively were independent contracts whereby they irrevocably and unconditionally undertook to pay forthwith without reference to the plaintiff on the first demand of PSM stating that the plaintiff has committed a default, the amount of **Rs.18,499,393,00** each to PSM who has already made the demand for such payment but so far the amount has not been paid by the defendant Nos. 2 and 3 and they seem to be in collusion with the plaintiff and PSM who while reserving its right against

the defendant Nos. 2 and 3 also claims the aforesaid sum of **Rs.4,01,69,849.85** from the plaintiff with interest at 2% annum above prevailing Bank rate from 24/**28.10.1996** till payment with costs. It is further contended that in view of the averments of the PSM made hereinabove and from the material which will be produced at the trial there is no doubt that the plaintiff in collusion with the then management was able to procure the purchase order for the supply of the Lathe Machine at most exorbitant price whereas the said type of Lathe Machine was not at all required by PSM who accordingly tried to impress upon the plaintiff to refund the amount of **Rs.3,69,98,786.00** pocketed by him in shape of Steel Mills products and discount and commission of **Rs.32,11,372.00** and **Rs.4,01,698.32** respectively as back as in the year 1996 but the plaintiff has failed to do so.

3. It is further contended that the allegations made by the plaintiff are baseless. The plaintiff has neither suffered nor likely to suffer any loss. On the contrary he has pocketed the above amount of Rs.3,69,98,786.00 plus discount and commission in 1996 thereby causing loss to PSM who are already under financial crisis and the plaintiff is also a contributory to it. The PSM has also claimed the said amount from the plaintiff by way of counter-claim. The plaintiff cannot be allowed to take undue advantage due to his own fraud and collusion in the aforesaid shabby transaction. On the contrary PSM values its claim at Rs.4,01,69,849.85 and maximum Court fees of Rs.15,000.00 is being paid and no cause of action has accrued to the plaintiff against the PSM and the suit is liable to be dismissed. The plaintiff is liable to the counter-claim of PSM.

4. Defendant No.2 / Habib Bank Limited., (hereinafter HBL) was served and filed written statement. It is averred by HBL in the written statement that at the request of the plaintiff, Defendant No.2 did issue

guarantee No. 159/96 dated 6.10.1996 expiring on **5.10.1997** in the amount of Rs.18,499,393/- in favor of PSM. The Plaintiff and M/s. S. Mahmood Tanveer Corporation issued a counter-guarantee in favor of the Defendant No. 2 in consideration of its having issued the aforesaid guarantee. It is submitted that no cause of action has been disclosed as against Defendant No.2. However, a prayer has been made for injunction restraining the defendant No.2 from making payment to PSM against the guarantee aforesaid. It is averred that no demand for payment has been made or alleged to have been made by PSM against the guarantee and the defendant No.2 is liable to be struck off as a party to the suit.

5. On **30.11.1998** following issues proposed by defendant No.1 alongwith issue No.1 of the plaintiff were adopted by the Court.

- i. Whether purchase order dated **4.9.1996** was issued in the name of Plaintiff after due approval by the Board of Defendant No.1? If so, its effect.
- ii. Whether the plaintiff was able to procure the Purchase Order for the supply of Lathe Machine from the defendant No.1 collusively and fraudulently at most **exorbitant** price? Is the transaction lawful and valid?
- iii. Whether the plaintiff has received from the defendant No.1 steel products of the value of Rs.4,01,69,848.85 instead of Rs.3,69,98,786/- by way of mobilization advance with discount and commission of Rs.32,11,372/- and Rs.4,01,698.32 respectively? Is he liable to refund the said amount and / or any part thereof?
- iv. Whether the defendant No.2 and 3 irrevocably and unconditionally undertook to pay to the defendant No.1 the sum of Rs.18,499,393/- each and furnished Bank Guarantees for the same? If so, what is the effect?
- v. Whether the defendant No.1 has violated the terms of the contract? If so, what is the effect?
- vi. What loss, if any, has the plaintiff suffered?
- vii. What should the decree be?

I have heard learned counsel for the plaintiff and perused the record. None present for the defendant. My findings with reasons on the issues are as follows:-

**Issues No.1 and 2**

Learned counsel for the plaintiff contends that the plaintiff has participated in the bidding for item No.19 of the Tender Notice (P/1) and out of several competitors only three bidders were in the field on **28.3.1996** when the sealed tenders were opened. The offer of the plaintiff was accepted as it was the lowest one. He contends that there is no dispute that the Purchase Order was issued and the value of it was also determined as per the documents. The plaintiff's actual terms and conditions agreed upon were subsequently altered by defendant No.1 to their advantage and the plaintiff has agreed to modify his offer of 33% cash advance payment of mobilization charges to only 20% payable not in cash but in the form of steel product equivalent to it against bank guarantee. At the request of plaintiff steel products equivalent to the value of mobilization were supplied to M/s. Steel Corporation Karachi, therefore, irrespective of the fact whether it was duly approved or not by conduct the purchase order having been acted upon stand approved. The question of exorbitant price is not relevant since the tender documents shows that the acceptance of tender was on the ground that it was minimum price quoted by the plaintiff. The plaintiff's counsel has further contended that plaintiff was not aware of the internal process of defendant No.1 for placing the purchase order. Therefore, plaintiff cannot be blamed for any irregularity on the part of defendant No.1. In fact for whatever reasons the failure of defendant No.1 to fulfill their obligation under the Purchase Order has caused losses to the plaintiff.

No one is present on behalf of defendant No.1. On perusal of record I am of humble view that these two issues supplement the defense raised



by defendant No.1 against the claim of the plaintiff in issues No.3 and 6 that he is entitled to the damages and also to forfeit entire mobilization advance or only part of it. Defendant No.1 has raised these issues in their written statement to show that even the Purchase Order was fraudulent, without lawful approval and even the prices were manipulated, therefore, the mobilization advance is liable to be refunded and there was no damage to the plaintiff. The first burden of proof was on defendant No.1. On examination of evidence of defendant No.1. I found that in support of contents of para 2, 4, 5 and 9 of written statement, the witness has produced an investigation report dated 27.3.1997 which was initiated on **8.1.1997** on the subject of procurement of **CNC ROLL TURNING LATHE**. Relevant portion of report is reproduced as follows:-

17. Purchase proposal was thus prepared in favour of M/s. Pakistan Industrial Corporation, being lowest bidder, Separate tools, grinding wheels, tool kit, accessories i.e. cooling pump device, open steady rest, closed steady rest, clutch-able grinding attachment, installation and commissioning of machine. As against this, these items were included in the scope of supply in the tender documents. Hence, the cost of the Roll Turning Lathe was raised to Rs.18,49,93,930/- against different heads, whereas the expenses (travelling, lodging/boarding) to be incurred on training of 04 Pakistan Steel Engineers at manufacturing plant, were to be borne by Pakistan Steel. **The supplier had also included 24 months delivery period (as against 12-16 months desired by the indenter at the time of technical evaluation of the offers) and 33% advance payment was demanded by the lowest bidder and establishment of local L/C.**

a) .....

b) .....

c) The papers available on record vindicate that the **financial feasibility was not submitted by 25.7.96**. If the financial feasibility was not submitted by 25.7.96, then how it could be justified that the Board of Directors had approved the proposal on the basis of financial feasibility submitted in this regard.

**Recommendations:-**

a) C.N.C. (Computerized Numerically Controlled) Roll Turning lathe Machine is not required. Instead a Roll

Turning Lathe Machine (Conventional) may be procured for HSM.

b) Negotiation be made with the supplier, M/s. Pakistan Industrial Trading Company for cancellation of the LOA of the subject Machine and either recovery of the amount paid as mobilization advance or adjustment of this amount from their existing / future contracts.

Learned counsel for the plaintiff during the cross-examination of witness of defendant No.1 did not challenge veracity of contents of Ex.66. On the investigation report (Ex.66) only cross-examination was a suggestion that probably there were two more parts of report which according to the plaintiff were not produced. The limited cross on Ex.66 is as follows:-

*“I do not know whether we have not filed Part-2 and 3 of Investigation Report, the Ex.D/66. It is incorrect that Part-2 and 3 were deliberately not filed”.*

The evidence of defendant No.1 was consistent to their claim in written statement. It may be mentioned here that defendant No.1 has relied on the investigation report in their written statement, therefore, if there was part-2 & 3 of the investigation report as suggested and there was anything in favour of plaintiff, the plaintiff should have put the defendant on notice for production of the same under **Article 77** of the Qanun-e-Shahadat Order, 1984. It was not done. In view of the documentary evidence led by defendant No.1 mere denial of the plaintiff that the allegation of foul play in obtaining purchase order dated 4.9.1996 (Ex.P/3) was not enough. Defendant No.1 has repeatedly stated in his written statement that **CNC (computerize numerically controlled)** Roll Turning Lathe Machine was not the requirement of defendant No.1. The burden was then on the plaintiff to show that tender was for procurement of **CNC Roll Turning Lathe Machine**. The Ex.P/1, Tender Notice and Ex.P/2, Tender Enquiry containing three pages confirm that in these basic documents defendant No.1 has **not** mentioned **CNC** Roll Turning Lathe Machine. The plaintiff has made offer of **CNC Heavy Duty**

**Horizontal Lathe** whereas in the two official tender documents (Ex.P/1 and P/2) the requirement of defendant No.1 is simply a Roll Turning Lathe Machine. The offer of Plaintiff, therefore, was different then the specification in official tender document. In view of the evidence on record, the possibility of mismanagement or misrepresentation in obtaining approval of Board of Defendant No.1 cannot be ruled out looking at the documents of plaintiff, the possibility of involvement of the plaintiff cannot be excluded from all these activities. These issues are, therefore, decided accordingly.

**Issue No.4**

This issue is of no consequence since it is not disputed by defendant No.1 that the two banks (defendant No.2 & 3) have furnished bank guarantees which already stand expired on **05.10.1997**. The plaintiff has also admitted in his cross-examination on **23.8.2008** that *“till today said bank guarantees have not been encashed”*.

**Issues No.3, 5 & 6**

These are main issues and the burden of proof of these issues is on plaintiff. The plaintiff has conceded in his evidence that he has realized / received steel products towards mobilization advance

*“I received Rs.3,69,98,786/- as mobilization advance from Defendant No.1”.....  
 .....“I do not know whether an amount of Rs.4,01,698.32 was also given to the said dealer towards commission”. Steel Corporation Karachi is the name of the said dealer but I do not remember the name of their owner. It was at my instance that the said dealer was given products of defendant No.1 towards mobilization advance”.....*

Learned counsel for the plaintiff vehemently contended that defendant No.1 has breached the contract by not opening inland letter of credit for the remaining 80% of the cost of the lathe machine and mobilization advance was consumed in the process of procurement of machinery. The

plaintiff for claiming damages has relied on oral cancellation of tender on the pretext of change in the management of defendant No.1. In this context only paragraphs 9 & 10 of the plaint are relevant. The same are reproduced below:-

9. That inspite of their obligation for establishing letter of credit, the Defendants have failed to do so and this is creating very serious commercial problems for the plaintiff. The plaintiff and his engineer had taken several trips to China and elsewhere to meet the requirements of the defendant.

10. That neither the contracted item in demand in the general market in Pakistan nor can plaintiff bring it to Pakistan without creating a massive financial burden on his own resources. It is also not known that even if this item arrives in Pakistan, how long it will take to dispose it off to a possible customer other than the defendant (who are now refusing to accept it) and at what price and at cost to the reputation of the plaintiff. It is also not known as to what will be the financial burden on the plaintiffs at the end of such a vast transaction without finances being made available by the defendant, as agreed. In currently held discussions the defendant has indicated that under current discussions within defendants establishment they have decided not to purchase the agreed item. However, formal intimation to this effect has not yet been given to the plaintiff. As the time for making the complete supply is 24 months the plaintiff will be exposed to serious loss if the defendant does not open a letter of credit within time. Treating failure of defendant to open a letter of credit as breach as also their oral communication of not completing the purchase. The plaintiff treats the failure of the defendant as breach of contract and forfeit the advance received and claims damages for expenses incurred, loss suffered, prospective loss on account of failure of defendant, all in the sum of Rs.120,500,810.00.

In support of the above averments of the plaint and to justify the damages and forfeiture of mobilization advance, the plaintiff has not produced any tangible evidence except letters dated 11.12.1996 and 28.1.1997 (Ex: P/13 and Ex: P/15) to defendant No.1 in which it was claimed that order has been placed to Chinese supplier and they are threatening to forfeit the mobilization advance. The plaintiff has not produced any evidence to show that he has even properly utilized mobilization advance in furtherance of the work / purchase order. When

the plaintiff claim that order has been placed and advance paid to Chinese supplier of the Roll Turning Lathe Machine, he was also required to prove transfer of funds from his account to the Chinese supplier and their acknowledgment of having received the money toward supply of Lathe Machine. He has not produced even a Fax, e-mail or any other documents showing any effort on his part to discharge his liability under the purchase order dated **4.9.1996** (Ex.P/4). The perusal of evidence of the plaintiff shows that only one gentleman, the plaintiff himself, has appeared in the witness box and none of his engineer or anyone else has stepped in the witness box to support the contention of the plaintiff that he has made several trips to China with the plaintiff to meet the requirement of defendant No.1. He has not produced record of even his own travel to China or any other country. He has not even disclosed the dates on which he travel to China. In his cross-examination he admits;

*“I have not supplied CNC Roll Turning Lathe Machine to defendant No.1 .....  
 .....  
 .....  
 I have not produced any documentary proof in this suit in support of my averments about our trips abroad. I have also not given details of such trips”.*

The plaintiff has failed to show even breach of contract by defendant No.1. There was not any specific terms / condition in the contract / purchase order that mobilization advance could be liable to forfeiture. Mobilization advance can be forfeited only when the plaintiff establishes that a condition was provided in the contract / purchase order that violation of such condition and / or in default by defendant No.1 the plaintiff will be entitled to forfeit the mobilization advance. To the contrary defendant No.1 has secured its refund in case of default by plaintiff through bank guarantees so that plaintiff should not run away. Defendant No.1 till date has not cancelled the purchase order and the record shows that in the investigation report reproduced in discussion on issue No.1 and 2 above, the committee has recommended negotiation

with the plaintiff to the effect that “**either recovery of the amount paid as mobilization advance or adjustment of this amount from their (plaintiff’s) existing / future contracts**”. The perusal of para-10 of plaint reproduced above clearly indicates that plaintiffs were in negotiation with defendant No.1. Therefore, the plaintiff has neither spent a single penny out of mobilization advance nor he has produced any evidence about it. However, on realizing the ground reality within first six months on a contract in which time period was two years, the plaintiff instead of filing a suit for specific performance of contract, filed the suit for damages. The purpose was to stop immediate recovery/ adjustment of mobilization advance which seems to have been achieved on the date of expiry of bank guarantees way back in **1997**. However, in ultimate analysis the plaintiff has failed to prove his entitlement to forfeit mobilization advance and damages. The plaintiff has not produced evidence of any “expenses incurred” by them and there is no explanation that how they have calculated “suffered losses”, and what is “prospective loss” to be compensated in the sum of **Rs.120,500,810/-**.

**Issue No.7**

In view of the above facts and discussion, the plaintiff’s suit is dismissed and the counter claim of defendant No.1 is decreed with 10% mark-up from the date of decree till its realization.

Karachi  
Dated:04.05.2018

**J U D G E**