

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.987 of 1998 &  
Suit No.988 of 1998**

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Date Order with signature of Judge

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For final arguments.

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**Suit No.987 of 1998**

Plaintiff : M/S Ghaffar Corporation  
Defendant No.1 : M/S Metro Commodities (Pvt) Ltd.  
Defendant No.2 : The Manager Habib Bank Limited.

**Suit No.988 of 1998**

Plaintiff : M/s Metro Commodities (Pvt) Ltd.  
Defendant : M/S Ghaffar Corporation  
Date of hearing : 21.12.2017  
Date of Order : 21.12.2017

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Mr. Muhammad Aqil, Advocate for the plaintiff in suit No.987 of 1998 and for the defendant in suit No.988/1998  
Mr. Yawar Farooqui, Advocate for defendant No.1 in suit No.987 of 1998 and for plaintiff in suit No.988 of 1998.  
Mr. Suleman Huda, Advocate for defendant No.2 in suit No.987/1998.  
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NAZAR AKBAR, J. By this common judgment I intend to dispose of both the cross suits. Suit No.987/1998 by M/S Ghaffar Corporation is for Specific Performance of Contract and Injunction against M/S Petro Commodities Pvt. Limited. Suit No.988/1998 filed by M/S Petro Commodities is simple suit for injunction and damages against M/S Ghaffar Corporation. For the purpose of avoiding confusion, in the judgment plaintiff would mean M/S Ghafoor Corporation and defendant would mean M/S Petro Commodities.

2. The plaintiff in suit No.987/1998 claimed that he has contracted in writing to purchase 1600 M.Tons Rice IRRI-9 at the

rate of Rs.10,250 per M. Ton from defendant No.1 and an advance payment of Rs.500,000/- to the defendant. It was agreed that the delivery order will be issued by defendant No.1 to the plaintiff within 10 days from the date of advance payment. It was averred that defendant No.1 illegally and unauthorizedly contracted to sell the said 1600 M. Tons Rice to some different party and issued delivery vouchers through defendant No.2 to a new buyer. The plaintiff claimed that he was willing to perform his part of contract as agreed by making payment of the agreed price in partial manner on partial delivery of the agreed goods but defendant No.1 failed to supply the 1600 M. Tons Rice to the plaintiff, therefore defendant No.1 is liable to pay compensation towards increase in price @ 2750/- per tons which comes to Rs.22,00,000/-. Therefore, being aggrieved, the plaintiff filed the instant suit seeking the following terms:-

- (a) *Decree for specific performance of contract dated 21.3.1998 directing the defendant No.1 to deliver 1600 M. Tons Rice Goods at the agreed price to the plaintiff.*
- (b) *Directing the defendant No.1 to deliver remaining 800 M. Tons Rice Goods or whatever quantity lying in the warehouse M/s. Karachi Dock Ltd. to plaintiff on partial payment under the terms of contract.*
- (c) *Directing the defendant No.1 to pay the increase in price in case of non delivery of the contracted quantity of 1600 M. Tons as difference of prevailing market price @ Rs.2,750/- per M. Ton which comes to Rs.44,00,000/- with interest @ 18% P.A from the date of Contract till its realization.*
- (d) *Directing the defendant to pay Rs.22,00,000/- as compensation @ Rs.2,750/- per M. Ton on already sold 800 M. Tons Rice Goods.*
- (e) *Interest/mark-up/equalizer @ 18% per annum on the aforesaid amount of compensation from the date of suit till realization.*
- (f) *Permanent injunction restraining the defendants, their servants, agents, representatives, assigns or any person/s acting through or under them from removing, selling or delivering the Rice Goods lying with defendant No.3 to any other person/party*

*directly or indirectly in any manner whatsoever except the plaintiff on contracted partial payment and delivery to the plaintiff.*

- (g) Cost of the suit be borne by the defendant.*
- (h) Any other relief which this Honourable Court deems fit and proper under the circumstances of the case.*

3. Defendant No.1 filed their written statement in which they claimed that in March 1998 the plaintiff offered to buy 1600 M. Ton of Irri 9 Rice from defendant and the goods were to be lifted within 10 days from **25.3.1998** after advance payment of Rs.500,000/- for the contracted quantity but the plaintiff failed to perform his contractual obligations as neither any step was taken to lift the stock nor was the balance amount paid to defendant No.1. Defendant No.1 averred that after the breach committed by the plaintiff, the stock was delivered to other parties. The plaintiff, therefore, may be restrained from demanding delivery of the Rice from the defendant, and compensate the losses of the defendant amounting to Rs.10 Million. On **3.9.1998**, the plaintiff's application under Order XXXIX Rules 1 and 2 CPC to restrain the defendant from selling the Rice to third party was dismissed.

4. On **18.10.1999** this Court from pleading of the parties framed the following issues in suit No.987/1998:-

- 1. Whether the suit is not maintainable?*
- 2. Whether the plaintiff under agreement dt: 21.3.1998 was required to perform his obligations within ten days thereof, making time the essence of the contract"*
- 3. Whether the plaintiff failed to perform his contractual obligations?*
- 4. Whether the plaintiffs desire to re demand the purchase of the goods 5 months later was a result of price fluctuation in the market?*

5. *Whether the plaintiff in law and on facts is entitled to specific performance and other reliefs claimed in suit?*
6. *Whether any cause of action accrued to the plaintiff?*
7. *What should be the decree?*

5. The plaintiff examined Muhammad Abdul Ghaffar, Managing Partner of plaintiff as sole witness and he was cross-examined by the counsel for the defendant. Defendant No.1 has examined one Muhammad Ashraf, Director of defendant. He was cross-examined by the counsel for the plaintiff.

6. On **09.10.2014** this Court has dropped the above issues and by consent framed the sole issue incorporated in the following order:-

09.10.2014

*Mr. Muhammad Aqil, advocate for plaintiff.  
Mr. Yawar Farooqi, advocate for Defendant No.1.  
Mr. Suleman Huda, advocate for Defendant No.2*

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*Since this is a suit for specific performance in respect of a contract regarding perishable goods and it was filed in 1998 it has lost its utility during last 16 years. As of today the only issue is **“whether down payment made by the Plaintiff in Suit No.987/1998 to the Defendant No.1 at the time of entering into contract dated 21.3.1998 was refundable or not in view of the failure of the parties to execute agreement letter and spirit?”**. Therefore, **all the issues framed by this Court earlier are dropped by both the parties**. Simultaneously both the parties have also given up their claim of damages against each other. Now this case will be decided on the basis of issue framed hereinabove on the basis of evidence available.*

*Parties are directed to come prepared on the issue framed today on 30.10.2014.*

7. I have perused the record and heard learned counsel for the parties. My findings on the above sole issue are as follows:-

8. Learned counsel for the plaintiff (M/S Ghaffar Corporation) has contended that there was no agreement to the effect that in case of

failure of the plaintiff to lift the Rice, the defendant will forfeit the advance paid to the defendant. He has further contended that the defendant has fraudulently obtained the advance by inducing the plaintiff to enter into contract of sale of 1600 M. Ton Rice though at the relevant time it was not the property of the defendant and the defendant has already pledged the Rice with HBL. However, the plaintiff has entered into a contract in good faith. The defendant even otherwise has subsequently sold the Rice to third party and as such they have neither suffered any loss nor they have any right to retain the earnest money. The defendant's counsel contended that it is the practice of the market that the earnest money has to be forfeited in case plaintiff defaults in lifting Rice within stipulated time. To a query from the Court that whether the plaintiff was informed that the Rice in question were mortgaged/pledged with the Habib Bank Limited, learned counsel concedes that no such information was passed on, however, he explained that on receiving the sale consideration, the plaintiff could have cleared the loan against which the Rice were pledged with the Habib Bank Limited and, therefore, it was not necessary to inform the plaintiff in advance that the goods were mortgaged.

9. The witness of the defendant has also conceded in his cross examination in the following manner:-

*It is correct to suggest that I have not informed Mehmood A. Ghaffar regarding pledged Rice with H.B.L. It is correct to suggest that I have no documentary evidence which show that the Rice pledged with H.B.L informing Mehmood A. Ghaffar regarding pledge of the Rice. It is correct that the Rice was lying in site No.B-32 Site, Karachi where the Rice was under the pledge of H.B.L.*

10. In view of the above evidence the defendant M/S Petro Commodities Private Limited had no legal right to retain the earnest money amounting to Rs.500,000/-. Learned counsel for the plaintiff

has relied on a Division Bench Judgment of this Court in a case of Saeed Naseem Cheema vs. Mrs. Rukhsana Khan (**2010 MLD 123**). In this case while declining the relief of specific performance of contract, the Division Bench has been pleased to direct the defendant to return the earnest money with penalty. In another case of Muhammad Ghafoor vs. Mst. Munawar Shahzadi and another (**2007 MLD 264**) it has been held that the plaintiff was entitled to receive a notice of forfeiture of the earnest money if the defendant were entitled to forfeit the same under the contract or otherwise.

11. In the case in hand in my humble view both the case laws are relevant there was no clause of forfeiture of the advance paid by the plaintiff to the defendant nor the defendant has issued any notice to the plaintiff that in case of default of lifting Rice from the godown within stipulated time defendant will suffer loss or otherwise would forfeit the advance paid by the plaintiff. The other unfortunate fact which has come on the record against the defendant is that the plaintiff was not informed that subject matter of the contract was pledged with Habib Bank Limited. Since it was pledged, the defendants were under obligation not only to inform the buyer/plaintiff before entering into a contract of sale but also they should have obtained permission from the HBL for their intention to sell the goods pledged with them.

12. In view of the above facts and law the suit No.987/1998 is decreed, however, as far as the claim of mark-up of the amount of Rs.500,000/- which remained in the pocket of defendant for almost 20 years since March, 1998 is concerned, in my humble view, the defendant is also entitled to pay the mark-up at the rate of 10% per annum from the date of filing of suit No.987/1998.

13. The issue adopted by this Court on **09.10.2014** is decided in favour of the plaintiff in suit No.987/1998 and against the plaintiff in suit No.988/1998. The suit No.988/1998 is dismissed. The Petro Commodities (Pvt.) Limited is liable to refund the earnest money amounting to **Rs.500,000/-** with 10% interest per annum to M/S Ghaffar Corporation Pvt. Limited from the date of filing of suit No.987/1998 till realization.

14. Both the suits stand disposed of in the above terms.

JUDGE

Ajaz Gul/PA\*