

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.150 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant No.1 : Muhammad Saleem
Through Mr. Habib Jalib, advocate.

Versus

Respondent No.1 : Learned Trial Court of Xth Senior Civil Judge
Karachi South.

Respondent No.2 : Learned Appellate Court of XII TH Additional
District Judge Karachi South.

Respondent No.3 : Shell Pakistan Ltd.
Through Mr. Rajendar Kumar, Advocate.

Date of hearing : **10.05.2019**

Date of Decision : **10.05.2019**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IInd Appeal has challenged the concurrent findings. The X-Senior Civil Judge, South Karachi by judgment dated **28.04.2014** partly decreed civil suit No.590/2011 filed by Respondent No.3 and the XIIth-Additional District Judge, South Karachi by judgment dated **06.11.2017** maintained the finding of trial Court and dismissed Civil Appeal No.103/2014 filed by the appellant.

2. Precisely the facts of the case are that Respondent No.3 filed civil suit for recovery of Rs.3,348,885/- alongwith markup and Damages of Rs.2,000,000/- against the appellant stating therein that they are oil marketing company involved in distribution, marketing and sale of Petroleum products and blending packing, distributing

marketing and sleeking lubricants and the appellant is his distributor of lubricants. The agreement of distributorship was executed on 16.11.2017 between Respondent No.3 and the appellant for initial period of three years, whereby, the appellant was appointed as distributor of Respondent No.3 for stocking, trading, distributing and selling his lubricant products. It was averred that Respondent No.3 in the ordinary practice require distributors to make payment for the supply of lubricants in advance at the time of placing of purchase order but on special request of the appellant, Respondent No.3 allowed him a credit facility of Rs.7,000,000/- subject to deposit of 50% of credit facility i.e Rs.3,500,000/- as security and such security amount was deposited by the appellant with Respondent No.3. The appellant has also deposited Rs.1,50,000/- with Respondent No.3 under clause 4 of the agreement as security. Respondent No.3 as per practice used to deliver lubricants to the appellant and the appellant used to make payment through Electronic Fund Transfer in the bank account of Respondent No.3. It was claim of Respondent No.3 that on many occasions the appellant did not immediately clear the whole invoices and made partial payments on the pretext of liquidity problem and, therefore, on 13.08.2013 amount of Rs.6,998,885/- was outstanding against the appellant. Finally Respondent No.3 adjusted the security deposit of appellant Rs.3,650,000/- and after deducting the said security deposit, the appellant was required to pay balance amount of Rs.3,348,885/-. For the said unpaid outstanding amount, Respondent No.3 sent written notices and telephone calls but of no avail, therefore, Respondent No.3 filed Civil Suit for Recovery of Rs.3,348,885/- alongwith markup and Damages of Rs.2,000,000/- against the appellant.

3. After summons/notices of the civil suit, the appellant filed written statement wherein he denied all the allegations and even execution of distribution agreement dated 16.11.2007. He contended that the said agreement was not finalized his signature were affixed on blank papers. He also contended that the documents annexures B, C, D, E, F, F/a and F/2 annexed with the plaint of the suit were also not prepared at the time of drafting of agreement but Respondent No.3 got signature of the appellant on blank documents. He also denied the credit facility of Rs.7,000,000/- of Respondent No.3 but admitted that he has paid Rs.35,00,000/- against the lubricants which was purchased by him from Respondent No.3 but denied that this amount was security deposit with Respondent No.3. The appellant admitted deposit of security Rs.1,50,000/- with Respondent No.3.

4. Learned trial Court from the pleading of the parties framed the following issues:-

1. *Whether the suit is not maintainable?*
2. *Whether the alleged Agreement dated 16th November 2007 was not finalized between the parties of this suit.*
3. *Whether the plaintiff had supplied the lubricants to the defendant as per Agreement dated 16th November 2007?*
4. *Whether the defendant had paid the amount for the quantity of lubricants supplied by the plaintiff to him, if so to what extent?*
5. *Whether the plaintiff is entitled to claim the damages amount of Rs.20,00,000/-?*
6. *What should the decree be?*

5. The trial Court after recording evidence and hearing the parties partly allowed the suit of Respondent No.3 to the extent that the

appellant is entitled to recover an amount of Rs.3,348,885/- with 5% markup from the date of filing of suit till realization of decree and dismissed the claim of damages being not proved. Against said judgment, the appellant filed Civil Appeal No.103/2014 before XII-Additional District Judge, South Karachi which was dismissed by judgment dated **06.11.2017**. The appellant filed instant IInd Appeal against both the judgments of trial Court as well as Appellate Court.

6. I have heard learned counsel for the appellant and perused the record.

7. Learned counsel for the appellant by order dated **07.3.2018** has been directed to satisfy the Court about maintainability of instant second appeal. The grounds of second appeal are almost verbatim reproduction of the grounds of memo of first appeal which were agitated before the first appellate Court. He has contended that after the first appeal the appellant had no option except to file second appeal, however, he was unable to appreciate the requirement of **Section 100** of the CPC which envisages only three possibilities for entertaining the second appeal against the order of the first appellate Court by the High Court. The learned counsel when confronted with the requirement of **Section 100** of the CPC, he was unable to point out that the decision was contrary to law or to some usage having force of law and also that there was any failure of the Court to determine the material issues of law or to some usage having the force of law. All the grounds taken before the appellate Court were thoroughly examined by the two Courts below and even the power of attorneys and other evidence have been thoroughly referred and discussed in the impugned judgments. There was clear-cut admission of non-payment of price of lubricants handed over to the

appellant by the Respondents under a written agreement of distributorship between the appellant and Respondents. The Court has only granted the principal amount and 5% markup from the date of filing of the suit. The damages claimed by the Respondents were declined by the trial Court.

8. In view of the above, instant second appeal was dismissed by short order dated **10.05.2019** and these are the reasons for the same.

JUDGE

Karachi, Dated: 27.07.2019

Ayaz Gul