

2. To be very precise, the facts of the case are that The Respondent (TCP)/Plaintiff had filed civil suit for recovery of **Rs.11,71,043.74** against the applicant / defendant (M/s. Commodity Links) stating therein that the Respondent under contract No.RECP/EXP/5(97)/92 dated **11.10.1992** had sold a quantity of 5000 tons of Irri-6 white 25-30% broken rice of 1991-92 crop at US\$ 190.27 per ton and in pursuance to **clause 4** of the said contract, the buyers were required to ship the entire quantity of 5000 tons of rice by **09.12.1992**. It was averred that the applicant/defendant instead of arranging loading the entire contracted quantity of 5000 tons rice, on **29.11.1992** requested initially for the release of 3000 tons of rice only and further vide telex dated **07.12.1992** also requested for release of further quantity of 400 metric tons rice. The applicant later on showed their inability to lift the same and requested to condone non-shipment of remaining quantity and since the applicant failed to lift the contracted quantity, consequently the Respondent/Plaintiff vide letter dated **13.1.1993** forfeited the security deposit of **US\$ 9512** and later on by letter dated **28.6.1993** called upon the applicant/defendant to pay **Rs.11,71,043.74** being the actual loss suffered by the Respondent due to non-lifting of 1600 ton of rice. When the applicant inspite of repeated requests and demands neither replied the letter nor paid the said amount, the Respondent on **31.10.2001** filed suit for recovery of **Rs.11,71,043.74**.

3. The Applicant/Defendant, after service of notice, filed written statement wherein they admitted the fact of entering into contract with the Respondent in respect of 5000 tons rice and also that they could not lift balance quantity of 1600 tons of rice. However, they further contended that the contract between the parties only provided

for forfeiture of the security deposit and since security deposited has already been forfeited, therefore, no cause of action arose to the Respondent/Plaintiff for filing the suit. It was further averred that as per **clause 7** of the Contract, only forfeiture of security deposit was provided, whereas there is no provision in the said contract for levying, charging and/or claiming recovery of damages.

4. The trial Court after framing issues, recording evidence and hearing the parties, decreed the suit of the Respondent by judgment dated **11.04.2013**. Against the said Judgment, the applicant preferred Civil Appeal No.117/2013 before the V-Additional District Judge, South, Karachi. The Respondent has also filed Civil Appeal No.148/2013 before the appellate Court praying therein to allow interest at the rate of 16% per annum on the decretal amount i.e **Rs.11,71,043.74** since **26.06.1993**. The learned appellate Court by common judgment dated **19.02.2015** has been pleased to dismiss both the appeals. Against the said appellate Judgment, both the applicant and Respondent have preferred the above Revision Applications.

5. I have heard learned counsel for the parties and perused the record as well as written arguments submitted only by the applicant/defendant.

6. The main contention of learned counsel for the applicant/J.D in Revision Application No.38/2015 was that both the Courts below have failed to appreciate that there was no documentary evidence at all from Respondent that how it suffered alleged loss and calculated its quantum which was not covered in forfeiture of security amounting to **9512 US Dollars**. It is further argued by learned counsel that Respondent/plaintiff has also already received full price

of rice in US Dollars including packing charges etc.. His other contention was that the applicant under instructions of principal had entered into contract with the Respondent for purchase of 5000 metric ton rice. The rice was the property of principal and not of the agent and therefore, claim of the TCP against the agent (Commodity Links) was hit by **Section 182 and 230** of Contract Act, 1872 that provides that agent cannot personally enforce nor be bound by contract made on behalf of principal. The principle laid down by Courts is that promise enforceable against principal cannot be enforced against agent, therefore, he contended that both the Courts below have failed to appreciate that the applicant has acted as agent for another or represented other person in dealing with third person. The principal had paid the consideration of contractual amount, therefore, the foreign buyer/principal was liable, if any, for recovery as a result of contract between them.

7. Learned counsel for the Respondent (TCP) in rebuttal has only referred to the letter available at page **181** annexure **A/14** to claim that the damages have been identified through the said letter which was also exhibit and since no reply to it was sent by the applicant (Commodity Links) therefore, it stands proved. I am not convinced with such arguments. The applicants have categorically denied any liability under the said letter in their written statement and burden of proof of such losses was on the respondent/plaintiff. He has, however, contended that his case is solely based on **clause-4** of the agreement dealing with the right of respondent (TCP) for the damages suffered on account of failure of the applicant to lift 1600 ton rice. However, as far as the details of damages is concerned he says nothing except annexure **A/14** has been produced by the respondent / plaintiff. After hearing at length the parties were directed to file

further written arguments, if any, within three days. However, only the applicant/defendant filed written arguments and the counsel for the Respondent (TCP) has not filed any arguments whatsoever.

8. The examination of the evidence shows that the Respondent/Plaintiff reliance on clause-4 of the agreement was uncalled for as it does not talk about any right of the respondent/plaintiff to claim damages or compensation as detailed in annexure **A/14** at page **181** rather the failure of the applicant/defendant to lift rice was fully covered by **clause-7** of the agreement. Clause-7 of the agreement from page 77 of R&P is reproduced below:-

7. **FORFEITURE OF SECURITY DEPOSIT:**

That the Rice Export Corporation of Pakistan (Pvt) Ltd., have made known to me/us that rice procured by them is from finance provided by scheduled banks on the basis of mark-up and that the Sellers incur storage charges on the rice stored in their godowns and that if I/We fail to observe stipulations as to time for opening of Letter(s) of credit or for making of payments, as to procuring of ship(s) and/or shipping space or as to taking delivery and/or making of exports, the Rice Export Corporation of Pakistan (Pvt) Ltd., may without prejudice to their rights and remedies under the Agreement resulting from this tender, or any law, forfeit the security deposit.

9. The applicant/defendant out of 5000 ton rice has failed to lift only 1600 ton rice. It is admitted position from the evidence that price of remaining rice including its packing had been paid by the applicant/defendant and therefore, nothing was due and payable and a charges for removing the same were not more than the amount of security forfeited by the respondent/plaintiff on **31.1.1993**.

10. It is clear from the reading of judgments of the Appellate Court and the trial Court that they have not examined the evidence in the correct prospective nor they have examined the agreement itself. The forfeiture clause was directly relating to the failure of lifting the shipment. It does not stipulate failure to lift shipment would cause any loss or damages to the respondent/plaintiff. Therefore, both the Courts have erred in law and facts both in awarding claim of recovery to the respondent/plaintiff over and above security through the impugned judgments and decrees.

11. In view of the above discussion, facts and evidence on record, which seem to have been misunderstood / overlooked or ignored by the two Courts below, the Civil Revision **No.38/2015** filed by Commodity Links International is allowed and consequently Civil Revision **No.30/2015** filed by TCP is dismissed.

JUDGE

Karachi
Dated:03.02.2020

SM /Ayaz Gul