

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1262 of 2000

Present :

Mr. Justice Nadeem Akhtar

Date of hearing : 12.12.2012.

Plaintiff : Suzuki Motorcycles Pakistan Limited,
through Mr. Aimal Kasi, Advocate.

Defendants : Malik Qaiser Zaman and Malik Pervaiz Adnan,
called absent.

J U D G M E N T

NADEEM AKHTAR, J.- The plaintiff has filed this Suit praying that a decree may be passed jointly and severally against the defendants in the sum of Rs.7,899,249.00 with a return thereon at the rate of 2% for the delay in paying the said amount to the plaintiff from the date of filing of the Suit till the recovery of the entire amount.

2. Briefly stated the facts of this case are that the plaintiff is the manufacturer of Suzuki motorcycles, their parts and accessories in Pakistan, which are sold by the plaintiff throughout Pakistan through the authorized dealers appointed in this behalf by the plaintiff. The products are supplied by the plaintiff to its authorized dealers on credit, who after selling the same, pay the sale proceeds thereof to the plaintiff after deducting their commission at the agreed rate. All the three defendants are the partners of a partnership firm ; namely, 'New Kamran Enterprises', carrying on business at Mian Chunnu, previously known as 'Kamran Enterprises'. Defendants No.1 and 2 are real brothers, and defendant No.3 is their real father. At the request of the defendants, the plaintiff appointed them as its authorized dealer through a Dealership Agreement dated 14.06.1995 (the Agreement). At that time, the defendants were carrying on the business of dealership in the name and style of 'Kamran Enterprises'.

3. The salient features of the Agreement were that confirmation letters were to be issued by the plaintiff on monthly basis showing the outstanding amounts payable by the defendants, and upon receipt of such confirmation letters from the plaintiff, the defendants were required to return the same to the plaintiff with their counter signatures thereon and comments, if any, confirming the outstanding amounts payable by them ; the defendants were required to pay to the plaintiff the outstanding amounts within the agreed period, but not later than 90 days from

the date of issuance of the invoice ; and in case of delay in payment by the defendants, the defendants were required to pay to the plaintiff interest at the rate of 2% per month on the outstanding amount. In addition to the execution of the Agreement, defendant No.3 executed an undertaking whereby he undertook to be liable for all or any financial dispute arising out of the Agreement.

4. According to the plaintiff, the plaintiff performed its agreed part of the contract by promptly supplying its products to the defendants from time to time with effect from June 1995. It is the case of the plaintiff that the defendants committed default on a number of occasions, and without first settling their outstanding liabilities, they pressurized the plaintiff to supply further stocks. The plaintiff has stated that whenever default was committed by the defendants, they were requested by the plaintiff to adhere to their obligations. It has been further stated by the plaintiff that pursuant to the terms and conditions of the Agreement, the plaintiff issued balance confirmation letters after every three months in order to avoid any ambiguity showing the amounts outstanding in the account of the defendants. The defendants never raised any objection in respect of the amounts shown as outstanding in the balance confirmation letters, but in fact they confirmed the same by signing and returning the balance confirmation letters to the plaintiff. It is also the case of the plaintiff that when the balance confirmation letter showing the amount of Rs.7,899,249.00 payable by the defendants as on 30.06.1999 was sent by the plaintiff to them, the plaintiff received letters dated 07.10.1999 and 19.10.1999 from the defendants, whereby they disputed the amount and denied their liability.

5. In their aforementioned letters, it was alleged by the defendants that certain payments made by them during the years 1995 and 1996 were not shown / credited by the plaintiff. It was further alleged by the defendants that certain amounts had been shown / claimed by the plaintiff without delivering the motorcycles to them in lieu of such amounts. It has been averred by the plaintiff that all the objections raised by the defendants pertained to the years 1995 and 1996 the accounts / outstanding amounts whereof had been duly intimated by the plaintiff to the defendants and they never objected to the same. The plaintiff has submitted that the defendants confirmed the outstanding balance of Rs.9,599,134.00 as on 30.09.1995 through the balance confirmation letter dated 15.10.1995, wherein all such outstanding amounts were mentioned which were subsequently disputed by the defendants through their above referred letters. Regarding the delivery of the motorcycles, the plaintiff has submitted that, as per the usual practice and instructions of the defendants, the motorcycles were delivered to the transporter appointed by the defendants, and the said transporter had confirmed having received all the motorcycles on behalf of the defendants. It is the case of the plaintiff that the amount of Rs.7,899,249.00 claimed in this Suit is the amount that has not been paid by the defendants for the motorcycles

supplied to them by the plaintiff. The plaintiff has alleged that, in order to adjust their outstanding liabilities partially, the defendants issued four (04) cheques in January and February 1996 totalling to Rs.1,500,000.00, and another cheque dated 07.04.2000 for Rs.400,000.00, but all the said cheques were dishonoured upon presentation.

6. All the three defendants filed their combined written statement, wherein they denied their liability and asserted that the Suit against them is not maintainable. The defendants have asserted that, 'M/S Kamran Enterprises' was appointed as the authorized dealer of the plaintiff through the Agreement, but the Suit has been filed against the partners of 'New Kamran Enterprises'. According to them, both the above named entities are separate and distinct entities having different NTN numbers. The defendants have asserted that this is sufficient ground for the dismissal of the Suit. The other objections that have been raised by the defendants *inter alia* are that the Agreement was executed only by defendant No.1 as the sole agent of the plaintiff who acted as a middle man on behalf of the plaintiff ; the cheques handed over to the plaintiff were not meant for presentation, but were handed over as a security / guarantee ; and the Suit is barred by time as the cheques were issued in the year 1996. Regarding the claim of the plaintiff in respect of the outstanding amount, the defendants have admitted the letters dated 07.10.1999 and 19.10.1999 issued by them to the plaintiff, and have reiterated the contents thereof. However, the defendants have asserted that they are not liable to pay to the plaintiff any amount claimed in this Suit, and that the Suit liable to be dismissed.

7. On the basis of the pleadings of the parties, following issues were settled by the Court on 24.12.2001 :

- “ 1. *Whether the defendants No.1 to 3 entered into a Dealership Agreement dated 14.06.1995 and agreed to (!) bound by the terms and conditions of the Dealership Agreement ?*
2. *Whether the defendants No.1 to 3 undertook to make payments for the goods supplied to them on credit by the plaintiff within 90 days from the issuance of invoice and also agreed to pay for the delay at the rate of 2% per month ?*
3. *Whether the defendants defaulted in making payments / repayments of their outstanding dues towards the plaintiff against the goods supplied to the defendants ?*
4. *Whether the defendants confirmed its outstanding dues Annexure 'I' to the plaint ?*
5. *Whether the plaintiff delivered the motorcycles to the defendants and the defendants confirmed receiving the motorcycles in running and perfect condition from the plaintiff ?*

6. *Whether the plaintiff is entitled to a sum of Rs.7,899,249/- with a return at a rate of 2% per month on account of delay in payment from the defendants ?*
7. *Whether the cheques were issued as Security only ?*
8. *Whether the cheques were presented before Bank beyond the period of Limitation / validity ?*
9. *Whether the Suit is barred under the law ?*
10. *Whether the all arrears upto 1999 paid by defendant & acknowledged by plaintiff vide letter dated 08.03.1999 as annexure 'F' ?*
11. *Whether the defendant was only the Commission agent as mutually agreed vide para 5 of the agreement ?*
12. *What should the decree be ? ”*

8. The plaintiff examined its authorized representative / General Manager Finance & Administration, who produced all the relevant documents ; namely, the authorization from the plaintiff in his favour, the undertaking executed by defendant No.3 (Exh.P/1), the Dealership Agreement dated 14.06.1995 (Exh.P/2), 'Memorandum on Payment (Credit Sales – 3 Months)' (Exh.P/3), letters dated 22.11.1995 and 23.11.1995 from 'New Kamran Enterprises' (Exh.P/4 and P/5), letters dated 07.10.1999 and 19.10.1999 from 'New Kamran Enterprises' (Exh.P/6 and P/7) disputing the plaintiff's claim, the statement of account (Exh.P/8), four dishonoured cheques totalling to Rs.1,500,000.00 issued by 'New Kamran Enterprises' (Exh.P/9), Debit Note No. 000493 dated March 1996 for Rs.1,500,000.00 (Exh.P/10), Bank Return Memo dated 25.03.1996 for all the said four dishonoured cheques with the remarks "*Refer to Drawer*" (Exh.P/11), Balance Confirmation Letter dated 15.10.1995 showing outstanding amount of Rs.9,599,134.00 sent by the plaintiff to the defendants (Exh.P/12), Delivery Certificate of motorcycles dated 01.09.2000 issued by Saleem Raza Goods Transport Co., the transporter of the defendants (Exh.P/13), Sale Invoices for the years 1995 and 1996 with their respective delivery challans (Exh.P/14 to P/39), plaintiff's letter dated 20.10.1999 to the defendants claiming from them the outstanding amount of Rs.7,899,249.00 (Exh.P/40), the dishonoured cheque of Rs.400,000.00 issued by 'New Kamran Enterprises' (Exh.P/41), and the Bank Return Memo dated 19.04.2000 for the dishonoured cheque of Rs.400,000.00 with the remarks "*Effects not cleared. Please present again*" (Exh.P/43).

9. The plaintiff's witness was cross examined by the defendants' counsel, whereafter the plaintiff closed its side. As the defendants did not file their affidavits-in-evidence nor did they produce any evidence, their side was closed vide Order dated 16.03.2009. During the pendency of the Suit, defendant No.3 passed away, and defendants 1 and 2 were brought on record in his place as his

surviving legal heirs. On 11.04.2011, it was ordered that the defendants be served through the District Judge concerned. Accordingly, a notice was issued by the office on 26.04.2011 addressed to the learned District Judge, Mian Channu, for service on the defendants. As per the bailiff's report dated 11.05.2011 sent to this Court by the learned District Judge, the notice was received by defendant No.2 personally as well as on behalf of defendant No.1. Despite proper service, the defendants were called absent when this matter came up for final arguments on 12.12.2012.

10. Mr. Aimal Kasi, the learned counsel for the plaintiff submitted that, as per the terms and conditions of the Agreement, the plaintiff started supplying motorcycles to the defendants from 1995, and Sale Invoices in respect thereof were issued in the name of 'New Kamran Enterprises' along with their respective delivery challans. All the said motorcycles were duly received on behalf of the defendants by their transporter, who acknowledged the delivery by issuing the Delivery Certificate. He further submitted that the defendants acknowledged their liability to the extent of Rs.9,599,134.00 in respect of the motorcycles received by them during the period 1995–1996 by confirming / signing the balance confirmation letter dated 15.10.1995 and returning the same to the plaintiff, wherein the said amount was shown as the outstanding amount. The learned counsel submitted that, after admitting and confirming their liability, disputing the same liability by the defendants after four years through letters dated 07.10.1999 and 19.10.1999 was a malafide attempt on their part in order to usurp the sale consideration of the motorcycles supplied by the plaintiff. He contended that the plaintiff used to send statements of account to the defendants on regular basis, wherein the amount claimed by the plaintiff in this Suit was continuously shown as the outstanding amount payable by the defendants. He submitted that the admitted issuance of cheques in favour of the plaintiff as part payments, is sufficient to belie the assertions made by the defendants. Finally, the learned counsel prayed that the Suit be decreed as prayed by the plaintiff.

11. After perusing the pleadings of the parties, examining the evidence on record and hearing the learned counsel for the plaintiff, my findings on the issues involved in this Suit are as under :

ISSUES No. 1 and 2 :

12. The first two issues are interlinked; therefore, they are being dealt with together. The defendants have alleged in their written statement that 'M/S Kamran Enterprises' was appointed as the authorized dealer of the plaintiff through the Agreement and the Suit has been filed against the partners of 'New Kamran Enterprises', and that both the said entities are separate and distinct

entities having different NTN numbers. In other words, it is the case of the defendants that there is no privity of contract between them and the plaintiff. The defendants have admitted that the letters dated 07.10.2009 (Exh. P/6) and 19.10.2009 (Exh. P/7) were issued by them to the plaintiff. I have noticed that both the said admitted letters were typed on the letter-head of 'New Kamran Enterprises', and were signed by defendant No.1 as the Director of 'New Kamran Enterprises'. In both the said admitted letters, the amount claimed by the plaintiff was disputed, but it was not denied that 'New Kamran Enterprises' was not the authorized dealer of the plaintiff or that the defendants were not the partners of 'New Kamran Enterprises'. Moreover, the defendants have also admitted having issued the cheques (Exh. P/9 and P/43) in favour of the plaintiff, which were dishonoured upon presentation. All the said cheques bear the rubber stamp of 'New Kamran Enterprises' at the place of the drawer's signature. These admitted documents produced by the plaintiff have established that 'New Kamran Enterprises' was the authorized dealer of the plaintiff, and that the Dealership Agreement dated 14.06.1995 was kept alive by the parties, especially by the defendants / the partners of 'New Kamran Enterprises', who acted upon the same by issuing letters, cheques, etc., as per the terms and conditions Agreement. Resultantly, the parties remained bound by the terms and conditions of the Agreement, including the stipulation that the defendants will make payments for the goods supplied to them on credit by the plaintiff within 90 days from the issuance of invoice and will pay for the delay at the rate of 2% per month. Issues No. 1 and 2 are answered in the above terms.

ISSUE No.3 :

13. I have already held while answering Issues No. 1 and 2 that the defendants were the authorized dealers of the plaintiff. It is an admitted position that the cheques (Exh. P/9 and P/43) were issued by the defendants in favour of the plaintiff in partial satisfaction of their outstanding liabilities, and that the said cheques were dishonoured upon presentation. The defendants have alleged that the said cheques were not meant for presentation, but were given only as security / guarantee, and that all the cheques given by them to the plaintiff used to be returned to them by the plaintiff after receiving the amounts of the cheques. If this plea is accepted, then it amounts to an admission on the part of the defendants that they were obliged to pay the amounts of the cheques to the plaintiff. The defendants have claimed that there were no outstanding dues against them and that the plaintiff's claim is false and unjustified. If the defendants had settled their liabilities as claimed by them, they would have certainly asked the plaintiff for the return of their cheques. But admittedly, no such demand was made by the defendants nor have they pleaded so. Moreover, outstanding amounts were shown continuously in the statements of account (Exh. P/8) produced by the plaintiff for the period from 12.06.1995 to 01.07.1999.

These statements of account were sent by the plaintiff to the defendants on regular basis, but no objection was raised by them. The balance confirmation letter dated 15.10.1995 produced by the plaintiff as Exhibit P/12 is an important document, as the defendants had confirmed the amount of Rs.9,599,134.00 outstanding against them as on 30.06.1995, by signing and returning the said letter to the plaintiff. The defendants, vide letters dated 07.10.1999 and 19.10.1999 (Exh.P/6 and P/7), disputed the plaintiff's claim of Rs.7,899,249.00, but admittedly did not respond to the plaintiff's letter dated 20.10.1999 (Exh.P/40) whereby the allegations made by the defendants were denied by the plaintiff, and the claim of the outstanding amount of Rs.7,899,249.00 was reiterated. In Exhibit P/40, the plaintiff had further clarified that all the objections raised by the defendants pertained to the years 1995 and 1996 for which the defendants had already confirmed their outstanding liability by confirming the contents of Exhibit P/12. In the absence of any denial of the contents of Exhibit P/40 by the defendants, the presumption would be that they had admitted the contents thereof. Moreover, no evidence was produced by the defendants in rebuttal to the evidence produced by the plaintiff. As such, the entire evidence produced by the plaintiff has remained unchallenged and unrebutted. This Issue is, therefore, decided in the affirmative.

ISSUE No.4 :

14. This Issue relates to balance confirmation letter dated 15.10.1995 produced by the plaintiff as Exhibit P/12, whereby the defendants had confirmed the amount of Rs.9,599,134.00 outstanding against them as on 30.06.1995 by signing and returning the said letter to the plaintiff. This letter (Exh. P/12) has been mentioned in paragraph 13 of the plaint and has been annexed as annexure 'I' thereto. In paragraph 13 of their written statement, the defendants have not specifically denied the contents of Exhibit P/12, but have vaguely denied the contents of paragraph 13 of the plaint by stating that all the arrears had been paid by them upto March 1999. This assertion by the defendants was meaningless, as Exhibit P/12 was the balance confirmation letter in respect of a specific outstanding amount as on 30.09.1995. Regarding this issue and Exhibit P/12, the defendants have not produced any evidence, and the evidence produced by the plaintiff has remained unchallenged and unrebutted. This Issue is also answered in the affirmative.

ISSUE No.5 :

15. This Issue relates to the dispute as to whether the plaintiff delivered the motorcycles to the defendants, and the defendants confirmed receiving the motorcycles from the plaintiff in running and perfect condition. In paragraph 14 of the plaint, the plaintiff has specifically pleaded that the motorcycles were delivered to the transporter appointed by the defendants for receiving delivery on

behalf of the defendants, and that the said transporter issued a certificate (Exh. P/13) confirming delivery of the motorcycles by the plaintiff. In the said paragraph, the plaintiff has also mentioned about the delivery challans (Exh. P/14 to P/39) issued at the time of delivery of the motorcycles. In paragraph 14 of their written statement, the defendants have denied the contents of para 14 of the plaint in a vague and evasive manner. It has not been denied by them specifically that the transporter was not authorized by them, or that he did not receive the motorcycles from the plaintiff in running and perfect condition. The defendants have also not disputed Exhibit P/13 and/or Exhibits P/14 to 39 produced by the plaintiff, nor have they produced any evidence in rebuttal thereto. It may be noted that in case the motorcycles had not been delivered by the plaintiff, the defendants would certainly have asked the plaintiff to deliver the same. Admittedly, there is nothing on record to this effect, nor the defendants have pleaded so. It is, therefore, held that the motorcycles were delivered by the plaintiff to the defendants and the defendants confirmed their delivery in running and perfect condition from the plaintiff.

ISSUE No.6 :

16. I have already held while dealing with Issues No. 1, 2, 3 and 5, that the defendants were the authorized dealers of the plaintiff ; the parties were bound by the terms and conditions of the Agreement ; the defendants with the present name of their firm acted upon the terms and conditions of the Agreement ; the defendants defaulted in making payments of their outstanding liabilities towards the plaintiff ; and that the motorcycles were delivered by the plaintiff and the defendants confirmed their delivery in running and perfect condition from the plaintiff. Vide Exhibit P/40, the plaintiff had specifically denied all the allegations made by the defendants, reiterated its claim of the outstanding amount of Rs.7,899,249.00 against the defendants, and had clarified that all the objections raised by the defendants pertained to the years 1995 and 1996 for which the defendants had already confirmed their outstanding liability by confirming the contents of Exhibit P/12. Admittedly, the defendants did not respond to Exhibit P/40. In the absence of any denial of the contents of Exhibit P/40 by the defendants, the presumption would be that they had admitted the contents thereof. Moreover, no evidence was produced by the defendants in rebuttal to the evidence produced by the plaintiff. As such, the entire evidence produced by the plaintiff has remained unchallenged and unrebutted. This Issue is, therefore, decided in the affirmative.

ISSUE No.7 :

17. This Issue is, whether the cheques were issued as security only ? The defendants have alleged that the said cheques were not meant for presentation, but were given only as security / guarantee, and that all the cheques given by them to the plaintiff used to be returned to them by the plaintiff after receiving the amounts of the cheques. If the defendants had settled their liabilities as claimed by them, they would not have allowed the plaintiff either to retain the cheques or to present them. But admittedly, no demand was made by the defendants for the return of the said cheques. In any case, the defendants have not produced any evidence in support of their assertions or in rebuttal to the evidence produced by the plaintiff. As such, the claim of the plaintiff in this regard stands proved, and it is held that the cheques were not issued by the defendants as security only, but were issued for consideration.

ISSUE No.8 :

18. This Issue relates to the presentation of the cheques beyond their validity and the period of limitation. The three cheques (Exh. P/9) issued by the defendants in January and February 1996 were presented by the plaintiff in March 1996, which is evident from the Bank Return Memo dated 25.03.1996 (Exh. P/11). Similarly, the cheque dated 07.04.2000 (Exh. P/41) issued by the defendants was presented by the plaintiff in April 2000, which is evident from the Bank Return Memo dated 19.04.2000 (Exh. P/42). I have no doubt in holding that all the cheques were presented within their validity and within the period of limitation.

ISSUE No.9 :

19. This Issue is, whether the Suit is barred under the law ? In their written statement, the defendants have not pleaded or disclosed as to under which law the Suit is barred according to them. As far as the question of limitation is concerned, I have already held that the cheques were presented within time. The cause of action kept on accruing to the plaintiff as the amounts outstanding against the defendants were being continuously shown in the statement of account (Exh. P/8) till 01.07.1999, wherein debits and credits in the month of June 1999 were also shown. Thus, from the statements made in the plaint and the cause of action accrued to the plaintiff, the Suit does not appear to be barred by any law.

ISSUE No. 10 :

20. This Issue is answered in the negative in view of the findings on Issues No. 1, 2, 3 and 5, and also as Issue No. 6 has been decided in the affirmative.

ISSUE No. 11 :

21. This Issue is answered in the negative in view of the findings on Issues No. 1 and 6.

ISSUE No. 12 :

22. This Issue is that what should the decree be ? Since it has not been denied by the defendants that they were the partners of 'New Kamran Enterprises', the said partnership firm and all its partners, as the agents of the firm, are jointly and severally liable. The entire evidence produced by the plaintiff has remained unchallenged and unrebutted. The defendants have not led or produced any evidence. The pleadings of the defendants cannot be treated as a substitute of their evidence. In view of the above and also in view of the findings on the Issues, this Suit is decreed with costs against the defendants, jointly and severally, as prayed by the plaintiff.

J U D G E