

# IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 571 of 1997

**PRESENT:**

**Mr. Justice Arshad Hussain Khan.**

**JUDGMENT**

Plaintiff: Trading Corporation of Pakistan  
through Mr. Mohammad Safdar, Advocate

Defendant: M/s. Punjab Trading Agency  
through Mr. Khalid Daudpota, Advocate

Date of Hg: 07.09.2016

Date of judgment: 28.09.2016

**ARSHAD HUSSAIN KHAN, J.** This suit was initially filed by Rice Export Corporation of Pakistan [RECP] on 15.01.1997 against the defendant for Accounts and Recovery of Rs.23,45,77,337/-[Rupees twenty-three crore, forty-five lacs, seventy-seven thousand, three hundred and thirty-seven only] with the following prayer:-

- (1) *Decree for a sum of Rs.234,577,337/= against the defendants with interest and for mark up at 14% per annum from the date of suit till recovery plus cost of the Bardana found short at the time of final account.*
- (2) *In the alternative the plaintiff prays for a judgment and decree against the defendant to render true and faithful account of the stocks of rice and bardana entrusted to defendant as mentioned in the plaint and to pass final decree for amount ascertained on rendition of account.*
- (3) *Cost of the suit.*
- (4) *Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case.*

2. Subsequently, upon applications of the parties, this court vide its order dated 01.10.2001, allowed substitution of Trading Corporation of Pakistan as plaintiff in place of RECP as the RECP was merged with Trading Corporation of Pakistan and accordingly amended title was filed on 01.1.2002. Thereafter, this court by its order dated 25.08.2003 allowed yet

another amendment in the plaint and consequently para 14-A was inserted in the plaint and accordingly the amended plaint was filed on 03.09.2003 with following prayers:-

- 1) *Decree for a sum of Rs.252,513,749/- against the Defendant with interest / Mark-up @ 14% p.a. from the date of suit till recovery plus cost of the bardana found short at the time of final account.*
- 2) *In the alternative the Plaintiff prays for a judgment and decree against the Defendant to render true and faithful account of the stocks of rice and bardana entrusted to Defendant as mentioned in the Plaint and to pass final decree for the amount ascertain in rendition of account.*
- 3) *Cost of the suit.*
- 4) *Any other relief which this Hon`ble Court may deem fit and proper in the circumstances.*

3. The case of the plaintiff as averred in the plaint is that the plaintiff for handling of crop 1988-89 at its godown at Bin Qasim [QRG] awarded the contract No.RECP-5/M&M/88-89/5 dated 14.1.1990 to the defendant. Pursuant to the contract the defendant firm was appointed as the Handling Agents for handling the rice of 1988-89 crop at QRG of the Plaintiff as well as for handling any other rice stocks which the plaintiff may entrust to the defendant during the currency of the contract. As per terms of the contract the defendant had to exercise all care in respect of stock including its buy product etc., entrusted to them and were liable for and make good any loss or damage therein howsoever caused or arising. The contract was awarded and accepted on the basis of Book Balance and defendant signed the documents accepting that he had received the stocks mentioned in it. It is also averred that pursuant to the said contract the defendant was entrusted with large quantities of rice of various qualities, gunny bags and dunnages in connection with the performance of the contract. The period of contract was upto 07.01.1991 from the date of acceptance but since the considerable amount of rice crops 1988-89 could not be exported, the plaintiff management extended validity period of contract from time to time upto 30.09.1995. It is also averred that the services rendered and work performed by the defendant throughout the handling of rice crops 1988-89 was found unsatisfactory. Despite plaintiff's request/demand the defendant failed to carry out the physical verification and submit R.S. Account and

also failed to point out the position of the stocks in his possession. It is also averred that the defendant failed to submit Account of 21,957 M.Ton Basmati Rice and 24,324 M.Ton of other varieties of rice. As per terms of the contract the defendant was liable to render account for the stocks entrusted to them and they are also liable to pay to the plaintiff a sum of Rs.239,234,184/= being the value of shortage and cost of rice which was entrusted to the defendant and remained unaccounted for. It is also averred in plaint that after adjustment of security and retention money of 86-87 and 87-88 crop and cost of shortage in 1983-84 crop and security money/retention money of 1988-89 crop, the defendant is liable to pay Rs.234,577,337/=. The defendant failed to render the account of 286,287 B Twill /P Twill bags, 704,566 Hessian Bags and 41,003 Heavy Cess Bags (Total 1,031,846 bags). The defendant as handling agent under the terms and conditions of contract is liable to render account for the bags entrusted to them and hence is liable to pay Rs.17,936,412/= being the value of bags found short.

4. Upon service of the notice of this case the defendant firm initially filed their written statement on 17.03.1998 however, upon amendment in the plaint, allowed by this court, the defendant also filed their amended written statement on 24.12.2003. In the written statement while denying the allegations leveled therein the defendant stated that in fact tender was only to take over the stock of 1988-89 crops in respect of which an earlier contractor namely M/s. Behri Enterprises had already defaulted. In this regard Clause-2 of the Tender Notice was referred which says that the successful bidder will be required to takeover the stocks of 1988-89 crop already received in RECP Godown of QRG/Landhi, prior to the award of this contract and previous crop on the basis of BOOK BALANCE certified by Reserve Stock Account of the Corporation. The subject tender was not fresh tender but in respect of stock left by the previous contractor at QRG on Book Balance for the remaining period. As per the terms of the contract the Defendant had deposited with the with Plaintiff an amount of Rs.17,00,000/= as security money besides this, 2% of the amount of each running bill as retention money which according to the defendant during the currency of the contract comes to Rs.33,56,944/= has been retained by the plaintiff which amount shall be required to be refunded to the defendant on completion of the contract. It is also averred that the liability of the

defendant under the said contract by virtue of the Book Balance clause was very limited. It is also averred that the defendant firm were satisfactorily performing their contractual obligation, resultantly the plaintiff time and again renewed / extended the contract from 1991 to 1995. It is also the case of the Defendant that since beginning of the contract the Defendant had been requesting the plaintiff to conduct survey so as to avoid the complication at the time of final accounts but the plaintiff has failed to do so. It is also averred that because of the plaintiff's unfair conduct the previous contractor abandoned and the plaintiff by misrepresentation persuaded the defendant to take contract on 'Book Balance' basis. Further averred that the contract was awarded to the defendant on the 'Book Balance' basis at the risk and cost of defaulting contractor, therefore, the defendant firm is not responsible for any loss. The security and retention money pertaining to the contracts of 1983-84 crop, 1986-87 crop and 1987-88 bear no nexus to the subject matter of the present suit. It is also averred that the plaintiff does not have right to adjust/claim security and retention money of 1983-84 crop, 1986-87 crop and 1987-88 crop total amount whereof comes to Rs.1,21,65,050/= which amount the plaintiff is liable to refund to the defendant. The Defendant in this regard also made complaint to the 'Wafaqi Mohtasib'. It is also averred that the claim of the plaintiff is baseless and after thought based on malafide intentions to avoid payments of retained amount towards security deposit and retention money lying with the Plaintiff in respect of the earlier contracts, to the Defendants.

5. It is imperative to mention here that this court on 14.09.1998, while deciding the CMA 6437/1998 (application under Order 39 Rule 10 Read with Section 151 of CPC filed by the Defendant) ordered, operative part whereof, for the sake reference is reproduced as under:

*“Under the circumstances, I feel it would be in the interest of justice if the plaintiff keep the retention money amounting to Rs.1,21,65,050/- separately from the amount claimed from the defendants and are not to adjust it against the claimed amount. This amount is to be kept in separate account till such time that this suit is disposed of. This CMA is disposed of.”*

The Plaintiff did not file any appeal against the said order however, the Defendant preferred High Court Appeal bearing HCA No. 299 of 1998 which HCA was disposed of on 2.09.1999. The said order is reproduced as under:

*“ Mr. Arif Hussain Khilji, Advocate submits letter issued by the Allied Bank of Pakistan Ltd., dated 26.08.1999 which shows that Rice Export Corporation of Pakistan Ltd has deposited a sum of Rs.12,472,959/- in separate A/C No.9-9.*

*The amount shall remain in the Bank and may not be withdrawn by Respondents with decision of the suit.*

*The appeal stands disposed of. Copy of order may be sent to the bank.”*

6- Out of the pleadings of the parties the following issues were framed / settled by this Court on 12.10.1998 which are as follows:-

*“1. Whether contract for 1988-89 was given on “BOOK BALANCE” basis at the risk and cost of the defaulting contract. If so, its effect?*

*1.A. Whether defendant rendered the account; if not, its effect?*

*2. Whether the performance of the contract or the part of defendant was unsatisfactory?*

*3. Whether plaintiff can adjust security deposit and retention money for the contracts of the years of 1983-84, 1986-87 and 1987-88 lying as trust with plaintiff?*

*4. Whether plaintiff have not issued N.O.C., Clearance certificates as to completion of earlier contracts?*

*5. Whether the suit is maintainable?*

*6. Whether plaintiff is entitled to suit money?*

*7. What should the order be?”*

7. Subsequently, on 09.02.2004 an additional Issue was also framed by this Court which is as follows:-

*“Whether the Defendant is liable to account / pay the claim of the Plaintiff relating to the bags as mentioned in Para 14(A) of the amended plaint?”*

8. On 16.12.2004, the Commissioner was appointed to record evidence in the matter. The said commission was completed and the learned commissioner through his report dated 21.04.2005 placed on record the evidence of the parties recorded by him in the matter.

9. The plaintiff in support of its case has examined one witness, his Deputy Manager (Go downs) CSD namely, **Muhammad Atiq Khan** as **P.W.1**. Whereas the defendant in support of its stance in case has also examined one witness, its Managing Partner namely; Rashid Akbar as **D.W-1**.

10. The plaintiff filed affidavit-in-evidence of Muhammad Atiq Khan [Exh. P] and produced the following documents:

SR.#	DESCRIPTION OF DOCUMENTS	DATE	EXHIBITS
01	Attested copy of Contract No.REC P-5/M&M/88-89 between the Plaintiff and Defendant alongwith Tender Notice and its Annexures (i) to (iv) (25 Pages)	14.01.1990	P/3
02	Attested copy of Plaintiff's Letter No.RECP-5/M&M/88-89-91/Ext. to Defendant	19.10.1995	P/4
03	Attested copy of Plaintiff's Memo No.RECP/QRG/PHY VERI./88-92	13.11.1995	P/5
04	Attested copy of Plaintiff's letter No.RECP/ORG/PHY VERI./88-92 to Defendant	15.06.1996	P/6
05	Attested copy of Plaintiff's letter No.RECP/QRG/PHY VERI./88-92 to Defendant	18.06.1996	P/7
06	Attested copy of Plaintiff's letter No.RECP/QRG/(8)90-91 to defendant and others	03.12.1991	P/8
07	Attested copy of plaintiff's letter No.RECP/QRG/A-1(10)92	03.10.1992	P/9
08	Attested copy of plaintiff's letter No.RECP/QRG/A-1(10)92 to defendant and others	20.10.1992	P/10
09	Attested copy of plaintiff's letter No.RECP/QRG/4(8)92 to defendant	07.11.1992	P/11
10	Attested copy of plaintiff's letter No.RECP/QRG/4(8)92 to defendant	16.11.1992	P/12
11	Attested copy of plaintiff's letter No.RECP/QRG/4(8)92 to defendant	21.11.1992	P/13
12	Attested copy of plaintiff's letter No.RECP-5/M&M/88-92/Shortage to defendant	31.10.1996	P/14
13	Attested copy of Office Order of the plaintiff for appointment of Enquiry Officer.	14.01.1999	P/15
14	Attested copy of plaintiff's Enquiry Report on shortage of Gunny Bags	24.05.1999	P/16
15	Attested copy of Resolution of Board of Directors of the plaintiff	26.02.2003	P/2

The said witness (P.W.1) was subsequently cross-examined by the counsel of the defendant, whereafter the side of the plaintiff was closed.

11. The defendant filed affidavit-in-evidence of its witness namely, Rashid Akbar [Exh. D] and produced following documents:

SR.#	Description	Exhibits
01	Letter dated 22.8.1989 from plaintiffs offering for handling left over stock by Bahri Enterprises for the	D/1

	year 1988/89 on adhoc basis	
02	Letter dated 12.11.1989 from plaintiffs to defendants informing that defendant's offer dated 22.10.1989 in respect of tender notice dated 9.10.1989 has been scrapped.	D/2
03	Letter dated 10.1.1990 from the plaintiffs to defendants informing acceptance of defendants' offer in respect of tender opened on 30.11.1989.	D/3
04	Defendant's letter dated 15.5.1991 to plaintiffs informing loss of rice.	D/4
05	Letter dated 30.4.1992 by defendants to plaintiffs apprising in loss in weight and requesting survey.	D/5
06	Letter dated 10.8.1992 by defendants to plaintiffs showing apprehension of heavy loss in weight requesting immediate survey.	D/6
07	Letter dated 17.9.1992 by defendant to plaintiffs informing loss of weight due to lengthy storage, moisture and infestation requesting immediate survey.	D/7.
08	Letter dated 6.10.1992 by defendant to plaintiffs requesting immediate survey to assess loss.	D/8
09	Letter dated 16.11.1992 by plaintiffs to defendants advising to furnish stock position of 1988/89 crop.	D/9
10	Letter dated 18.11.1992 by defendant to plaintiffs in reply to letter dated 16.11.1992 again requesting survey	D/10
11	Letter dated 22.11.1992 by defendant to plaintiffs repeating request to conduct survey.	D/11
12	Letter dated 03.4.1993 to plaintiffs by defendants showing willingness to bear the expenses of S.G.S. in respect of survey and other allied functions.	D/12
13	Letter dated 19.6.1994 by defendants to plaintiffs laying down procedure for delivery of rice facilitating survey and assessing loss in weight.	D/13
14	Letter dated 08.9.1994 by plaintiffs to defendant agreeing to adopt the procedure for delivery as detailed in defendants' letter dated 19.6.1994.	D/14
15	Letter dated 15.11.1995 by defendants to plaintiffs regarding physical verification of 1988/89 crop adopting procedure laid down in plaintiffs' letter dated 08.9.1994.	D/15
16	Letter dated 07.01.1996 by defendants to plaintiff to physically verify 1988/89 crop rice requesting to adopt procedure already agreed on 8.9.1994.	D/16
17	Letter dated 22.01.1997 by defendant for handling of rice 1988/89 crop at QRG	D/17
18	Letter dated 12.11.1996 by defendant in reply to letter dated 31.10.1996	D/18
19	Letter dated 04.3.1997 by plaintiff to defendants in reply to defendant's letter of 22.01.1997	D/19
20	Letter dated 13.05.1995 by defendants to plaintiff in respect of transfer of Bags from new to serviceable De-charketed account 1988-89 crop	D/20
21	Letter dated 14.11.1996 by defendants to plaintiffs in reply to their letter dated 03.11.1996	D/21
22	Statement of lots of bags for local disposal from Sr. No.1 – Lot No.882 PTA (with location) to Sr. No.183 – Lot No.1137 PTA by the defendants.	D/22
23	Letter dated 02.8.1992 by plaintiff to defendants.	D/23
24	Letter dated 10.3.1991 by plaintiff in reply to defendants letter dated 10.1.1990	D/24
25	Photocopy of Letter dated 30.01.19— by defendants to plaintiff	D/25

26	Photocopy of Rice handling contract	D/26
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The said witness of the Defendant was subsequently cross-examined by the counsel of the Plaintiff.

12. I have heard Mr. Muhammad Safdar, learned Advocate for the Plaintiff and Mr. Khalid Daudpota, learned Advocate for Defendant, perused the submissions in writing filed by them and with their assistance also examined the evidence.

13. The learned counsel for the plaintiff has argued that the contract was entered into between Plaintiff Corporation and Defendant being proprietary concern signed by one Chaudhary Muhammad Yousuf as sole proprietor, whereas the written statement was filed by a partnership firm, furthermore, the written statement filed on behalf of the Defendant by an unauthorized person as no authority letter and/or power of attorney of the other partners, which could authorizes the person who signed the written statement, was filed in the case, hence in the circumstances, the written statement is liable to be discarded and the defence of the Defendant can not be looked into. It is also urged that Plaintiff was legally entitled to appropriate the Security Deposit and Retention Money deposited in respect of the subject contract as well as relating to the past contract. Security Deposit and Retention Money of Rs.1,21,65,050/- pertaining to the previous contracts of 1983-84, 1986-87, and 1987-88 was not adjusted though the Plaintiff was entitled to do the same as per Clause 15 (iv) of the Contract, yet retained because of lien thereon and due to its claim in the present suit which is more than double of the said amount. The said amount is lying in separate bank account of the Plaintiff in compliance of the order passed in the case. It is also argued that the defendant is not legally entitled for refund of the said amount (Rs.1,21,65,050/-) as the same is admittedly not the subject matter of the present suit and defendant did not file any counter claim and or set off claim in respect of the said amount in the present suit. Further urged that the Plaintiff through evidence has proved its claim in the case, hence, the Plaintiff is entitled to the decree as prayed. In support of the stance in the case, the learned counsel also relied upon following case law:

**2008 MLD 755 (Trading Corporation of Pakistan V. Messrs. Al-Noor (pvt.) Ltd.)**

In this case this court in a contract of similar nature on the basis of admission of the defendant in respect of shortage of rice claimed by plaintiff and further the quantity of short bags and value thereof mentioned in plaint and affidavit-in-evidence of plaintiff not challenged during his cross-examination by defendant, decreed the suit in favour of the plaintiff.

**PLD 2004 Karachi 281** (*Trading Corporation Of Pakistan Shahrah-e-Faisal Karachi v. Messrs. Continental Cargo Services, Shahrah-e-Liatquat Karachi*)

In this case the suit filed by plaintiff was dismissed where after defendant filed application to the effect that since suit filed by plaintiff had been dismissed, Certificates deposited by it as security, be ordered to be returned to it alongwith the profit earned thereon. It was held that dismissal of suit would not automatically make defendant entitled for recovery of said amount in absence of any counter claim or set off on the part of defendant and any such decision in respect thereof in the suit. Application filed by defendant, having no force was dismissed.

14. In rebuttal, the learned Advocate for the Defendant besides reiterating contents of the written statement and affidavit-in-evidence filed on behalf of the Defendant has argued that the plaintiff has failed to prove its case in the evidence. Further urged that the plea taken by the learned counsel for plaintiff regarding filling of written statement by unauthorized person is alien to the pleadings of the Plaintiff as this plea is raised by the counsel of the plaintiff first time that too at the stage of final arguments, hence, not sustainable in law. Furthermore, the written statement was signed by a duly authorized person and authority letter whereof was also filed with the written statement which is available in the court's file. Further urged that the Plaintiff has filed the present suit with malafide intentions to avoid payments (refund of security deposit and retention money) in respect of previous contracts of the defendants on the basis of an afterthought enquiry wherein neither the defendant participated nor any intimation notice was issued to the defendant. Moreso, said enquiry was conducted after more than four (4) years of expiry of the contract and handing over the godown by the defendant. It is also urged that the case of the Plaintiff has been completely shattered in the evidence, hence in the circumstances, the suit is liable to be dismissed with compensatory cost. The learned counsel in support of his arguments also relied upon the following case law.

**2002 CLC 607** (*Messrs. Rice Export Corporation v. Messrs. A.H. Corporation and 3 others*)

In this case this court while dismissing the suit of the plaintiff for damages has held that in grain handling contract there was inherent risk of diminishing quantity and quality of the food grain. Defendant could not be called upon to submit account for the shortfall which was not only on account of inherent risk but a natural incident and consequences of grain handling contract. The defendant as bailee could be held liable for the losses if accrued for want of contractor/bailee's due care and negligence.

**Judgment dated 04-05-1999 passed by this Court in Suit No.796/1987.**

In this case this court dismissed the suit of the plaintiff filed against the defendant for accounts and recovery of amount in respect of shortfall of stock of rice and gunny bags entrusted to the defendant under the contract of handling rice crop, on the ground that the plaintiff failed to justify its claim in the evidence.

**Judgment dated 4.6.1999 passed by this Court in Suit No.752/1986** (*Rice Export Corporation of Pakistan v. Star Trading Company*).

In this case also the suit of the plaintiff filed against the defendant for accounts and recovery of amount in respect of shortfall of stock of rice and gunny bags entrusted to the defendant under the contract of handling rice crop, was dismissed on the ground that the plaintiff failed to justify its claim in the evidence.

15. I have given due consideration to the arguments advanced by the learned counsel for the parties, minutely perused the material/evidence available on record, the applicable laws and the case law on the subject. My findings on the issues are as under:

16. **Issue No.5:** I propose to decide this issue first as the same relates to the maintainability of the suit. It is now well settled that the point of maintainability of the proceedings is to be decided in the first instance. Though the question of maintainability of the suit was not raised by the Defendant either in its written statement or in the affidavit-in-evidence filed in the case but this issue was framed. Furthermore, the learned counsel for the parties also not addressed this issue in their oral arguments, however, the Plaintiff and the Defendant in their submissions in writing addressed this issue. It is submitted by the Defendant that from the perusal of the evidence it has been cleared that the Plaintiff has failed to establish its case with regard to any violation of the terms and condition of the contract committed by the defendant. It is next submitted that the Plaintiff has also

failed to establish any claim against the Defendant except mere words that the amount is payable by the defendant for violation of the contract, which was left by out going contractor M/s. Behri Enterprises, awarded subsequently to the defendant on the 'Book Balance' basis, hence any shortage in the stocks entrusted to it, is the sole responsibility and concern in between Plaintiff and out going contractor. It is also submitted that the documents filed by the defendant, showing the request of the defendant for its due payments, have not been disputed by the Plaintiffs, hence, the present suit for contract in question is not maintainable against the defendant. Whereas the Plaintiff in its submissions in writing has stated that since there is nothing on record on the side of the defendant to substantiate that the suit is not maintainable, hence, in absence thereof this Issue to be answered in affirmative.

17. The question of 'Maintainability of lis' and 'Entitlement to relief' are two distinct things. **'Maintainability of lis'** is a legal question, inter alia, related to a legal character of the person under the provisions of Section 42 of Specific Relief Act, which requires any person entitled to any legal character or to any right as to any property, may institute suit against any person denying or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled. It would thus be safely stated that the law authorizes a person to seek enforcement of his right to any property by instituting a suit against a person denying his right or title. Relevant judicial precedents are *Parveen Begum and another v. Shah Jehanand another* (PLD 1996 Karachi 210) and *Abdul Razzak Khamosh v. Abbas Ali and others*(PLD 2004 Karachi 269). Whereas **'Entitlement to Relief'** is the question of facts to be proved through the evidence.

18. The 'legal character' is the most important aspect of a lis [case] and in absence thereof one cannot maintain his/her lis though filed for a relief, recognized under 'Specific Relief Act or under any other law' except matters, qualifying requirement of Section 91 of the C.P.C. Furthermore, such aspect of the case can also be decided in a summary manner at initial stages. However, the party seeking entitlement to relief has to prove his entitlement through evidence and such aspect cannot be decided in summary manner but after a proper trial.

19. In the present case the defendant did not agitate any legal question regarding maintainability of case whereby the present suit could be liable to be dismissed on the ground of maintainability. Furthermore, it is an admitted position that the plaintiff has awarded the contract to the defendant for handling 1988-89 crop at its Bin Qasim Godown, however, after completion of contract when the physical enquiry was conducted, shortage of stocks were surfaced for which the Plaintiff filed the present case for accounts and recovery of amount, hence the Plaintiff, having legal character, within its right to file the present case, however, the entitlement to the relief claimed in the suit will be decided on the basis of the evidence led by the parties. In the circumstances, the upshot of the above discussion is that the suit is maintainable. Accordingly, this issue is answered in affirmative.

20. **Issue No.1:** It is contended by the learned counsel representing the plaintiff that the plaintiff awarded the Contract [Ex P/3 at Pg. 1 of the Evidence file] to the Defendant on the Book Balance Certified by Reserve Stock Accounts but not at the risk and cost of the previous defaulting contractor as alleged by the defendant. Further contended that no evidence contrary to this has been produced. It is also contended that defendant upon signing the contract had impliedly accepted having received stock mentioned in it and entrusted to him and further the defendant as prudent Handling Agent was required by way of abundant caution to have the physical verification of the entrusted stock of rice in question before starting handling of the same. Moreso, the defendant even did not carry out the physical verification of the stock despite Plaintiff's letter [Ex-P/5 to P/7 at Pg. 53 to 57 of evidence file].

21. The learned counsel for the Defendant in respect of this issue contended that from the evidence it has been proved that the contract [Ex-P/3] was awarded to the Defendant on the basis of 'Book Balance' left by previous contractor M/s. Behri Enterprises at the risk, cost and consequences on defaulting contractor, which in the present case is M/s. Behri Enterprises, as per clause 16 (a) of the contract. Further contended that since the stock was not physically verified at the time of handing over the stock in the year 1990, hence after completion of the contract in 1995, the defendant, who helped the plaintiff in the difficult times, cannot be held responsible for any loss in respect of the contract left by previous

contractor. Furthermore, the liability of the losses of stocks of rice, gunny bags, if any, shall be undisputedly lies upon Behri Enterprises.

22. The record of the case reveals that RECP [Plaintiff] through its letter 22.08.1989 [Ex. D/1] initially appointed the defendant to handle rice of crop 1988-89 at the Qasim Rice Godowns in respect of contract awarded to M/s. Behri Enterprises. The arrangement was temporary and on the basis of 'Book Balance'. The said letter also reveals that at the time when the Defendant was appointed to handle the rice there was strike of labour and the defendant was directed to ensure the work handling is resumed immediately.

23. The Plaintiff invited second tender in respect of the 1988-89 crop left over by M/s. Bahri Enterprises, however, subsequently the plaintiff through its letter dated 12.11.1989 [Ex.D/2] scraped/cancelled the said tender. Thereafter, the Plaintiff invited third tender in respect of the said crop 1988-89 [Tender of the subject contract]. The clause 2 of the Tender notice [Ex.D/2] forming part of the contract [Ex.P/3] stipulates as under:

*"The Successful bidders will be required to take over the stocks of 1988-89 crop already received in RECP Godowns of QRG/Landhi prior to award of this contract and previous crops on the basis of "BOOK BALANCE" certified by Reserve Stock Accounts of this Corporation."*

24. The said tender was subsequently awarded to the Defendant vide RECP's [Plaintiff] letter dated 10.01.1990 [Ex.D/3]. In the said letter the Defendant was, inter alia, requested to take over the stocks and stores with immediate effect on the basis of Book Balance certified by RSA of the Plaintiff and ensure that work of handling and shipment of rice does not suffer in any case. Subsequently, pursuant to the terms a written contract bearing No. RECP-5/M&M/88-89/5 was entered into between the RECP (Plaintiff) and Defendant on 14.01.1990 [Ex.P/3]. Relevant clauses whereof for the sake ready reference are reproduced as under:

*"1. APPOINTMENT OF HANDLING AGENTS:*

*Subject to the terms and conditions hereinafter appearing and those provided in the Tender Form No. RECP-5/M&M/88-89/ at Annexure-III to the Contract, the Corporation hereby appoints the Contractors as Handling Agents handling the rice of 1988-89 crop at the Qasim Rice Godowns of the Corporation as well as for handling any other rice stocks which the corporation may entrust to the contractors during the currency of this contract and the Contractors hereby accept such appointment.*

6. Interpretation:

*The provisions of this contract shall supplement the terms and condition provided in the Tender Notice, List of Requirements/Declaration (Annexure-I and II), Tender Form Annexure-III and Schedule of Rates Annexure-IV and V of this Contract, and shall bind the contractors notwithstanding any thing to the contrary contained therein. The Contractors agree and agree and irrevocably and that the interpretation given by the Corporation to any provision, clause or sub-clause would always be accepted as the true meaning and intention of the particular provision, clause or sub-clause in the contract.*

Tender Form Annexure-III

15. SECURITY DEPOSIT / RETENTION MONEY

(i) The amount of SECURITY MONEY to be furnished with the Tender as indicated in Clause -2(f) for each area is mentioned below:-

QASIM RICE GODOWNS : Rs.17,00,000/-  
(Rupees Seventeen Lacs only)

LANDHI GODOWNS : Rs.5,00,000/-  
(Rupees Five Lacs only)

(ii) A sum equivalent to 2 percent of the amount of each running bills passed during the currency of the Contract for services rendered and work performed in pursuance of the terms of the contract shall be retained by the Corporation as 'RETENTION MONEY' which shall be refunded to the Contractors of the Issuance of Clearance Certificate by the Corporation on completion of the contract.

(iii) The amount of SECURITY DEPOSIT plus the Retention Money deducted from the running bills under Clause-15(ii) shall remain with the Corporation until the finalization of accounts after the performance of the contract by the Contractors. No interest shall be payable to the Contractors on the SECURITY DEPOSIT and the amount retained by the CORPORATION under Clause-15(ii).

(iv) The Corporation shall have lien or charge upon the SECURITY DEPOSIT / RETENTION MONEY and may forfeit the same if the Contractor commit a breach of Contract or fail to perform any of the terms, conditions and covenants contained in the contract or understanding given by them to the Corporation. Out of the SECURITY DEPOSIT/RETENTION MONEY, the Corporation may appropriate and reimburse to itself sums due by the Contractors to the Corporation. If the sums due to the Corporation exceed the amount of the SECURITY DEPOSIT/RETENTION MONEY, the Corporation shall have the right to demand the excess amount from the contractors and/or recover the same from the Contractors out of any other amount that may be payable by the Corporation to the Contractors. .

16. (a) If the Contractors commit a breach of any of the terms or conditions of the contract or fail to perform any of their

*duties, obligations or services under the contract to the satisfaction of the Corporation, the Corporation may, at any time, terminate the contract after giving seven clear days notice to the Contractor and get such duties obligations or services performed by another contractor at the risk and cost of the contractors.*

*(b) The Corporation have absolute right in its sole discretion to terminate the contract at any time and get such duties obligations or services performed by other contractors and the contractors will not be entitled to any damages/loss, if any, suffered by him on account of such termination.”*

**Underlining is to add emphasis**

25. The above facts show that defendant was appointed as **Handling Agent** in respect of previous rice crop 1988-89 on ‘BOOK BALANCE’ basis certified by Reserve Stock Accounts [RSA] of the plaintiff as well as for handling any other rice stocks which the plaintiff may entrust to the contractor during the currency of the contract. The right and obligations of the parties are mentioned in the contract [Ex.P/3] as well as other supplemented documents in respect thereof, which are self explanatory. The clauses referred to above transpire that the contractor for performance of the contract was not only required to deposit security amount but the retention money was to be deducted from the running bill of the contractor and retained by the plaintiff till finalization of accounts after performance of the contract by the contractor; that is, the Defendant. Furthermore, the plaintiff under the terms of the contract had the right to terminate the contract and forfeit the security deposit and retention money in the event contractor fails to perform its part of obligation and or commit breach of any of the terms of contract. In view of the above said facts, it would thus safely be concluded that the subject contract, for all practical purposes, was a fresh contract and the defendant was not merely required to extend handling services in respect of left over quantity of the rice crop in the Plaintiff’s own godown but the contractor had to perform its part of obligation under the terms of the contract in respect rice stock which were already lying at the godown at the time of award of the contract as well as rice stock which may entrust to the contractors during the currency of the contract and in case of breach of any of the terms and condition thereof the defendant was liable to be exposed to the consequences as mentioned in the contract. Hence, this issue is answered accordingly.

26. **Issues Nos.1-A and 2** :Since these issues are connected with each other therefore, same are taken up together. It is contended by learned

counsel for plaintiff that as per the Clauses of the Tender Form (Annexure-III) to the Contract [Ex. P/3], the defendant was required to take care of stock of rice, separately maintain complete record and submit accounts to the plaintiff but the defendant has failed/neglected to do so and besides also failed to produce any evidence contrary to the plaintiff's case which is supported by the documents viz. **Ex. P/5 to P/7 and P/9 to P/14**. Further contended that the performance of the defendant during the currency of the contract remained unsatisfactory as the defendant has failed to perform its part of obligations under the terms and conditions of Contract [Ex.P/3] such fact can be substantiated from the letters addressed to the defendant.

27. Conversely, learned counsel for the defendant has contended that since the contract was given on 'Book Balance' basis in respect of the crops left by the outgoing contractor at his costs and risks as per Clause 16(a) of the Contract, hence defendant was not liable to maintain any separate accounts and submits the same to the Plaintiff. Nevertheless, the defendant had been regularly submitting monthly accounts to the plaintiff, which were not disputed by the plaintiff. Further contended that the subject contract was initially for one year from 1990 to 1991, however, subsequently it was extended by the plaintiff from time to time till 30-9-1995. In this regard, **Ex. D/1 to D/4** are referred. Such extensions of the contract clearly reflect the performance of the defendant was satisfactory. Furthermore, after expiry of said contract the responsibility of defendant also came to an end. . It is also contended that from evidence it has been proved that performance of the defendant had remained satisfactory and furthermore the plea of plaintiff regarding unsatisfactory performance of contract by the defendant is an afterthought and has been raised only to avoid payment of the defendant in respect of security and retention money lying with plaintiff in respect of earlier contracts for the period 1983-84, 1986-87 and 1987-88 and that too when defendant approached the Wafaqi Mohtisib in respect thereof.

28. The relationship between the plaintiff and the defendant under the subject contract is that of '**bailor**' and '**bailee**' as defined in Chapter IX of Bailment under Section 148 of Contract Act 1872, which for convenience sake is reproduced as under:

**“148.** A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the

directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

*Explanation* – If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.”

To constitute effective bailment contract, it is obligatory on the part of the bailor to put the bailee in possession of the goods. There must be actual tender and delivery of the goods and acceptance thereof by the bailee. There must be actual and physical transfer of possession. Merely putting into possession of the documents of title does not constitute bailment of goods. Reliance is placed upon *Messrs. Rice Export Corporation v. Messrs. A.H. Corporation and 3 others (2002 CLC 607)* and *Duli Chand v. Jwala Parsad & Sons (AIR 1934 Allahabad 568)*

29. In the present case appraisal of the evidence leads to the conclusion that the contract was awarded to the defendant on the ‘Book Balance’ basis without any physical verification of the stock of rice which was lying in the godown in dumped position, thus in the circumstances, it can not be assumed that a proper account can be made without physical verification of stock, which admittedly was not done in the present case despite various request and letters by the defendant. Such fact is also substantiated from the cross examination of the plaintiff’s witness, relevant excerpts whereof is reproduced as under:

*“The contract of M/s. Behri Enterprises was cancelled after their default to perform the contract at their risk and costs. The contract of M/s. Punjab Trading was initially for one year which extended from time till. 30.9.1995. I can not say how much quantity of goods were lying in the godown as on 30.9.1995. The goods of the defendant were lying in the godown till 1996. It is correct to suggest that the defendant requested for the survey of the goods from time to time right from the date of contract. It is correct to suggest that no physical verification was made prior to 1996.”*

In this regard a letter dated 30.01.1990 [Ex.D/25] addressed by the defendant to plaintiff relevant portion whereof for the sake of ready reference is reproduced as under:

*“Please refer to the above contract for handling 88/89 crop at QRG. It is submitted that rice stocks of 88/89 crop left over by M/s. Bahri Enterprises, were taken over by us in August 1989. You are aware that*

*since then very nominal quantity of Basmati/Sela rice has been exported leaving behind considerable quantity awaiting export.*

*Since the last over two years these stocks are lying in a dumped position which are very heavily infested with the result of grain has converted into powder. Under these circumstances rice is likely to lose weight to a considerable extent. In order to assess the weight loss, we request that immediate survey of the stocks be carried out.*

Thereafter the Defendant addressed yet another letter dated 15.05.1991 [Ex.D/4] to the plaintiff, relevant portion whereof is reproduced as under:

*“In accordance with orders of the management, lots of rice for local disposal were prepared at Q.R.G. Later on we were instructed that the bags of these lots may be heaped as the RECP decided to dispose off rice legally in loose form. Accordingly under orders from area officer QRG the work of heaping started and it was noticed that due to work being performed in open space, the dust and other by products were blown off, causing huge loss. There is no provision of any invisible loss in our contract and it is felt that the loss in weight would be on the high side, thus creating problem in finalization of account.*

*Secondly the heap of rice shall remains in the open exposed to sun and other weather hazards. The monsoon is also approaching and there is every chance of its being damaged by rain water.*

*Under the circumstances, you are requested to kindly bring this fact to the notice of the management so that losses in this connection are written off by RECP at the time finalization of accounts.”*

Thereafter, another letter dated 30.04.1992 [Ex.D/5] was addressed to the plaintiff relevant portions whereof for the sake of ready reference are reproduced as under :

*“We wish to inform you that while effecting delivery of FAO Rice Basmati 88-89crop to mills it has been noticed that the contents have lost weight considerably which fact has also been ascertained by us by conducting weighment of the bags.*

*Under the circumstances it is apprehended that huge wight shortage is likely to occur in stocks of Rice for which we are not to be held responsible.*

*In order to assess the weight shortage and its writing off, we request that necessary survey may please be carried out so that the management is apprised of factual position to do the needful.*

*In the meantime we are unable to undertake the work of handling till such time necessary survey to assess the loss is completed.*

*We hope that earliest action would be taken to constitute a team of officers/surveyors for the purpose in order to avoid delay in the work of preparation of rice stocks for export.”*

Another letter dated 10.08.1992 [Ex.D/6] was addressed to the Plaintiff relevant portion whereof for the sake of ready reference is reproduced as under:

“In this connection we invite you kind attention to our letters of even number dated 30.1.1992 and 30.4.1992, respectively (copies enclosed) mentioning therein the conditions under which stocks of 88-89crop rice are lying and same being further deteriorated due to long storage, infestation besides many other reasons.

Under the circumstances we had requested for necessary survey to asses the loss and bring the facts to the notice of the Management for necessary action but regret no heed has been given to our proposal/request till time of writing.

Presently, while Basmati and Sela Basmati is being processed in Godowns/Mills for the purpose of export. It has been observed that weight has been considerably lost and as such heavy shortages in stocks are apprehended. We, therefore, once again request you to kindly arrange necessary survey so that suitable action could be taken.”

Another letter dated 17.09.1992 [Ex.D/7] addressed to the plaintiff relevant portions whereof for convenience sake are reproduced as under

“We invite your kind reference to our letter of even number dated 10.8.1992 and earlier letters of 30.1.1992 and 30.4.92 requesting for conducting survey of rice stocks 88-89 crop being handled by us at ORG so as to assess the loss suffered due to long and lengthy storage, moisture infestation besides other reasons but regret that till the time of writing no action has been taken in the mater.

Rice stocks of 88-89 crop are being processed and prepared for export purpose and if timely action for conducting survey is not taken, we apprehend it would not be possible to assess the actual loss as stocks would be consumed and consequently land us in difficulties while finalizing our RS Accounts.

Under the circumstances you are once again earnestly requested to arrange necessary survey without any further loss of time else we would be left with no other alternative but to stop/suspend the work of preparation till survey is carried out and decision taken to allow loss of rice.

We in a business-like manner request you to expedite the matter so that the work of rice export may continue smoothly without any such incident which may be regretful for both.”

The defendant addressed another letter to the plaintiff on 06.10.1992 [Ex.D/8]

“We have the honour to invite your kind attention to our letters of 30.1.1992, 30.4.1992, 10.8.1992 and 17.9.1992 (copies enclosed for your ready reference) requesting therein for carrying out necessary survey in order to assess the loss suffered to rice stocks due to storage of over four years besides other reasons i.e. infestation, etc. with the result that contents have turned into dust/power and weight of rice had been considerably lost.

*It is regretted that despite our repeated written as well as verbal requests no suitable action by the RECP has been taken to assess the loss for due consideration by the RECP Management.*

*Export of Basmati and Sela Basmati Rice to Saudi Arabia is in progress. It is requested that before stocks of this variety are consumed and exhausted it would be necessary to conduct survey to assess the loss else we would not be in a position to have our accounts finalized.*

*You are therefore requested to kindly order expeditious action so that the matter could be resolved without any further loss of time.”*

30. The Plaintiff addressed letter dated 03.10.1992 [Ex.P/9] to its handling agents which include the Defendant relevant portions whereof are reproduced as under:

*“It is noted that you have not submitted the R.S.Account of rice and bags for the month of August and September 1992 handled at Qasim Rice Godowns.*

*You are directed to submit the R.S. Accounts in your own interest immediately as the Account Division Head Office is pressing hard for the same.”*

The above letter was written to the defendant after approximately thirty-three (33) month of the award of contract to the defendant. Through this letter the defendant was asked to submit accounts for the months of August and September 1992 only. The said facts reflects that the defendant had been submitting accounts to the plaintiff and only two months accounts[RSA] were not submitted for which letter [Ex.P/9] was written.

The above letter of the Plaintiff was followed by letters dated 20.10.1992 [Ex.P/10], letter dated 7.11.1992 [Ex.P/11] and letter dated 16.11.1992 [Ex.P/12].

31. The said letters of the Plaintiffs were replied by the Defendant through its letter dated 18.11.1992 [Ex.D/10] relevant portions whereof are reproduced as under:

*“ Please refer to your letter Nos:RECP/QRG/4(8)/92 dated 7<sup>th</sup> and 16<sup>th</sup> November, 1992, respectively, asking for the stock position of the above crop at QRG.*

*In this connection it is submitted that stocks of above crop were handed over to us on the basis of Book Balance and not physically so that the exact location and godown position would have been available with us.* For your kind information we may mention here that the above crop was received handled by M/s Bahri Enterprises whose contract was cancelled and the work awarded to us. The left over stocks of 88-89 crop rice were thus handed over to us on Book Balance as certified by the RSA and not physically.

The stocks were lying in a dumped position and even our best ability to assess the actual quantity of stocks on general and visual survey could not bear any fruitful result. Secondly these stocks due to long and lengthy storage got very heavily infested besides other factors of losing weight and apprehending huge loss we brought the fact to the notice of RECP vide letter of even number dated 30.1.1992. Seeing no action from the Management, we again requested vide letter dated 30.4.1992. The Management on our request constituted a Committee comprising of certain Members to look into the matter and submit its report. We presume the report submitted by the Committee was found to be incomplete for the Management to take any further action in the matter. For a period of about two years these stocks could not be exported by RECP and no pains for proper aeration of stocks, its restacking for making alleys and other ways and means to safeguard the stocks were taken with the result condition of stocks further deteriorated and having no other alternative requested the RECP Management vide our letters of 10.8.1992, 17.9.1992 and 6.10.1992 respectively for doing the needful.

The defendant thereafter addressed yet another letter 22.11.1992 [Ex.D/11] to the plaintiff relevant portions whereof are reproduced as under:

“We refer to our letter of even number dated 6.10.1992, on the subject noted above, enclosing therewith copies of our previous letters written to RECP in connection with handling of 88-89 crop rice at Q.R.G. and stating circumstances under which the quality of rice has deteriorated, resulting in huge loss in weight. In order to assess the actual weight loss we had been requesting the RECP Management for conducting the necessary survey but highly regret that till the time of writing neither any arrangements for conducting survey have been undertaken nor any reply to our numerous letters has been received by us from RECP.

We may now mention here that regular preparation of rice and its export is in progress and we apprehend that if further delay in carrying out survey occurs, the stocks of rice would be consumed and exhausted and would thus put us and the RECP both in an embarrassing situation. Although we had also informed the RECP in our previous letters that if timely survey was no carried out, we would be left with no other alternative but to suspend rice handling work at ORG, but keeping in view our past business relations we avoided this course and instead offered our full cooperation by continuing the work and hoping that due consideration would be given to our request and necessary survey carried out. Unfortunately our best efforts did not bear any fruitful result.

We once again earnestly request you to kindly advise M&M Division for appointment of Surveyors so that the factual position of stocks and its losses could be ascertained. We hope that the matter would be dealt in a businesslike manner to avoid any unhappy course which we may be forced to undertake.”

In the above mentioned quoted paragraphs {excerpts} the underlining has been done to add emphasis.

32. The evidence also reveals that the plaintiff never asked the defendant for the accounts of stock as per book balance. In this regard relevant excerpts of the cross examination of plaintiff's witness is reproduced as under:

*"The guard and watchman on behalf of the plaintiff are posted on the gate of the area and the watch tower. It is correct to suggest that the plaintiff did not ask for the accounts of stock as per book balance. It is not correct to suggest that the present suit is only in respect of the crops for 1988-89, but it also includes the shortage of crops 1983-84. It is correct to suggest that the plaintiff had not taken any action in respect of shortage for 1983-84. Voluntary states that the shortage for 1983-84 were very nominal."*

*"It is correct that the contract for the crops year 1986-87, 1987-88 was with the defendants and performed successfully and there was no shortage. It is not correct to suggest that the plaintiff has withheld the amount on securities and retention money for the year 1986-87,1987-88, but it has been adjusted."*

The excerpts from defendant's cross examination\_

*"I see letter dated 12.11.96 Ex.D/18 and say that this letter is in reply of Ex.P/14. It is not correct that by this letter the defendants has not denied the shortage of Gunny bags to the extent 10,31,846. It is not correct to suggest that the defendants had not given the accounts of the bardana."*

*"It is not correct to suggest that the defendant have not giving the full and final statement of accounts in respect of rice and guny bags on the expiry of contract. It is not correct that I have not filed the statement of accounts in this case. I rely on Ex.D/22."*

33. In addition to the above there is a contradiction in plaintiff's pleading and evidence. No tangible and convincing evidence documentary or otherwise was brought on record by the Plaintiff for proving the exact quantity of rice stock handed over to defendant at the time of award of the contract and further what quantity, if any, of rice was subsequently handed over from time to time to the defendant during the period of contract that is, from 1990 to 1995. The plaint as well as the affidavit in evidence filed on behalf of the plaintiff also does not specify the period of account not rendered by the defendant. In absence of above said specific details of the account, the plea of the defendant that accounts had been submitted and its performance in respect of earlier contracts as well as the present one [subject Contract] was satisfactory, shall be accepted. Had it not been so, the contract of the defendant would have been terminated, instead of being

extended from time to time till 1995 by the plaintiff. In the circumstances, these issues are answered accordingly.

34. **Additional Issue:** Learned counsel for the plaintiff with regard to the Additional Issue has submitted that from the evidence it has been proved that defendant has failed to render accounts in respect of subject stock of rice and gunny bags at the time of awarding contract, as such, in the circumstances the plaintiff is to be compensated in respect of shortage of rice and gunny bags as per Verification/Enquiry Report made by M/s. Irbahim Shaikh & Company.

35. Learned counsel for the defendant with regard to the above additional issue has contended that plaintiff's witness [PW-1] has deposed that subject contract was given in the year 1990 which was extended upto 1995, thereafter no extension of the same was given and the contractor handed over stock-in-question to the Plaintiff. Further contended that after expiry of contract in the year 1995, there remained no question of accounts of any stock in 1999 as the Defendant being handling agent was not liable to render any RSA, as the possession of the stock of rice, bardanas, lying at the go down of Plaintiff was taken over by the latter [Plaintiff].

36. As it has been discussed while dealing with Issues No.1-A and 2 that no physical verification and or survey was conducted in respect of stocks entrusted to the defendant under the contract [Ex.P/3] despite various requests/letters addressed by the defendant. Record also shows that first time physical survey was conducted by M/s Ebrahim Shaikh & Company, after considerable period of expiry of the contract, which report [Ex.P/16] were made basis for additional claim in respect of gunny bags in the present case.

37. The defendant before expiry of the addressed a letter dated 13<sup>th</sup> May, 1995 [Ex-D/20] to the plaintiff, wherein, the defendant while giving accounts in respect of gunny bags lying in various head of account according of R.S. Account, relevant portions whereof are reproduced as under:

*“Huge Quantities of bags of different varieties are lying in shape of De-Charkotted/Serviceable condition in our custody. The Position of bags lying is various Head of Account according to R.S. Account is as under:-*

1. NEW HESSIAN BAGS (INNR) SIZE 22 X 36” .. 5,26,093 Bags

2. NEW HESSIAN BAGS (OUTER) SIZE 23 X 37”	..	2,63,093	“
3. NEW B-TWILL BAGS (BLUE) BAND SIZE 44 X 26½		2,73,521	“
4. NEW B-TWILL BAGS (RED) BAND SIZE 44 X 26½		17,566	“
5. NEW HEAVYCESS BAG SIZE 18 X 26”	..	5,244	“
6. NEW HEAVYCESS JUTE BAGS SIZE 23 X 37”	..	32,389	“

*The authorities of Area Office is advising us to declare the above mentioned huge quantity lying in our possession for Disposal/Local Sale, whereas the bags are lying in the Head of NEW BAGS ACCOUNT as such it is hardly possible to declare the same for disposal unless the bags are transferred from New to respective De-Charketted/Serviceable Head of Account.*

*Due to non-transfer of bags to Serviceable/De-Charketted Head of Account from time to time, the bags are still lying in the Head of Account. We are enclosing herewith a Periodical Statement showing number of bags De-Charketted under Clause “ 9” .of Schedule of our Contract for which necessary certificate have been issued to us. Not a single CWC to transfer the Number of Bags under Clause “9” from New to De-Charketted/Serviceable Account have been issued by the authorities concerned, reason best known to them.*

*Under the instructions of the Area Office Maximum number of Bags have been stacked into lot in OPEN at Kutch Plot and due to Weather Condition, the bags have been badly Sun-burnt/Rain Affected/Damaged and thus their condition is becoming worst day by day which is a Clear Loss to the Corporation.*

*In the light of above facts we request you to please look into the matter and the quantity mentioned above may please be allowed to transfer from New to Serviceable Account for Local Sale/Disposal without further delay.”*

Underlining is to add emphasis

The said letter of the defendant was not challenged and/or disputed by the plaintiff in the evidence. Thereafter the defendant addressed another letter dated 14.11.1996 [Ex D/21] to plaintiff in respect of shortage of Gunny Bags relevant portions whereof are as under:

*“With reference to your letter No. “RECP/M&M/GB/96 dated 3.11.96 on the above subject, we wish to inform you that there is absolutely no shortage of bags as alleged in your letter under reply. The balance quantity is physically available which is lying under the Head of NEW GUNNY BAGS awaiting transfer in other Heads. It is regretted that despite repeated requests, transfer CWC`s from one head to another have not been issued so that accounts could be finalized.*

*You are aware that new bag once decharketted cannot be used again as new and automatically becomes serviceable. A huge number of bags are decharketted in area due to several reasons, some of which are given below and for which function relevant work Performance Certificates are issued enabling us to receive payment for the work performed:-*

*i) Decharketting is done due to long storage of prepared stocks and ultimate delay is shipment. Such stocks develop dust and/or the bags become sun burnt and the same are rejected by the Inspection Agency at the time of its export. In several such cases the RECP has even*

recovered amount from Buyers for this loss besides extra function charges.

ii) *Excessive screen printing is carried out by the Screen Printing Contractor, under orders of the concerned area. Bags bearing marking which are in excess and left over cannot be re-utilised as new bags again and thus these too become serviceable.*

iii) *Due to heavy rejection (mainly Iran Govt. Rep), Mill to Mill movement of Rejected Rice is done and the inner bags once opened cannot be again utilised as new bags and thus these bags too become serviceable.*

*It is a normal practice that bags are then transferred from one head to another at the time of completion of contract, as has been done in the past.*

*It is regretted that despite our requests to concerned quarters, transfer of bags to serviceable/decharkatted Head of Account has not been effected with the result these are lying under the head of NEW BAGS.*

cont. . . . . /P-2

. . . . . 2 . . . . .

*Under orders of Area Officer, from time to time, these bags were placed in shape of Lots in open and covered with available tarpaulins. These bags/lots are lying in open since last 3/4 years awaiting disposal which is the sole discretion of RECP. Previously these bags were disposed off locally by RECP well within time but since the last 3/4 years RECP has changed its policy and these bags have been left at the mercy of rain, sun and other weather hazards. If delay in its disposal for one reason or the other has taken place due to change policy of RECP, we cease to be responsible for deterioration of quality and its subsequent consequences.*

Underlining is to add emphasis

The said letter of the defendant was also not controverted by the Plaintiff in its evidence. On the contrary, in cross examination, the witness of the defendant [DW-1] substantiated the stance of the defendant in the case. The relevant portion of the cross examination of the defendant's witness is reproduced as under:

*"It is not correct to suggest that the defendant have not giving the full and final statement of accounts in respect of rice and guny bags on the expiry of contract. It is not correct that I have not filed the statement of accounts in this case. I rely on Ex.D/22."*

38. The pleadings of the plaintiff as well as its affidavit in evidence are completely silent that at the time of award of contract to the defendant what exact quantity of Gunny Bags was entrusted and subsequently what quantity, if any, was handed over from time to time to the defendant during the period of contract that is, from 1990 to 1995. It is also an admitted position that despite various requests/letters by the defendant no physical

survey was conducted in respect of the stocks entrusted to the defendant either at the time of award of the contract or during the currency of the contract. The plaintiff's claim is mainly based on the survey report dated 24.5.1999 [Ex.P/16] which was conducted after years of expiry contract. Furthermore, neither any supporting document in respect of the report [Ex.P/16] has been produced nor the plaintiff examined the surveyor in the evidence to justify its claim. Accordingly, this issue is answered in negative and against the Plaintiff

39. **Issues No. 3 and 4:** These issues may conveniently be taken up together. It is contended by learned counsel for plaintiff that security deposit/retention money of the completed contracts for the years 1983-84, 1986-87 and 1987-88 amounting to Rs.1,21,65,050/= [rupees one crore, twenty-one lac, sixty-five thousand and fifty only] has not been actually adjusted but has been retained by the plaintiff in exercise of their lien on the said amount on account of dues claimed in the present case which is more than aforesaid amount. It is also contended that under Clause 15(iii) of the **Ex. P/3** to Contract the amount of security deposit plus retention money shall remain with Plaintiff Corporation until finalization of the account after performance of contract by the contractor. Further contended that as per Clause 15(iv) of [Exhibit P/3] to contract the plaintiff having lien upon the security deposit/retention money may forfeit the same if contractor commits breach of contract or fail to perform any of the terms and conditions of the contract. Furthermore, under the said clause the plaintiff has a right to demand the excess amount from contractor and/or recover the same from contractor, out of any other amount that may be payable by the contractor to Corporation, therefore the plaintiff is legally entitled to appropriate security deposit/retention money deposited by the defendant in the present suit as well as security deposit/retention money relating to the earlier contracts. It is also argued that the amount of Rs.1,21,65,050/= [rupees one crore, twenty-one lac, sixty-five thousand and fifty only] relating to earlier contracts has admittedly been deposited and is lying in the separate account with Allied Bank of Pakistan Ltd. in compliance of the order dated 14-9-1998 passed by this Court in present suit. It is also contended that admittedly since defendant has not filed any counter claim/suit in relation to said money/amount lying with plaintiff, hence they cannot claim that amount in present proceedings.

40. Conversely, learned counsel for the defendant in respect of these Issues has contended that admittedly the retention money of the contracts is for the years 1983-84, 1986-87 and 1987-88 which was performed by the defendant successfully and no shortage was reported in the said contracts of above tenure and as such the question of adjustment of the security deposit and retention money in the present proceedings does not arise in respect of said earlier contracts, as the earlier Contracts of rice handling which were fulfilled and completed successfully has no nexus with the subject Contract.

41. It is also contended that after successful completion of the earlier contracts the plaintiff had to return the said money (the security deposit and retention money) which were lying with plaintiff as trust money, but the plaintiff deliberately committed delay in making the payment to the defendant and however, when the defendant filed complaint with Wafaqi Mohtisib at Karachi the plaintiff filed the present suit with false allegations of shortage of stocks of crops of 1988-89. It is also contended that the plaintiff has retained security deposit/retention money of the completed contract illegally, without authority and, as such, same cannot be adjusted towards another contract.

42. From the perusal of the evidence, it is apparent that the Plaintiff either with its pleading and/or in its evidence has failed to produce the terms and conditions of the earlier contracts for the years 1983-84, 1986-87 and 1987-88 which can discharge the onus that under the specified terms whereof, the plaintiff has lien on the security deposit and retention money in respect of the earlier contracts. Furthermore, Clause 15 of Tender Form Annexure-III of the contract [Ex.P/3], already reproduced in preceding para 21, deals with security deposit and retention money of the defendant contractor/defendant. Clause 15 (iv) of the Tender Form Annexure-III states that the Corporation shall have lien or charge upon the Security Deposit/Retention Money and may forfeit the same if the Contractor commit a breach of contract or fail to perform any of the terms, conditions and covenants contained in the contract or understanding given by them to the Corporation and in event if the sums due to the Corporation exceed the amount of the security deposit/retention money, the Corporation [Plaintiff] shall have the right to demand the excess amount from the contractors and/or recover the same from the contractors out of any other amount that may be payable by the Corporation to the Contractors. Whereas Clause 16

of Tender Form Annexure-III of the contract [Ex.P/3], already reproduced in para 21 above, deals with the situation where the contractor commit breach of contract. It says that if the contractors commit a breach of any of the terms or conditions of the contract or fail to perform any of their duties, obligations or services under the contract to the satisfaction of the Corporation, the Corporation may, at any time, terminate the contract after giving seven clear days notice to the Contractor and get such duties obligations or services performed by another contractor at the risk and cost of the contractors.

43. In the present case, examination of the evidence results in holding that the earlier contracts for the period 1983-84, 1986-87 and 1987-88 awarded to the defendant had been completed satisfactorily by the defendant, however, the evidence of the parties does not show whether any NOC in respect of earlier contracts has been issued or not by the plaintiff. As regards the subject contract, that is, crop 1988-89 is concerned, it has also come on record that initially the contract was for one year from 1990 to 1991, however, subsequently the plaintiff extended the contract from time to time through letters [Ex. D/23, D/24, P/4] till 30.09.1995. The said extensions clearly reflect the performance of defendant was satisfactory. Had the performance of the defendant was found unsatisfactory; the subject contract would have been terminated by the plaintiff instead of being renewed the same from time to time. The record also shows that no notice under clause 16(a) of the contract has been given to the defendant whereby it could be assumed that the performance of the defendant was not satisfactory. In view of the above, these issues are answered accordingly.

44. **Issues No.6:** It is pertinent to note that 3<sup>rd</sup> paragraph of Section 1 of the Contract Act, gives overriding effect to the usage or custom of trade and any incident of any contract not inconsistent with the provision of the Act. While interpreting terms of a contract, Courts do not employ any consideration or term which are not expressly provided therein. It is only when any usage, custom of trade or incident of any contract comes on record or where both the parties either concede to existence of any such usage custom of trade or incident of any contract or otherwise same is established, then such incident of contract, custom, trade or usage, as may be reasonable and necessary in order to effectively determine right and obligation of the contracting parties are read as terms and condition of the

contract. It is now a well settled that in grain handling contract, like the one in hand, incidence of losses in quantity and quality, at various stages of storage, shifting, handling and transportation are but natural. Sanjiva Row in his well-written “Commentary of Contract Act and Law relating to Tenders etc.” 9th Edition at page 678 after reviewing large number of cases has given detail of essential features of mercantile usage to have binding effect and to be enforceable at law; such features may be summarized as follows:-

- (1) Must be universal.
- (2) Precise and certain, uniform in application in particular trade and business must be fair.
- (3) Reasonable, and equitable.
- (4) It is so universally practiced that everybody in the particular trade knows it or might know if he took pains to acquire.
- (5) It must be continuous in that it should have existed without interruption as controlling the subject-matter affected.
- (6) It must not be illegal or immoral or opposed to public policy of the State.

Furthermore, as stated above, in order to constitute effective bailment contract, it is obligatory on the part of the bailor to put the bailee in actual possession of the goods, and not merely on papers, which in the present case could only be possible if proper survey and or verification of the stock had been conducted at the time when the contract was awarded to the defendant. In the instant case, as already observed above, nothing has been brought on record by the plaintiff which shows as to what quantity was actually handed over to the defendant. Even the book balance quantity has not been mentioned in the pleading of the Plaintiff as well as affidavit in evidence of the plaintiff. Under the circumstances, it is only admission on the part of the defendant that can be considered relevant for the purposes of fixing any liability as to the quantity handed over to him which in the present case is not available. Another important aspect in such type of contract is that the bailor is also obliged to disclose to the bailee of the faults in the goods bailed or circumstances that may expose the bailee to extraordinary risk. If bailor does not make such disclosure, it is the bailor and not the bailee who has to suffer as provided for under Section 150 of the Contract Act, which section for convenience sake is reproduced as under:

*“150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially*

*interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.*

*If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.”*

In addition to the above, in the grain handling contract there is inherent risk of diminishing quantity and quality of the food grains and ratio of losses is inversely proportionate to the nature of storage, which may vary from case to case basis. Longer the duration, greater the quantum of losses. Reference is made to the case of Messrs. RICE EXPORT CORPORATION vs. Messrs. A.H. CORPORATION and 3 others (2002 CLC 607).

45. In the present case admittedly the crops were related to 88-89, the handling contract of which was earlier awarded to M/s. Behri Enterprises and on their failure the left over stocks were entrusted to the defendant through the subject contract. The said stock were lying in the godown of the plaintiff in a dumped condition for a considerable period of time there was every possibility that the stocks in question had diminished quantity and quality, inter alia, due to infestations and other factors. The defendant apprehending such facts had informed the plaintiff at the very outset of the contract but the plaintiff did not pay any heed and took no step to safe guard the stocks and to mitigate the losses. In the circumstances, and in view of my findings in respect of Issues No. 1-A, 2, and Additional Issue, I am of the opinion that the plaintiff has failed to establish its case.

46. **Issue No. 7**

The upshot of the above discussion is that the suit is dismissed with no order as to costs. The amount of Rs.1,21,65,050/= [rupees one crore, twenty-one lac, sixty-five thousand and fifty only] of the defendant relating to security deposit and retention money in respect of earlier contracts and is lying in separate account with Allied Bank of Pakistan Ltd. in compliance of the order dated 14-9-1998 passed by this Court in present suit which order was subsequently upheld by the learned division bench of this court in HCA No. 299 of 1998 on 2.09.1999 as well, may be returned to the defendant.

Karachi;

Judge

Dated: 28.09.2016