

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.637 of 1983

*Before **Mr. Justice Nazar, Akbar, J.***

Plaintiffs : M/s. National Motors Limited through Syed Iqbal Ahmad, Advocate

Defendant : Government of Pakistan, Directorate General of Defence Purchase, Ministry of Defence, Islamabad through Ms. Tabassum Ghazanfar, Standing Counsel.

Date of hearing : **10.12.2014**

J U D G M E N T

NAZAR AKBAR, J. Very briefly the facts of the case are that the plaintiffs entered into a contract dated 31.1.1967 with the defendant for local assembly of 450 vehicles imported by the Defendant. The plaintiff by March 1969 assembled and delivered 330 vehicles to the defendant and the remaining 120 vehicles could not be supplied for various reasons, therefore, by invoking Clause 38 of the Contract Act, the dispute was referred to the Sole Arbitrator where the plaintiff filed a claim of Rs.37,39,073.95 against the defendant and the defendant also filed counter claim amounting to Rs.1,75,25,343.06. The sole arbitrator announced the award on 30.04.1975 rejecting the plaintiff's claim and accepted the defendant's claim to the extent of **Rs.33,21,579.65.** The plaintiff filed objections under **Sections 30 and 33** of the Arbitration Act. 1940 and ultimately, the award was remitted to the Arbitrator with the directions to state reasons on the award in sufficient detail within a period of three months, however, the

Arbitrator failed to comply with the directions of the Court, meaning thereby that there did not exist any award. However, pending the proceeding before the Arbitrator, the defendant appropriated a sum of **Rs.33,21,579.65** from the amount of the plaintiff lying in credit account with the defendant in respect of some other bills and in some other contract. Therefore, on **30.08.1983** the plaintiff filed the present Suit for recovery of Rs.7,050,653.58 under two different heads reproduced below:

(i)	appropriated by the defendant	Rs.33,21,579.65
(ii)	other charges claimed	<u>Rs.37,32,273.93</u>
	Total	Rs.70,53,853.58

2. The Defendant filed written statement and attempted to justify their act of appropriation of Rs.33,21,579.65 from the credit account of the plaintiff lying with the defendant in respect of some other contract and also denied the other charges claim of Rs.37,39,073.95. The Court from the pleading of the parties on **09.2.1986** framed the following issues:

1. Whether the claim in suit is bared by limitation?
2. Whether the Defendants were entitled to appropriate the sum of Rs.33,21,579.65 (Rupees Thirty three lacs twenty one thousand five hundred seventy nine and paise sixty five only) and are liable to pay back the same to the plaintiff?
3. Whether the plaintiffs are entitled to claim the sum of Rs.37,39,073.95 (Rupees thirty seven lacs thirty nine thousand seventy three and paise ninety five only) as per Schedule 'A' to the plaint?
4. Whether 330 chassis were defective and the plaintiffs failed to rectify the defects? If yes, what is the effect?
5. Whether the plaintiffs delayed in offering 120 chassis and the same were defective and rejected on that account? If yes, what is the effect?
6. Whether the Defendants are not liable to pay the storage charges and heavy expenditure met by the plaintiff for

removing the rust from 453 vehicles and their reconditioning?

7. Whether or not the cause for delay in the assembly of the vehicles occurred on account of Defendants and as enumerated in para 8 of the plaint?

8. What should the decree be?

3. The parties led their evidence. The Plaintiff examined Muhammad Iqbal Adil, as witness who produced certified copy of plaint at Ex.P-1/1, letter dated 22.10.2012 at Ex.P-1/2, contract dated 31.1.1967 executed between the plaintiff and the defendant at Ex.P/1/3, copy of award at Ex.P/1/4, agreement dated 30.06.1974 at Ex.P/1/5, original inspection report at Ex.P/1/6, letter dated 18.07.1975 at Ex.P/1/7, cheques slip at Ex.P/1/8, certified copy of order dated 09.04.1976 at Ex.P/1/9, certified copy of application under section 16 of the arbitration award of order dated 27.02.1983 at Ex.P/1/10 and Ex.P/1/11. The Defendant examined Matiul Haq, as witness, who produced letters dated 05.04.1967 and 04.08.1967 as Exs.P-1/12 and P-1/13.

4. The suit was dismissed by judgment dated **27.11.2006**. The plaintiff preferred High Court Appeal No.25 of 2007 which was allowed on **3.9.2009** and the case was remanded for a fresh decision on all the issues. The relevant portion from the order to appreciate the mandate of the remand order is reproduced below:-

“12. We have examined the case in the light of the arguments of the learned counsel and have perused the records of the case including the impugned order and also the order of the learned single Judge who had initially remitted the award which is reported in the case of the present appellant and the respondent in PLD 1982 Karachi 260. In this order the learned single Judge had held that any award remitted shall become void on the failure of the arbitrator to resubmit in accordance with directions of the Court. We have also noted that the learned single Judge has

not considered the arguments of the learned counsel that without there being any valid order of award in his favour, there was no basis for the defendant to appropriate this amount from some other amount lying to the credit of the present appellant in the books of accounts of Defendant in some other contract. We have also seen that the learned single Judge although he initially had observed that the amount of Rs.37,39,083.95 was claimed on account of storage and other charges but while finally dealing with the matter and rejecting the claim he had observed that the entire amount was for storage charges. We, therefore, tend to agree with the learned counsel for the appellant that for the disposal of his claim it was necessary that the learned single Judge should one way or the other decide whether the Defendant had properly and legally appropriated the above mentioned first part of the claim. We have also observed that while rejecting the second claim the learned single Judge has only discussed storage charges and completely ignored to give any finding as to whether the claim for other charges was admissible or not. We are of the considered opinion that the above order cannot be sustained.

13. The above are the reason in support of our short order delivered in Court after hearing the learned counsel on 18.08.2009 by which we had set aside the impugned judgment and decree and remanded the case to the learned single Judge in Chambers to be decided afresh after giving both the parties opportunity of being heard and giving finding on all arguments advanced by the counsel and after examining the documents and record, preferably within a period of six months. We have also directed the Roster to fix the matter before the learned single Judge on 08.09.2009 and have apprised both the learned counsel for this date.”

5. I have heard the learned counsel for the plaintiff and the learned Standing Counsel for the Defendant. My findings on each issues are as follows:-

6. **Issues No.1 and 4** were not pressed and therefore need no comment. Issue No.2 & 3 are two main issues between the parties. Issue No.5, 6, and 7 are off shoots of issue No.3 as the same refers to the accounts head under which the Plaintiff has raised claim of Rs.37,39,073.95 and detailed in schedule ‘A’ to the plaint. Therefore, after issue No.2, the remaining issues No.3, 5, 6 and 7 will be discussed jointly.

7. **Issue No.2** The burden of proof of this issue was on the Plaintiff. Plaintiffs' sole witness Muhammad Adil Iqbal produced undisputed contract dated **31.1.1967** (Ex.P-1/3) and categorically stated that after the dispute regarding non-acceptance of delivery of 120 vehicles by the Defendant the issue was referred to the sole Arbitrator who gave an Award (Ex.P-1/4) for **Rs.3,321,579.65** in favour of the Defendant. This Award was challenged by raising objection, and ultimately it was set aside by this Court when Suit No.456/1975 was decided in favour of the Plaintiff and the Arbitrator was directed to give a fresh decision on the dispute. However, before the award could be made rule of the Court the Defendant appropriated the said amount from the account in respect of another agreement dated **30.6.1974** (Ex.P-1/5). The witness stated on oath as follows:-

“Before the award could be made a rule of the Court the Defendant appropriated an amount of Rs.3,321,579.65 out of the other bills that were payable to the Plaintiffs in respect of an agreement dated 30.6.1974 bearing No.0114-0014/3562/DP(Army). I produce the same as Ex.P/1/5. The amount so deducted by the Defendant towards the transaction in question was due and payable to the Plaintiff in respect of an earlier transaction as the vehicle supplied thereunder were duly approved after inspection.
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.Such deduction was made despite the Plaintiff's request to the Defendant not to do so. I produce the letter dated 18.7.1975 addressed by the Plaintiffs to the Defendant in that regard as Ex.P1/7. I produce a “cheque slip” pertaining to the above deduction as Ex.P1/8”.

He further said that:

“the amount deducted by the Defendant as stated earlier has not been refunded to the Plaintiffs, even after the Award (Ex.P/1/4) become null and void pursuant to the Judgment dated 11.8.1981 (PLD 1982 Kar. 260) and order dated 27.2.1983 (Ex.P/1/11) in Suit No.456 of 1975”.

9. The above evidence of the Plaintiff was un rebutted and even the witness of Defendant Major Matiul Haq, admitted it when in his cross-examination he stated that

“prior to award being made rule of the court we had adjusted the amount given in the award from the bill of the Plaintiffs. It is also correct to suggest that we had not filed any appeal or revision against the award or the said order. It is also correct to suggest that the amount adjusted by the Defendant under the award has not been refunded to the Plaintiff. I cannot say that the Defendant has not informed the Plaintiffs. It is correct to suggest that the Plaintiffs had filed a suit No.456 of 1975 Ex.P/1/11. We have not filed suit against the Plaintiffs for recovery of the amount”.

10. The above evidence of the Plaintiff and admission of the Defendant is more than enough to hold that the Defendant’s act of appropriation of a disputed amount in respect of contract dated **31.7.1967** from the amount lying with them under an agreement dated **30.6.1974** was not justified nor lawful. The failure of the Defendant to pursue legal remedy for recovery of the said amount once the award was set-aside by the High Court renders the Defendant liable to refund the said amount forthwith. In view of the evidence and legal position the issue No.2 is answered in negative.

11. **Issue No.3, 5, 6 and 7** the burden of these issues was on the Plaintiff as he was required to establish by positive evidence that how the claim raised by the Plaintiffs in schedule ‘A’ to the plaint is justified. The Plaintiff in schedule ‘A’ to the plaint has referred to the various expenses / charges under different head as shown below:-

A. Storage charges	Rs.01,38,240.00
B. Ordinary Maintenance charges	Rs.00,36,893.00
C. Special Reconditioning / Rehabilitation charges	Rs.20,00,493.00
D. Assembling Charges	Rs.03,15,939.00

Interest for 4 years @ 8.5% per annum	Rs.01,06,739.33
E. Additional Stock Absorber	Rs.00,24,960.00
F. Cost of Repair Kits.	Rs.00,23,940.00
G. Development cost of brake	Rs.02,24,451.00
H. Transportation charges	Rs.00,01,600.00
Margin 20% to cover administrative cost (20% of B, C, E, F, G, H)	Rs.04,64,227.00
Additional cost incurred on 330 Units already delivered (as per details attached)	<u>Rs.03,94,791.60</u>
Total	<u>Rs.37,32,273.93</u>

12. The Plaintiff has failed to place on record a single bill / voucher submitted by the Plaintiff to the Defendant on account of any of the above claims. The Plaintiff has failed to prove by any documentary evidence that the Defendant was liable to pay any storage charges, maintenance charges / special reconditioning and rehabilitating charges as well as assembling charges. Plaintiff was also unable to show by any documentary evidence that his claim of additional stock absorber or any other charges mentioned in the schedule 'A' to the plaint were ever agreed by and between the parties before incurring these expenses on behalf of the Plaintiff. The Plaintiff's counsel has, in fact, conceded that these claims have not been supported by any documentary evidence. Plaintiff has never submitted any bill right from 1967 to 1975 to claim the aforementioned charges. The Defendant has denied the claim of Plaintiff raised in schedule 'A' and burden was on the Plaintiff to establish by cogent evidence that the Defendant was liable to make such payment. The Plaintiff has failed to discharge burden of proof to establish claim of Rs.37,39,073.95, thus the issues No.3, 5, 6 and 7 are decided in negative.

13. **Issue No.8.** In view of the above discussion, the Plaintiff is entitled only to claim a sum of **Rs.33,21,579.65** as refundable by

the Defendant. The Defendant without proper determination of their claim against the Plaintiff has illegally appropriated the said amount from the credit account of the Plaintiff available with the Defendant in some other contract. Therefore, suit is decreed against the Defendant only to the extent of **Rs.33,21,579.65** with interest @ 14% per annum from the date of filing of the suit till realization with cost throughout.

Karachi
Dated:_____

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