IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.93 of 1999

Before:
Mr. Justice Nadeem Akhtar &
Mr. Justice Muhammad Iqbal Kalhoro

Date of Hearing: 16.10.2014.

Appellants Messrs I.J. Supply Agency & another, through Mr. Abdul Razzaq, Advocate.

None appeared for the respondent.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:-By this judgment we intend to dispose of the instant High Court Appeal preferred by the appellants against the judgment and decree dated 04.11.1998 passed by the learned single Judge of this Court, whereby the Suit No 375/1986 filed by the appellants for recovery of Rs.13,77,934.00 was dismissed.

2. The relevant facts narrated by the appellants in their suit are that the appellant No.1 was a registered partnership firm dealing in supply of orders and contracts in various items including gas cylinders, whereas the respondent was a company believed to be a subsidiary of a foreign company of the same name. The company was being run by the foreign nationals in Pakistan. The company had been acting as contractors on a big scale and had carried out works at various places, which included Pakistan Steel Mills, Port Qasim Authority and Kotri Barrage etc. On 20.11.1976 the respondents wrote a letter to the appellants requesting them to supply 04 gas cylinders charged with hydrogen gas for their project at Kotri Barrage and they agreed to pay gas bills and also the hire

charges at Rs.10./- per week per cylinder after the successful negotiations between them, whereafter on the regular basis the respondent kept on demanding from the appellants the gas cylinders which was obliged by them. The appellants came to know that the respondent had reduced the staff considerably as they had decided to wind up their business affairs in Pakistan and were to leave the country, in view of which the appellants requested the respondent to settle accounts regarding the rent due from them at the rate of Rs.10/- per cylinder per week and regarding the compensation for the cylinders lost by them and not returned to the appellants, pursuant to which the negotiations had taken place between them, thereafter, the appellants had asked for the compensation for 374 cylinders, however the respondent had agreed to pay the compensation for 274 cylinders only, which arrangement was accepted by the appellants. The respondent did not settle the payment on account of the rent of cylinders, resultantly the appellants sent a notice dated 19.03.1976 seeking payment of Rs.13,77,934.00 wherein they supplied the details in respect of the rent of cylinders, which the respondent replied vide a letter dated 27.04.1986, denying their liability It was in that background that the suit was filed on the following prayers:

i) To pass judgment and decree in the sum of Rs.13,77,934.00 in favour of the plaintiffs and against the defendants.

ii) To allow interest /return at 16% per annum on the suit amount with effect from the date of filing the suit till final payment.

iii) To award costs of the suit ; and

iv) To pass any other relief /reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case.

3. The respondent in the written statement denied the case of the appellants and further stated that the letter dated 20.11.1976 was in

respect of the transaction for supply of 04 gas cylinders only for Kotri Barrage project, which did not create any binding contract for the subsequent or other transactions which varied according to circumstances of each transaction. The respondent further stated that they had regularly paid for the gas supplied by the appellants as per settled terms, and there were no accounts to be settled. The respondent denied that they were winding up the business in Pakistan and also denied that 374 cylinders were missing, however, further stated that the final settlement of accounts between them was made on 30.11.1985, whereby an amount of Rs.303,000/- was paid to the appellants, which was accepted by them without any protest or objection. The respondent further stated that the claim for the rent /hire charges for each cylinder made by the appellants was false and baseless and they never agreed to pay any such charges. In addition to above, the respondent also claimed that the suit was barred by time and no cause of action had arisen to the appellants.

4. On the pleadings of the parties, the following issues were framed by the learned single Judge:

1. *What is the applicability and effect of letter dated 20th November, 1976?*
2. *Whether there was any trade practice between parties to pay rent /hire charges? If so what is its context and effect?*
3. *Whether there was any general binding contract for payment of hire charges at Rs.10/- per cylinder?*
4. *What is the effect of settlement dated 30.11.1985?*
5. *Whether the plaintiff is entitled to relief of amount claimed in suit?*
6. *What should the decree be?*

5. Learned single Judge, while replying to the above issues after a thorough discussion, came to the conclusion that the appellants were not

entitled to the relief(s) claimed by them and dismissed the suit vide impugned judgment and decree dated 04.11.1998. Feeling aggrieved by and dissatisfied with the said judgment and decree, the appellants preferred the instant appeal.

6. Learned counsel for the appellants has contended that the learned single Judge has not appreciated the evidence led by the parties properly in its true perspective, as the documents filed by the appellants in support of their case have not been looked into and no proper findings have been given thereon. Per learned counsel the appellants were able to prove their case by submitting the relevant documents to show that they were entitled to the prayers made by them, but that aspect of the case was totally ignored by the learned single Judge, while deciding the case against the appellants. He further contended that there was an oral agreement between the parties, vis-à-vis the supply of cylinders and because of the confidence built among the parties over the years, the appellants had supplied the gas cylinders to the respondent with the understanding that the rent /hire charges of cylinders would be paid to them by the respondent in due course. He further contended that the findings of the learned single Judge that the rent was payable for only 04 cylinders, as there was a letter /agreement to that respect, and it was not payable for the hundreds of cylinders later on supplied by the appellants to the respondent, is based on non-appreciation of evidence, as the appellants were able to prove through their untarnished evidence that the supply of gas cylinders to the respondents subsequently was in tandem with the oral agreement to pay the rent charges thereon. He lastly prayed for setting aside the impugned judgment and decree passed by the learned single Judge and allowing the suit.

7. It is not out of place to state here that no one appeared for the respondent to submit brief on its behalf, despite the service of intimation notice to its counsel in compliance of the order passed by this Court dated 25.08.2014.

8. We have heard the learned counsel for the appellants at length and perused the material so made available before us.

9. In order to decide the controversy between the parties, we have considered as to whether the findings of the learned single Judge on aforementioned issues are illegal, arbitrary and against the well-established principles governing the appreciation of evidence.

10. We propose to examine the case of the appellants issues-wise in the light of the evidence adduced by the parties.

11. Regarding issue No.1, we have noted that the appellant No.2 during the trial had examined himself in support of his claim, whereas on behalf of the respondent one Malik Asmatullah, being Secretary of the respondent, examined himself to advocate the contents made in the written statement. The appellants have filed the suit for recovery of Rs.13,77,934.00, which according to them had accrued on account of the rent /hire charges of gas cylinders, supplied to the respondent time and again and in order to prove their such claim, the appellants have mainly relied upon the letter dated 20.11.1976. It is pertinent to reproduce here the said letter for proper appreciation and elucidation:

Messrs. I. J. Supply,
Agency Liaquatabad,
Karachi.

Our ref. *VVP/714.*
Your ref.
Subject *: Supply of Hydrogen Gas to our Kotri Site*

date November 20, 1976

Dear Sir,

We refer to the telephonic conversation of our Purchase Officer Mr. Ishrat with you recently and confirm our request, for the supply of 4 Cylinders charged with hydrogen gas for our Kotri Bridge Project.

We enclose herewith our Cheque No.888356 for Rs.10,000. – as deposit against the use of Cylinder and accept your hire charges of Rs.10. – per week per cylinder. Kindly acknowledge receipt.

Please forward your bills for the gas to us for payments.

Thanking you in anticipation.

Yours faithfully,
VOLKERVAM (PAKISTAN) LIMITED

Sd/-
(Mohd. Bashir)
Director

12. A bare perusal of the letter makes it abundantly clear that it was written in the context of supply of 04 cylinders charged with hydrogen gas for use at Kotri Bridge Project being carried out by the respondent and acceptance of the hire charges appertaining to the said cylinders and along with the letter a cheque of Rs.10,000/- was deposited against the use of such cylinders. The letter does not tend to depict that the same was to be used as an agreement between the parties for any subsequent transaction regarding supply of the gas cylinders to the respondents. Under the circumstances, it cannot be held that the said letter could be construed to have any other implications or significance excepting the purpose and context for which it was written by the respondent. Per settled law, no meaning or interpretation can be attached to the letter beyond the simple understanding, which is patent by the simple reading thereof. More so DW Malik Asmatullah, during the course of his cross-examination, has clearly deposed that Rs.10,000/- were deposited as security for 04 cylinders by the company and subsequently Rs.26,000/-

were also deposited as security for the said cylinders. No question appears to have been put to the said witness regarding any subsequent transaction between the parties or that the respondent had agreed to pay the rent /hire charges on the gas cylinders which were subsequently supplied to it. Appellant No.2, in his cross examination has made certain admissions having direct nexus to the case set out by them in their pleadings therefore, it is pertinent to reproduce here such admissions to appreciate their case.

> *"It is correct that I had not made any other claim at the time of settlement of claim for empty cylinders"*
> *"As a special case for the supply of those four cylinders, the defendants had agreed to pay hire charges at Rs. 10/- per weed per cylinders"*
> *"It is fact that the defendants had not agreed to pay hire charges for other transaction for supply of gas".*

In view of such admissions, the case of the appellants does not hold field in respect of their claim concerning the said hire charges over the gas cylinders supplied to the respondent, after the 04 gas cylinders the subject matter of the letter ibid, and it is apparent that the respondent had never agreed to pay any such charges. We, therefore, find no illegality or mis-appreciation of evidence in the findings arrived at by the learned single Judge on issue No.1.

13. So far as the issue No.2 is concerned, it appears that mere a contention was raised by the appellants in the plaint in respect of a practice between the parties to pay the rent /hire charges on the cylinders and in support of such claim no ocular or documentary evidence was brought on record by the appellants to prove it. It is a well-established principle of the law that the burden to prove a particular statement as to the existence of a fact lies upon the person who makes it before the Court. In this regard Articles 117 and 118 of Qanun-e-Shahadat Order,

1984, can be referred to, which, for ready reference, are reproduced as under:

> ***117. Burden of proof.***---*(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> ***118. On whom burden of proof lies***.---*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

In the light of above factual and legal position, we are of the same view which has been taken by the learned single Judge who has replied the issue No 2 in negative.

14. Since issue No.3 has the same connotations which have already been discussed by us in issues No.1 and 2, therefore, we need not discuss issue No.3 in detail. Suffice it to say that no record has been produced by the appellants to satisfy the Court that there was any binding contract for the payment of the hire charges at Rs.10/- per week per cylinder, particularly when the appellant No.2 has admitted so in his deposition as reproduced above.

15. With regard to issue No.4, we have examined the evidence qua the settlement dated 30.11.1985, made by the parties, there appears no quarrel between them over the settlement, however, it is in respect of the quantity of cylinders of various combustible gases, which were supplied to the respondent, the cost per cylinder and the amount due thereon. The said settlement apparently has no direct bearing on the case of the appellants set up by them in the plaint regarding the recovery of the sum which, according to them, accrued to the respondent on account of the

rent /hire charges of cylinders supplied to them. The said settlement is palpably with regard to the cost of the missing cylinders, agreed upon by the parties and in consequence whereof, the matter was amicably settled between them. The appellants admittedly cannot get any benefit from the execution of any such settlement to establish their case based on the different facts, which, as discussed above, they have failed to prove to the satisfaction of the principles governing the appreciation of evidence.

16. We, therefore, find no merit in the instant Appeal, resultantly; the same is dismissed with no order as to costs.

17. Foregoing are the reasons of the short order announced by us on 16.10.2014, whereby this appeal was dismissed.

JUDGE

JUDGE

Tahseen /PA