

# IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.266 of 2003

**S.M. Khalid -----Plaintiff**

**Versus**

**RAJA AUTOCARS LIMITED & another -----Defendants**

**Dates of hearing: 03.02.2016, 17.03.2016 & 29.03.2016.**

**Date of Judgment: 28.06.2016**

**Plaintiff: Through Mr. Zaheer-ul-Hassan Minhas, Advocate.**

**Defendant: Through Mr. M. Aziz Khan, Advocate.**

## J U D G M E N T

**Muhammad Junaid Ghaffar J.-** This is a Suit for declaration, injunction, specific performance and damages primarily against defendant No.1 seeking following relief(s):-

- (i) it be declared that defendant No.1, without fully performing and discharging its obligations under Sale Agreement dated 12.11.2002 (annexure P/5), including the payment of the entire balance of the sale consideration to the plaintiff, is not entitled to obtain the Deletion Programme for its Factory at Tariqabad Bhimbar Road Mirpur (AK) for assembling/producing the Motorcycles by the brand-name of ROCKET or by any other name, and/or to assemble/produce motorcycles on the machinery and equipments of the plaintiff, which has been installed by defendant No.1 in its said Factory.
- (ii) The defendant No.1 be directed to perform its obligations under the Sale Agreement dated 12.11.2002 including the payment of the balance consideration of Rs.4,327,000/- forthwith to the plaintiff.
- (iii) On the failure of defendant No.1 to comply with the aforesaid direction, decree in the sum of Rs.4,327,000/-, with accretion thereon @ 20% per annum, from the date of the suit till realization, be passed against defendant No.1.
- (iv) The defendant No.1 be directed to withdraw Letter dated 7.1.2003 (annexure P/13) and not to obstruct/hinder the registration of the Auto-Rikshaw Chasis sold and delivered to the plaintiff under the AGREEMENT.
- (v) Restrain defendant No.1 from using, utilizing, operating or otherwise deriving any benefit, advantage or facility out of or on the basis of the subject machinery/equipments, including approval of Deletion Programme from defendant No.2, until full performance or discharge of the obligations by defendant No.1 under the AGREEMENT.

- (vi) Restrain defendant No.2, and all person acting under its authority, from according any approval to defendant No.1 of the Deletion Programme for its Factory at Mirpur (AK0 to assemble 70cc/125cc motor-cycles.
- (vii) Decree in the sum of Rs.1,950,000/- against defendant No.1 as damages/compensation for the losses suffered by the plaintiff on account of inferior quality and high price of 51 Vespa Auto-Rikshaw Chasis delivered to the plaintiff.
- (viii) Any other/further/better relief which this Hon'ble Court may deem just and proper, under the circumstances fo the case, be granted to the plaintiff.
- (ix) Costs of the suit be awarded to the plaintiff.

2. Pursuant to issuance of summons / notices, the defendant No.1 through his written statement has filed his counter claim in this matter and has sought the following relief(s):-

- i) To Declare that the Breach of Agreements is by the plaintiff, as he has failed to perform his part of the contract, and he is solely responsible for the same.
- ii) Directing the plaintiff to Refund the sum of Rs.1,25,67,3000/- (Rupees One Crore Twenty Five Lacs Sixty Seven Thousand Three Hundred) received by the plaintiff from the defendant No.1, alongwith the interest/profit/markup at the rate of 20% per annum, with effect from 01.10.2003 till the date of disposal of the counter claim, and payment of amount to defendant No.1.
- iii) To pay storage AND Chowkidar charges for the Machinery, lying with the defendant No.1 @ Rs.50,000/- per month, with effect from 01.01.2003 till the date of Removal of the same.
- iv) To pay profit which could have been earned by the defendant No.1, for the period 01.01.2003, till the disposal of this Counter Claim on the Estimated production of 1000 Units of 70 CC/125 CC Motor Cycles each month. The monthly profit calculated at the @ 15% Amounts to Rs.1,14,00,000/- (Rupees One Crore Fourteen Lacs) per month.
- v) To direct the plaintiff to return/handover 51 Rickshaw Chasis (Brand New), to the defendant No.1/OR to pay Rs.68,85,000 (Rupees Sixty Eight Lacs Eighty Five Thousand) alongwith markup/interest/profit @ 20% per annum from November, 2002 till the return of the Rickshaw Chasis, or payment of the Amount.
- vi) To direct the plaintiff to pay markup/profit/interest @ 20% per annum on sum of Rs.2,95,07,300/- (Rupees Two Crore Ninty Five Lacs Seven Thosuand and Three Hundred) from the date fo filing this suit i.e. March, 2003 till the Realization of total amount decreed by this Hon'ble Court, in the Counter Claim.
- vii) Any other/further/better, relief, which this Hon'ble Court may deem just and proper under the circumstances of the case.
- viii) Cost of the suit, and counter claim be awarded to the defendant No.1 alongwith compensatory cost U/S 35/A Civil Procedure Code.

3. Very briefly the facts involved are that the plaintiff and defendant No.1 entered into a transaction of sale and purchase of the assets of the plaintiff comprising of complete assembling facility for manufacturing of 70cc and 125cc, four strokes Motorcycles of **“Rocket”** brand. For such purposes a Sale Deed dated 24.09.2002 was signed by the parties, which was followed by a Sale Agreement dated 12.11.2002, wherein, the terms and conditions were set out. According to the Agreement a total sum of Rs.1,68,00,000/- (One Crore Sixty Eight Lac only) was agreed to be paid by the defendant No.1 to the plaintiff in consideration of the Agreement. The plaintiff issued seven cheques for a total sum of Rs.93,27,000/- (Rupees Ninety three Lac Twenty Seven Thousand only) and an amount of Rs.68,85,000/- (Rupees Sixty Eight Lac Eighty Five Thousand only) was paid in the shape of 51 Auto Rickshaw which were delivered to the plaintiff, whereas, an amount of Rs.5,88,000/- (Five Lac Eighty Eight Thousand only) on account of income was paid to the plaintiff. It was further agreed in the Agreement that there were certain acts, which were to be performed by the plaintiff, as detailed in Para 1 & 2 of the Agreement. Thereafter as a part payment 51 Auto Rickshaws were delivered to the plaintiff, whereas, machinery, equipment and other related material was handed over to defendant No.1 and after encashment of post-dated cheques of Rs.5 Million, a dispute arose between the parties in respect of issuance of approval by defendant No.2 (Engineering Development Board) and on such dispute the defendant No.1 stopped payment of two post-dated cheques dated 25.11.2002 and 29.11.2002 each for an amount of Rs.2,163,500/-. Defendant No.1 also approached the Excise and Taxation Department, whereby, the registration of 51 Auto Rickshaw was also stopped. On such dispute instant Suit has been filed, wherein, the defendant No.1 has also filed a counter claim.

4. After exchange of pleadings and filing of counter claim, following Issues were settled by the Court on 08.03.2006:-

1. Whether this Court lacks jurisdiction to entertain and hear the above suit?
2. Whether on 20.8.2002 the Technical Team of defendant No. 2 inspected and verified the newly installed machinery in the factory of the plaintiff for the assembly of motor cycles, if so, its effect?
3. Whether the contracted machinery was fully delivered by the plaintiff to defendant No. 1 within the agreed period of 31.12.2002, if so, its effect?
4. Whether the machinery delivered to defendant No. 1 was installed by it in its factory at Mirpur (Azad Kashmir) if so, its effect?

5. Whether the provisional approval of Deletion Programme dated 12<sup>th</sup> October 2002 was delivered by the plaintiff to the Director of defendant No. 1, if so, its effect?
6. Whether defendant No. 1 failed to comply with the requirements of the provisional approval dated 12<sup>th</sup> October 2002, if so, its effect?
7. Whether defendant No. 1 or plaintiff committed breach of the material terms of the transaction embodied in agreements dated 24.9.2002 and 9.11.2002?
8. Whether the machinery sold and delivered to defendant No. 1 was old and worn out as alleged in para 22 of the written statement, if so, its effect?
9. Whether defendant No. 1 is entitled to receive any amount under the counter claim filed by it, if so, the quantum thereof?
10. What should the decree be?

5. Learned Counsel for the plaintiff has contended that insofar as Issue No.1 is concerned the Agreement was entered into at Karachi, whereas, the property in question was also delivered at Karachi and the cheques were issued as well as stopped at Karachi, therefore this Court has the jurisdiction to entertain the instant Suit. He has further contended that even otherwise defendant No.1 has failed to produce any evidence to substantiate its objection with regard to the jurisdiction. Insofar as Issue No.2 is concerned, learned Counsel has contended that through evidence (Ex.P/2, P/3 & P/4) it has come on record that defendant No.2 had visited the site of the plaintiff, inspected entire assembly line and found it satisfactory, therefore, the Issue is to be answered in favour of the plaintiff. In respect of Issues No.3 & 4 he has relied upon Ex.P/20, which is a Letter dated 03.01.2003 and Ex.P/22 against a Letter dated 07.01.2003, which were issued by the plaintiff to defendant No.1, whereby, it was stated that all the commitments have been fulfilled and none of these were replied. He has also referred to Ex.P/25 and P/26 and the Reply of defendant No.1 in cross-examination, whereby, it has been stated by the witness that they have approached defendant No.2 for inspection of the Factory. Insofar as Issue No.5 is concerned, the learned Counsel has contended that in view of Ex.P/20 i.e. Letter dated 03.01.2003 and Ex.P/22, which is again a Letter dated 07.1.2003, the defendant No.1 was communicated that all commitments have been honoured and both these letters were never replied, therefore, it amounts to admission on the part of defendant. Insofar as Issue No.6 is concerned learned Counsel has contended that it has no relevance to the case, hence not pressed. For Issue No.7, learned Counsel has

contended that it was defendant No.1, who has committed breach of material terms of the Agreement in question as after receiving entire assembly line and having it installed at the Factory, the defendant No.1 even approached defendant No.2 for approval and procured parts from Vendors. Per learned Counsel this goes on to prove that insofar as the plaintiff is concerned, no breach has been committed. Insofar as Issue No.8 is concerned he has contended that machinery in question was inspected before purchase and no objection of whatsoever nature was raised by defendant No.1. He has further contended that Agreement was executed after 50 days of the Sale Deed during, which period most of the machinery was handed over and if it was worn out and rusty, it should not have been accepted by defendant No.1. He has also referred to the evidence led by defendant No.1, wherein, it has been stated that they have installed machinery at Factory but after due installation, it is not working due to interim orders passed by this Court. Insofar as Issue No.1 is concerned, it is contended that since defendant No.1 has violated the terms of the agreement, hence not entitled for any relief being sought through Counter Claim in this Suit.

6. On the other hand, learned Counsel for defendant No.1 has submitted that insofar as Issue No.1 is concerned, this Court has no jurisdiction to pass any declaratory decree in the instant matter. Insofar as Issue No.2 is concerned, learned Counsel submitted that though defendant No.2 had inspected the machinery, however, no Certificate was granted. Insofar as Issue No.3 I concerned, learned Counsel has contended that there were certain parts of the Agreement, which were required to be performed and honoured by the plaintiff and except machinery, no other items, as detailed in the Agreement, were delivered and therefore this Issue is to be answered in favour of defendant No.1. Insofar as Issue No.4 is concerned, learned Counsel admitted that the machinery has been installed but is not functional and it has worn out and rusty in nature. Insofar as Issue No.5 is concerned learned Counsel contended that it was obligatory upon the plaintiff to call witness from defendant No.2 to prove this Issue in its favour but the plaintiff has failed to do so. Insofar as Issue No.6 is concerned, learned Counsel submitted that defendant No.1 was not supposed to comply with any such condition. In respect of Issue No.7, learned Counsel has contended that no breach was committed by defendant No.1 as defendant No.1 in part performance of the Agreement initially delivered 51 Auto Rickshaws, and thereafter made payment of Rs.5 Million through different post-dated cheques and it is only when it came to the knowledge of defendant No.1

that the machinery is not functional, whereas, the plaintiff has failed to perform his part of the Agreement, these two post-dated cheques were stopped and the Excise Department was approached for refusing registration. Insofar as Issue No.8 is concerned, learned Counsel has contended that this Issue was required to be proved by plaintiff as it has been categorically stated in the written statement that the machinery supplied is old, rusty and worn out, therefore, this Issue is to be answered in favour of defendant No.1. Learned Counsel has further contended that once the defendant No.1 had specifically denied the averments of the plaintiff and no proper cross-examination was made in respect the defendant's denial through affidavit-in-evidence, it would impliedly mean that all such assertions of defendant No.1 stands proved. In support of his contention learned Counsel has relied upon the case reported as *2000 CLC 1243 (AMANAT ALI and 2 others versus ANZIR AHMAD)*, *PLD 1994 Lahore 452 (SARDAR BAKHSH versus Mst. MAQSOOD BIBI)*, *PLD 1973 SC 17 (NOOR DIN versus The CHAIRMAN, MIANI SAHIB GRAVEYARD COMMITTEE, LAHORE)*.

7. I have heard both the learned Counsel and perused the record as well as evidence led on behalf of the parties. My findings Issue-wise are as under:-

Issue No.1:	Negative
Issue No.2:	Affirmative
Issue No.3 & 4:	Affirmative
Issue No.5:	Affirmative
Issue No.6:	No answer required
Issue No.7:	Answered accordingly
Issue No.8:	Negative
Issue No.9:	Negative
Issue No.10:	Suit Decreed

**ISSUE NO.1:**

8. Insofar as the jurisdiction of this Court is concerned though an objection has been raised on behalf of defendant No.1 in this regard,

however, nothing has been led in the evidence nor any convincing arguments has been advanced to substantiate such objection. It appears to be an admitted position that the Agreement in question was signed and executed at Karachi; the machinery was delivered at Karachi; the cheques were issued and presented at Karachi, and it is only for the reason that machinery was required to be installed at Mirpur Azad Kashmir by defendant No.1, such objection has been raised. In the circumstances, I am of the view that defendant No.1 has failed to prove the issue that this Court lacks jurisdiction. Therefore Issue No.1 is answered in negative by holding that this Court has jurisdiction.

**ISSUE NO.2:**

9. Insofar as this Issue is concerned, the plaintiff in support of its contention has exhibited the inspection report carried by the Technical Team of defendant No.2 through which it reflects that such Team on its visit on 19<sup>th</sup> & 20<sup>th</sup> August, 2002, visited various factories of motorcycle manufacturers, including the factory of plaintiff-company namely National Corporation Karachi, and Audit Report dated 20.08.2002 has been issued. Such report clearly reflects that insofar as the verification of the facility for Assembling, Painting and Testing is concerned, the plaintiff had adequate facilities except painting facility for which it has stated that it needs improvement. It has been further stated in the Report that verification of Vendors 100% orders have been placed for verification, which will be done after one year. This document has been signed by the five members of Audit Team, whereas, both these documents have exhibited as Ex.P/2 and P/3 and defendant No.1 has not been able to dislodge or shake the evidence led on behalf of the plaintiff in this regard. In view of such position this Issue is answered in the affirmative.

**ISSUE NO.3 & 4:**

10. Since both these Issues are interlinked, therefore, they are answered together. Insofar as these two Issues are concerned, it has come on record through evidence of defendant No.1 that they had received machinery in boxes and had installed the same at their Factory. It would be relevant to refer to the cross-examination of defendant No.1's witness namely Raja Habib-ur-Rehman, D.W-1, (Ex.D), who while replying has stated that *"We came to know for the first time that the equipments were defective, rusty, not genuine and that they were purchased from Shershah when*

*we opened the boxes. After opening the boxes we had installed the same at our factory. The machinery is still installed but not working due to stay order passed by the Hon'ble High Court of Sindh in this case. After installation of equipment we wrote a letter to the Engineering Development Board requesting therein to inspect factory. Such inspection was to be carried out for the purpose of approval of license. I am shown Ex.P/5 & Ex.P/22 and I do admit these documents".* This piece of evidence led on behalf of defendant No.1 clearly establishes that insofar as delivery of the machinery is concerned the same was received by defendant No.1 and installed at his factory. The question whether or not it was working or was old and worn out is a separate and independent Issue, for which no evidence has been led on behalf of defendant No.1. There is no inspection report in respect of machinery either by any private Surveyor or by Engineering Development Board to that effect. Moreover, once it is admitted that the machinery has been installed then the question of its being worn out, old and rusty is not relevant. If on opening of the boxes, the same was not in working condition, then it was incumbent upon defendant No.1 not to install the same and lodge a claim accordingly. This admittedly has not been done. In the circumstances, objection as to machinery being old, rusty and worn out, is not substantiated. In fact there is no specific issue framed in this regard. However, even otherwise no evidence has been led on behalf of defendant No.1 to this effect. Insofar as delivery of the items detailed in the Agreement in question is concerned, it is in fact admitted by the plaintiff in his cross-examination by stating that "*it is correct that I have not supplied the items mentioned being Item Nos.2,3,5 & 5 to defendant No.1*" and then he has voluntarily stated that "*the same were not given for the reason that defendant No.1 had got the cheques stopped*" and therefore, until such payments were realized, these items could not be supplied. In the circumstances, Issues No.3 & 4 are answered in the affirmative

**ISSUE NO.5:**

11. Insofar as this Issue No.5 is concerned, it would be relevant to refer to Ex.P/17, which is a Letter dated 26.11.2002, written by defendant No.2 to defendant No.1, which reads as follows:-

**“Assembly-cum-Progressive Manufacturing of Rocket Motorcycle at Raja Ltd,  
Tariqabad Engg. Complex, Mirpur AJK.**

Reference your letter No.RAC/MD/EDB/2K2 dated November 19, 2002. Formal conditional approval for the Deletion Programme for “Rocket” brand Motorcycle was granted to M/s. National Corporation, Karachi, which has been withdrawn.

Now, since “Rocket” Motorcycle will be launched/assembled/ manufactured at a new premises, fresh approval would be required.”

Perusal of the aforesaid Letter clearly reflects that insofar as the conditional approval of Deletion Programme for **“Rocket”** brand Motorcycle in favour of the plaintiff is concerned, the same has been admitted by defendant No.2 and as per the request of defendant No.1, whereby, they had stated that the machinery has been purchased by them and being installed at Mirpur, Azad Kashmir, the said conditional approval was withdrawn. It is but natural that if there did not exist any conditional approval of Deletion Programme, then there is no reason for Engineering Development Board to withdraw it. It is also a matter of record that the machinery after its purchase by defendant No.1 was to be installed at Mirpur, Azad Kashmir and therefore the same being at new premises, fresh approval was required. This in fact has been admitted in the evidence by defendant No.1 that after installation of the machinery at their factory, they had approached EDB for its inspection and approval. Even otherwise this Issue has no material effect on the performance of the Agreement as after shifting of the machinery, the defendant No.1 was required to obtain a fresh approval. Such procedure was known to defendant No.1. In the circumstances, Issue No.5 is also answered in affirmative.

**ISSUE NO.6:**

12. The learned Counsel for the plaintiff did not address this issue, whereas, Counsel for defendant No.1 had stated that his client was not required to comply with any condition in respect of provisional approval dated 12.10.2002. In view of such position, this issue is not required to be answered.

**ISSUE NO.7:**

13. Insofar as Issue No.7 is concerned, it appears that in this matter initially an Irrevocable Sale Deed was entered into between the parties on 24.09.2002 and thereafter a Sale Agreement dated 12.11.2002 was signed, in which certain terms and conditions were settled. Irrevocable

Sale Deed dated 24.09.2002 very clearly stipulates that the transaction which started from the month of October, 2002, shall be concluded by the end of December, 2002 as mutually and amicably agreed and settled between the two parties on the basis of the Irrevocable Sale Deed. It appears that initially 51 Auto Rickshaws were handed over to the plaintiff amounting to Rs. 68,85,000/- and for the balance sale consideration of Rs.93,27,000/-, postdated cheques were issued, out of which two cheques each of Rs.21,63,500/- dated 25.11.2002 and 29.11.2002 were stopped by defendant No.1. In his evidence, the defendant No.1 has exhibited Letter dated 22.11.2002 i.e. Ex.D/4, addressing the plaintiff that since requisite production machinery and documents and other rights and transfer of assets including assembly, manufacturing and selling the product in its brand name "**ROCKET**" has not been honoured, therefore, necessary instructions have been issued to the Bank to stop payment of the aforesaid two cheques. It is to be noted that this was done on 22.11.2002 and straight away the cheques were stopped by directing the Bank, not to honour such cheques, whereas, there is nothing on record that prior to issuance of Ex.D/4, any other correspondence was made with the plaintiff. The irrevocable Sale Deed provides that the transaction has to be completed by the end of December, 2002, therefore, even if the plaintiff had not honoured the commitment as alleged through letter dated 22.11.2002, it was not appropriate for defendant No.1 to stop payment of the aforesaid two cheques. The stipulated period provided in the irrevocable Sale Deed had not expired, and therefore before taking such an extreme action, defendant No.1 ought to have issued a notice to the plaintiff for performing his part of the Agreement. This in fact is the first breach of the Agreement by defendant No.1 and thereafter as conceded in the evidence, the plaintiff has withheld the documents, as stated in the Agreement dated 12.11.2002. Therefore, I am of the view that it is the defendant No.1, which initially breached the material terms of the transactions embodied in Agreements/Sale Deeds dated 24.09.2002 and 09.11.2002. In the circumstances, the Issue is answered by holding that defendant No.1 has committed breach of the Agreement in question.

**ISSUE No.8:**

14. Issue No.8 is answered in negative in view of the findings already recorded in respect of Issues No.3 & 4.

**ISSUE No.9:**

15. Coming to Issue No.9, it is to be noted that after the Suit was filed by the plaintiff, the defendant No.1 through its written statement has also filed a Counter Claim. In the Counter Claim there are certain payments and other relief(s), which have been demanded by defendant No.1 from the plaintiff. However, at the very outset, I may observe that not a single document has been brought in Evidence to support such Counter Claim. In fact, it is only the defence of defendant No.1, which has come in the evidence, whereas, the defendant No.1 has substantially and materially failed to lead any evidence in support of its Counter Claim. In the circumstances, insofar as this Issue is concerned, it is answered in negative by dismissing the Counter Claim of defendant No.1.

**Issue No. 10:**

16. On 21.10.2003, while disposing of CMA Nos. 1470 & 1471 of 2003 filed on behalf of the plaintiff, this Court had restrained defendant No.1 from utilising the assembly line/machinery delivered by the plaintiff to defendant No.1 for manufacturing of ROCKET brand motorcycles, whereas, defendant No.2 (EDB) was also restrained from approving the progressive deletion program of the same. Similarly the plaintiff was directed to deposit 50% of the amount already received by him from defendant No.1, and on 19.12.2003, plaintiff had deposited an amount of Rs. 60,00,000/- with the Nazir of this Court who was directed to invest the same in a profitable scheme. Therefore, in view of hereinabove facts and circumstances of this case, the plaintiff has established its case against defendant No.1 and is entitled for Judgment and Decree in its favour. Accordingly, the Suit of the plaintiff is decreed in the following terms:-

- i. The plaintiff is entitled for payment of balance sale consideration of Rs.43,27,000/- along with mark-up as prescribed by the State Bank of Pakistan during such period from the date of filing of the Suit till realization. However, this is subject to supplying / fulfilment of conditions / clauses 2, 3, 4 & 5 of Sale Agreement dated 12.11.2002 by the Plaintiff.
- ii. The plaintiff is further entitled for registration of 51 Auto Rickshaws and Letter dated 07.01.2003 issued by defendant No.1 to the Excise and Taxation Officer, Commercial Motor Vehicle Registration Wing, Karachi is of no legal effect and stands withdrawn.

iii The plaintiff is entitled for release of amount of Rs.60,00,000/- (Sixty Lacs) deposited with the Nazir of this Court, pursuant to Order dated 31-10-2003, including the up to date profit accrued on such deposit.

iv. The restraining order against defendant No.1 and 2 passed on 31.10.2003 is hereby vacated / recalled.

Dated: 28.06.2016

Judge