IN THE HIGH COURT OF SINDH, KARACHI

1. Suit No.1052 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

2. Suit No.1053 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

3. Suit No.1054 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

4. Suit No.1055 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

5. Suit No.1056 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

6. Suit No.1057 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

7. Suit No.1058 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

8. Suit No.1059 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

9. Suit No.1060 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

10. Suit No.1061 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

11. Suit No.1062 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Haji Khuda Bux Amir Umar (Pvt) Ltd.

12. Suit No.1066 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

13. Suit No.1067 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

14. Suit No.1068 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

15. Suit No.1069 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

16. Suit No.1070 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

17. Suit No.1071 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

18. Suit No.1072 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Dada Sons (Pvt) Ltd.

19. Suit No.1073 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Star Cotton Corporation (Pvt) Ltd.

20. Suit No.1075 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Star Cotton Corporation (Pvt) Ltd.

21. Suit No.1076 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Star Cotton Corporation (Pvt) Ltd.

22. Suit No.1077 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Star Cotton Corporation (Pvt) Ltd.

23. Suit No.1078 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Muhammad Amin Muhammad Bashir (Pvt) Ltd.

24. Suit No.1081 of 1988
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Muhammad Amin Mohammad Bashir (Pvt) Ltd.

25. Suit No.270 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Messrs Hakimuddin Hormusje & Sons and others

26. Suit No.271 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Messrs Hakimuddin Hormusje & Sons & others

27. Suit No.272 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Messrs Hakimuddin Hormusje & Sons & others

28. Suit No.273 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Messrs Hakimuddin Hormusje & Sons & others

29. Suit No.274 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
Messrs Hakimuddin Hormusje & Sons & others

30. Suit No.291 of 1989
Trading Corporation of Pakistan (Pvt) Ltd (TCP)
Versus
Al-Serat Cotton Ginning Pressing & Oil Mills Ahmedpur East and others.

31. Suit No.292 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
M/s. Cotrade Enterprises

32. Suit No.293 of 1989
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)
Versus
M/s. Cotrade Enterprises

33. Suit No.30 of 1990
Haji Khuda Bux Amir Umar (Pvt) Ltd.,
Versus
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)

34. Suit No.31 of 1990
Hakimuddin Hormusji and others
Versus
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)

35. Suit No.32 of 1990
Star Cotton Corporation (Pvt) Ltd.
Versus
Trading Corporation of Pakistan (Pvt) Ltd., (TCP)

For Plaintiff: Mr. Malik Muhammad Riaz, Advocate.

For Defendant Syed Afsar Ali Abidi, Advocate.

Date of hearing: 08.08.2016

Date of Judgment: 16.09.2016

JUDGMENT

Muhammad Faisal Kamal Alam J. By this common Judgment, the suits mentioned herein above are decided, as they involved identical issues framed as Court Issues by the order dated 10.02.2011. The subject action has been brought by predecessor-in-interest of present Plaintiff, viz. Cotton Export

Corporation of Pakistan (Pvt) Limited, a Private Sector Company whose shareholding was wholly owned by the Government of Pakistan.

2. Through instant proceedings, the Plaintiff is seeking a Judgment and Decree against the Defendant, inter alia, for damages. Since different suits have been filed, therefore, amount of damages also vary, together with interest at 14% per annum. The other two prayer about costs of the proceeding and discretionary relief are common in all the cases.

3. Notices of title suits were issued to Defendants, which contested the claims of Plaintiff by filing their pleadings / written statements.

4. The transaction in question involved supply of raw cotton bales to various foreign buyers. The undisputed facts are that from 1973 upto 1987 export of raw cotton was a regulated activity and during this period only Plaintiff being a wholly owned Federal Government Organization, was allowed to export it. However, in order to boost exports, under various Agreements of different dates, including the Agreement dated 27.01.1985 (Exhibit-6) **[*the main Agreement*]** different persons / entities including present Defendant were appointed as Export Agent and as the subject contracts / agreements show that two types of schemes were in vogue; under Scheme / Category-I, an export agent could act as a mere agent of Plaintiff to fetch a viable offer from a foreign buyer for supply of raw cotton (**the said goods**), which the Plaintiff used to supply from its own stock by entering into a formal contract with foreign buyer and in this transaction the export agent / Defendant used to get specified commission. Under Scheme / Category-II, an export agent was allowed to fetch an offer from a foreign buyer and supply the said goods from his / its own stock but under the name of

Plaintiff; against this transaction the Plaintiff was entitled to, inter alia, service charges. The Parties hereto have termed these two categories in their respective pleadings as SCHEME NO.1-A and SCHEME NO.I-B, respectively.

5. Dispute in all these cases pertains to the cotton crop year of 1986-1987 when various orders from different foreign buyers were received by Plaintiff through Defendant, which though were subsequently fulfilled, but became the bone of contention between Plaintiff and Defendant. As per averments of Plaintiff, the Defendant's negligent acts caused Plaintiff losses, as Defendant backed out from its commitment to supply said goods of different grade to Plaintiff for onward sale / export to various foreign buyers, whereas, main defence of Defendant is that all these export orders were required to be fulfilled and completed by Plaintiff as envisaged under Category-I, that is, from Plaintiff own stock. It was further contended on behalf of Defendant that it only acted as an export agent of Plaintiff to bring such viable offers from foreign buyers under Category-I and Plaintiff / C.E.C was exclusively responsible for fulfilling these Contracts. With regard to causing harm, injury and loss to Plaintiff, the Defendant side has argued that Plaintiff did not suffer any loss / losses and the present proceedings were initiated by erstwhile Cotton Exchange Corporation; present Trading Corporation of Pakistan with ulterior motives and in order to avoid payment of commission to Defendant for its services. It is further argued by Defendant that internal mismanagement of Plaintiff that caused national exchequer huge loses has been covered up by filing these numerous Court cases.

6. From divergent pleadings of the parties, though Issues were framed on 18.03.1990, but in supersession of earlier Issues, following were eventually agreed and adopted as Court Issues by the order dated 10.02.2011, for deciding the controversy in question_

"1). Whether there was a concluded contract under which the defendant agreed to supply cotton to the plaintiff for sale to the foreign buyer? In either event, what is effect?

2). Whether the plaintiff on defendant's commitment to supply cotton had entered into a contract with foreign purchaser. What is the effect?

3). Whether the price of cotton increased and defendant refused to tender cotton to plaintiff? What is the effect?

4). What is the legal basis on which plaintiff has claimed damages?

5). Whether any commission is payable to the defendant under the circumstances of this case?

6). Whether in the absence of "back to back contracts" executed between plaintiff and defendant, the defendant was required to supply cotton to the plaintiff?

7). Whether the defendant committed breach of contract by not tendering cotton bales to the plaintiffs for onward shipment to the foreign buyers?

8). Whether the suit has been filed for malafide purposes so as to detract attention from the losses caused by TCP's policies?

9). What should the decree be?"

7. By the order dated 02.04.2013, the following Additional Issue was also framed with regard to Suits No.30, 31 and 32 of 1990, filed by private parties / present Defendant in suit No.1052 of 1988.

ADDITIONAL ISSUE

"Whether the Suit No.30/1990, 31/1990 and 32/1990 are maintainable in view of the contract if any."

8. Since both parties have filed cases against each other, thus for the purpose of description, Trading Corporation of Pakistan (TCP) can be referred to as "**Claimant**", whereas, Export Agents who / which are Defendant in Suit No.1052 and other consolidated cases and Plaintiff in Suits No.30, 31 and 32 of 1990, be referred to as "**Objectors"**. Respective parties led the evidence by filing their consolidated affidavit-in-evidence and were subjected to cross-examination. Evidence recorded in Suits No.1052 of 1988 and 1054 of 1988 have been referred to and relied upon by both the counsel representing Claimants and Objectors.

9. Findings on the issues are as follows:

ISSUE NO.1:	In Negative.
ISSUE NO.2:	In Negative.
ISSUE NO.3:	Redundant.
ISSUE NO.4:	As under.
ISSUE NO.5.	In Negative.
ISSUE NO.6.	In Negative.
ISSUE NO.7.	As under.
ISSUE NO.8	Redundant
ADDITIONAL ISSUE:	In Negative.
ISSUE NO.9.	Suit dismissed.

10. At this juncture, it would be pertinent to mention that after conclusion of arguments, the learned counsel for the Claimant has filed an interlocutory application (CMA No.4438 of 2016) through which he has sought to bring on record certain documents, which as per his plea, should be read as part of the evidence. This application was vehemently opposed by Objector. The documents, which Claimant intends to bring on record are _

i) General Power of Attorney dated 10.04.1988 in favour of Mr. Fasihuddinson son of (late) Waziruddin, the General Secretary of Plaintiff, contained authority, inter alia, to file legal proceedings.

ii) Resolution dated 11.11.2003 from the Board of Plaintiff Company empowering Mr. Mehboob Akhtar, who appeared as PW-1, inter alia, to give evidence.

iii) A Performa / Draft Agreement with the heading "type purchase contract crop 1984-85 (Export out of Agent's own stock), which in fact is the draft of back to back agreement, which was to be signed between Plaintiff and its export agent in pursuance of transaction falling within Category-I, as mentioned hereinabove.

iv) Different International Bulletins of period 1986-87 in which price of cotton prevalent at that time is mentioned.

11. It is also a matter of record that evidence in all these cases was concluded many years back and the case law relied upon by learned counsel for the Claimant is not at all applicable to the present cases. Gist of case law is that Courts have allowed filing of additional documents while the matter was still at the evidence stage. So much so, in one of the reported decision relied upon by the Claimant's counsel, viz. 2005 CLC Page-1305 (Messrs Trading Corporation of Pakistan Versus Messrs Rahat and Co.,) this Hon'ble Court has observed that if an application of the nature is made prior to recording of the evidence then it would not be treated as an application at a belated stage. Conversely, in instant cases, the Claimant has filed this application many years after conclusion of evidence, which is not acceptable. More so, no one should be allowed to take undue advantage of Procedural Law (Civil Procedure Code), which can result in delaying the matter instead of deciding it expeditiously; this tantamounts to abuse of process of Court. No good cause has been shown by learned counsel for Plaintiff for not producing the above listed documents earlier either with their

pleadings or during evidence, particularly when admittedly all the above listed documents were always in the possession and custody of Claimant. Taking a lenient view, I am not dismissing this application with cost, as the counsel for parties have already concluded their final arguments in these cases. Accordingly, the above mentioned application under Order XIII Rule 2 of CPC, is hereby dismissed being meritless.

ISSUES NO.1, 6 AND 7.

12. Mr. Malik Muhammad Riaz, the learned counsel representing the Claimants has strenuously argued that Exhibits-7, 8 and 9, which are the Letter of Export Sale Confirmation, Export Sale Contract and Sales Confirmation Slip, all of same date; 20.09.1986 (in Suit No.1054 of 1988) are the tripartite concluded contracts between Claimants, Objectors and respective foreign buyers. The above mentioned documents collectively be referred to as "foreign contracts". The learned counsel has referred some of the Clauses of the foreign contracts, in particular Clause-21 of Letter of Export Sales Confirmation, in support of his arguments. This Clause-21 says that arrangement of the said goods would be from Objectors own stock. He further submitted that in terms of the above undisputed documentary evidence, Objectors were under a contractual obligation that the said goods were to be exported from Objector's own stock. It was further argued by learned counsel representing the Claimants that in the presence of the above mentioned documents / foreign contracts there was no requirement of back to back contracts as pleaded by Objectors. Mr. Malik Muhammad Riaz, learned counsel has cited a good number of reported decisions (mentioned herein under) to augment his arguments that the Objector committed breach of contract, which has caused enormous losses to Claimants:

i. PLD 1981 Karachi Page-170

ii. 2011 AC Page-169

iii. AIR (3) 1944 Nagpur Page-124

iv. AIR (29) 1942 Page-33

v. PLD 1977 Karachi Page-48

vi. AIR 1958 Karachi Page-195

vii. 1991 CLC Karachi Page-1844

viii. 1998 MLD Lahore Page-595

ix. PLD 1960 (W.P) Karachi Page-346

x. PLD 1958 (W.P.) Lahore Page-63

xi. AIR 1979 sc Page-621

xii. 1992 CLC Lahore Page-2344

xiii. 1994 SCMR Page-2189

xiv. PLD 1958 Privy Council Page-61

xv. PLD 1979 Karachi Page-95

xvi. 1985 PSC Page-800

xvii. 1999 MLD Karachi Page-2750

xviii. 1999 CLC Karachi Page-483

xix. PLD 1959 (W.P) Karachi Page-472

xx. 1999 CLC Lahore Page-1522

xxi. 1982 CLC Karachi Page-495

xxii. PLD 1983 Karachi Page-63

xxiii. PLD 1967 Karachi Page-318

xxiv. AIR 1964 Patna Page-250

xxv. AIR 1928 Privy Council Page-200

xxvi. PLD 1973 SC Page-311

13. On the other hand, Mr. S. Afsar Ali Abidi, representing the Objectors / Export agent in all suits has vehemently argued that since the said goods were to be supplied from Objector's stocks, therefore, a back to back agreement was necessary. The crux of his defence is that in absence of a back to back agreement in which important terms were to be mentioned, including the price on which the Claimants were required to purchase the said goods from Objector, for its onward export to foreign buyers / in the International Market, no concluded contract came into existence. To a query, learned counsel of Objectors replied that though the foreign contracts, which are being termed as concluded contracts by Claimants, were entered into by Objectors, but, it was the initial stage / one part of the entire contractual transaction and since the basic component, that is, back to back agreements were never signed, therefore, contract between Objectors (Defendants/Export agent) and Plaintiff (Trading Corporation of Pakistan) could not materialize and since there was no privity of contract between Objectors and Claimant, therefore, question of breach of contractual obligation on the part of Objectors did not arise at all. In support of his arguments, the learned counsel has cited following reported decisions_

i. PLD 1968 Lahore Page-1419

ii. PLD 1982 Karachi Page-76

iii. 1996 CLC Page-117

iv. 2002 CLD 218

v. PLD 2005 Lahore Page-419

14. With the assistance of learned counsel for the Parties, record of the cases have been examined. Evidence has been minutely evaluated. In the opening part of his cross-examination PW-1-Mehboob Akhtar, who was

the then Deputy General Manager of Claimant, admitted the fact that no resolution of the Board of Director or any other authority was filed. However, the said PW-1 states that he has been duty authorized to depose on behalf of the Claimant Company, but the fact remained that the said PW-1 did not produce any document either in the shape of Board Resolution or the Articles of Association (of Claimant), which can confirm the fact that PW-1 was duly authorized to give the evidence. However, legal effect of this factual aspect will be dealt in later part of this Judgment. The said PW-1 was extensively cross-examined on the factum that whether the contract between the parties hereto was concluded or not. Even otherwise, this is the core issue going to the very root of the case. It would be useful to reproduce herein below the relevant portions of the deposition of PW-1:

> *"The offer procured by defendant through Ex 7 was accepted by CEC. The CEC communicated the acceptance of the offer to the Export Agent. The contract was executed between CEC and Foreign buyers on 20.09.1986 through Export Agent. In this contract CEC is seller and foreign buyer is the buyer. It is correct that defendant is not a party to this Contract. Voluntarily says, the contract is based on Ex-7."*
>
> *"I cannot produce the Board Resolution authorizing me to give evidence on behalf of T.C.P right now, but I can produce it later on. It is incorrect to suggest that I have not been authorized by the Board to give evidence on behalf of T.C.P, but I cannot say if Fasihuddin was authorized to file suits on behalf of T.C.P. I had not dealt with these cases personally. I am giving evidence on the basis of record. In Ex. 7, entry at serial No:9 shows the price between CEC and foreign buyer in foreign currency."*
>
> *"Q: I put it to you that scheme 1-B referred to in your plaint envisages two separate Contracts one between CEC and foreign buyer and the other between CEC and local Export Agent"*
> *Ans: Yes:"*
>
> *"Q" Does the document Ex 7 disclose anywhere as to on what price the CEC would purchase Cotton from the defendants?*
>
> *Ans: No, it does not. Voluntarily says, it was already settled as minimum support price as per past practice.*

Q: Can you produce any document confirming that the defendants had agreed to supply Cotton to CEC at minimum support price?

Ans: No it was already settled as per past practice."

Q: Did CEC call upon the defendants between 20.9.1986 till 4.11.1986 to come forward and execute formal back to back contract and supply the cotton accordingly?

Ans: No, as there was no need of it because of Ex 7 and inability if Agent to supply Cotton 6 months before Shipment period, as per Ex 12."

"We did not call upon the defendants between 4.11.1986 to April/May 1987, the shipping period, for executing back to back contract and supply the cotton. Voluntarily says the defendants vide Exh 12 categorically expressed their inability to supply cotton."

15. Documents produced, exhibited and relied upon by respective parties are not disputed, except the photocopies of Debit Notes, which were produced in the evidence by one of the Objectors-Star Cotton Corporation (Pvt) Ltd., the Plaintiff of Suit No.32 of 1990. The authenticity of these Debit Notes, which are Bills for Commission, has been seriously questioned by Claimant, particularly in their Reply of 28.01.2008 (Exhibit-108), written in response to the Notice dated 25.01.2008 (Exhibit-107) under Order XII, Rule 8 of CPC, sent on behalf of Objector. Exhibit-6-the main Agreement regulates the relationship between parties hereto (Claimant and Objectors) and as already mentioned hereinabove that this Agreement envisages two categories of transactions. Although this main Agreement (Exhibit-6) does not specifically mentions that whenever the said goods were to be exported from Objector / Defendant's own stock, then the Claimant (Plaintiff) and Defendant (Objector) ought to have entered into a back to back contract, but in paragraph-5 of its pleadings and also in their Affidavit-in-Evidence it has been acknowledged by Plaintiff (Claimant-TCP) that when the said goods were to be exported from the stock of Objector / Export Agent, for which it had to purchase cotton directly from open market and subsequently

tendered it to the Claimant (TCP), then this type of sale transaction was to be done through and was covered under a back to back contract between the parties, inter alia, for receiving payments from Claimant in respect of the price, business procurement commission, export expenses, etc. The afore referred foreign contracts relating to the transactions in question also confirm that initially contracts for export of said goods to different foreign buyers were to be executed through present Defendant (Objector), as Clause-21 of Letter of Export Sales Confirmation [dated 20.09.1986-Exhibit-7] clearly mentions that said goods were to be supplied from agents (Objectors) own stock, whereas, over leaf (on the back page) under Clause-17 it is mentioned that shipment is to be handled by the present Defendant / Objector. Similarly another document Exhibit-8, which is a contract dated 20.09.1986 between Plaintiff and one of the foreign buyers in Switzerland, it is mentioned that the selling agent for such cotton consignment is the present Defendant (Objector). Sale price has been mentioned as 34.00 US Cents FOB (Free on Board), the Commission Column of this contract did not contain any figure but mentions “nil”.

16. In other connected suits more or less same factual position exists with the exception of date of foreign contract, foreign buyers, sale price and quantity of the said goods.

17. It is also not disputed that shipment period for all these goods / consignments in different connected suits was between November / December 1986 to May, 1987. However, by its correspondence of 04.11.1986 (Exh-6/1), the Objector showed its inability to continue with these foreign contracts on account of increase in cotton price in local market and requested Claimant to take over contracts in question. A list of these foreign contracts has been mentioned in

the above correspondence, which are subject matter of various connected suits. Thereafter nothing was heard from either party. After a silence of 15 (fifteen) months, legal notices of same date, that is, 27.02.1988 but with different claims were sent to all these Objectors. One such legal notice (Exhibit-16) was served upon present Defendant (Objector) on behalf of Plaintiff (Claimant), calling upon the former, inter alia, to pay a sum of Rs.9,161,250.00/- (Rupees Ninety One Lac Sixty One Thousand Two Hundred Fifty Only) towards losses/damages, which the Claimant allegedly suffered on account of breach of obligations by Objector, vis-à-vis contracts for sale and supply of cotton bales (said goods) to foreign buyers under the foreign contracts. The Objector (Defendant) responded by their letter dated 12.03.1988 (Exh: 5/7) and while denying claim of Plaintiff, has categorically mentioned that all these transactions in question was a past and closed matter. In its above Reply (of 12.03.1988), the Objector (Defendant) admittedly has not mentioned any amount, which they now claim as their commission from Claimant / Plaintiff and for which these Objectors have filed separate Suits No.30, 31 and 32 of 1990.

18. From the pleadings of the parties and on the basis of testimony of witnesses a conclusion can be drawn that Defendant (Objectors) in effect handed over the foreign contracts to Claimant rather surrendered these International Contracts to Claimants, which were accepted by the latter (Claimants) for the reasons that the latter (Claimant) itself exported consignment of cotton bales (said goods) to various foreign buyers under different foreign contracts, which are subject matters of present consolidated suits; (**ii**) and Claimant (TCP) did not raise any objection by addressing any correspondence in response to the above **letter** of 04.11.1986 (Exh: 6/1), which for the sake of reference be referred to as **withdrawal letter**; (**iii**) the only correspondence after the above withdrawal

letter from Claimant (Plaintiff's) side was the above referred legal notice dated 27.07.1988 (Exhibit-16), that is, after almost fifteen months. Consequently through their conduct, the Claimant has actually acquiesced to the above withdrawal letter of Defendant by acting upon it accordingly, as discussed hereinabove. From a minute examination of the case record, which obviously includes pleadings and evidence of respective parties, it is apparent that the present controversy had two stages; stage one was when initially by virtue of Exhibits-7, 8 and 9-the foreign contracts for the export of said goods to foreign buyers were entered into between Claimants (TCP) and Objectors; and the second or stage two of the present controversy is post withdrawal letter of 04.11.1986 when the Objectors (Export Agents) of these connected suits surrendered or transferred all these foreign contracts to Claimant (TCP). What actually has happened that on account of increase in cotton price in the local market, the Defendant on commercial consideration withdrew from the foreign contracts and handed over all such contracts to Claimant for its direct sale to different foreign buyers, to which the Claimant acquiesced. The plea taken by Objector as its defence for not supplying the cotton to foreign buyers from the Objector's own stock, stands proven after consideration of the evidence of the parties and in view of the discussion contained in preceding paragraphs. Thus, Section-63 of the Contract Act (1872) is applicable to the present nature of dispute; it would be advantageous to reproduce herein under the above provision_

> **"63. Promisee may dispense with or remit performance of promise**.—Every promisee may dispense with or remits wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees, A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees, C pays to B 1,000 rupees, and B accepts them in satisfaction of his claim on A. This payment is discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.**"**

19. With their written arguments, Claimant's side enclosed number of documents, which were filed by them with their above listed application, one of which is Annexure No.3-the Export Sales Procedure, which has been mentioned at Serial No.3 in the Index of written arguments of Claimant (TCP). Paragraph-7 of this Export Sales Procedure Document (Booklet) explains the mechanism about Export Sales of Goods through Local Export Agent, in the instant case, the present Defendant/Objector. It would be advantageous to reproduce herein under the Scheme No.I as mentioned in this document, at its page-3;

"SCHEME NO.1.

(a) Under this scheme, export agents function on commission basis for negotiating business with foreign buyers. Terms of sale including prices are cleared by CEC beforehand. The sale is made on behalf of CEC and the execution of the contract is the responsibility of CEC. Cotton is supplied from CEC's stocks.

(b) Under a variation of the above scheme, export agents can supply cotton from stocks purchased by them directly from the open market. In this case, the agents purchase cotton from the open market, tender it to CEC under a Back to Back contract and receive payment at the price at which CEC buys the relevant quality / variety from the ginning factories. Actual shipment is handled by the Export Agents.

In addition to the purchase price, CEC pays to the Export Agents: -

(i) Business Procurement Commission.

(ii) Export expenses (FOB Charges) and up-country expenses for delivery at Karachi.

(iii) Commission for guaranteeing quality and weight upto destination (to cover possible claims from buyers). In case of weight, the agents have the option to assume or not to assume the risk upto destination.**" (Underling of sub-clause (b) of Scheme-I as reproduced hereinabove is done for emphasis).**

20. Even with their CMA No.4438 of 2016 (ibid), a sample draft of this Back to Back Agreement is enclosed, description whereof is mentioned at 'Serial (iii)' (supra) of Paragraph-10.

21. On the contrary, the above documents, including Export Sales Procedure advance the case of Objectors, that if the exports were to be made from the stock of Objector then further codal requirements had to be fulfilled by the parties hereto (Claimant and Objector), who were required to sign a back to back agreement, wherein, terms of the transaction had to be penned down. This back to back agreement along with other terms and conditions as explained in the above mentioned documents (Export Sales Procedure) of Claimant as well as mentioned in its pleadings and affidavit in evidence was a pre-condition for bringing subject foreign contracts under Scheme I-B. This stance of Objector is further fortified by examining the letter of Export Sales Confirmation dated 02.09.1986, which has been produced and exhibited (P-5/2) in the evidence of

Suit No.1078 of 1988. The Objector / Export agent in this document-Exhibit P-5/2 is Muhammad Amin and Muhammad Bashir (Pvt) Ltd. On Page-2 of this document against Clause-20, it has been specifically mentioned that the Objector / Export agent will tender goods against back to back contract. In their consolidated Affidavit-in-Evidence, Objector's side has taken a specific stance that since no back to back agreement was signed between Claimant and Objector, therefore, the contract between Claimant and Objector with regard to export of the said goods to foreign buyers was never concluded, therefore, Objector never committed any breach of contractual obligation, consequently Claimant is not entitled for any damages. This stance / plea of Objector could not be shaken in the evidence by Claimant. Even in few connected suits, the witness of Objector-(DW-1) was not cross-examined on this material part of his testimony, which goes to the very root of the case. It is a settled rule of evidence that if a witness is not cross-examined on a material part of his deposition then inference can be drawn that the truth of that part of evidence has been accepted. Guidance can be taken from a Judgment of our Hon'ble Supreme Court reported in 1991 SCMR Page-2300 (*Nur Jehan Begum Versus Mujtaba Ali Naqvi*). It is now a proven fact that this condition precedent was never fulfilled as no back to back contract was signed between Claimant (Plaintiff) and Objectors (Defendants), hence, stage two of the subject transactions was never given effect to. Had it been so, then Objectors would have been saddled with a contractual obligation. In other words, no concluded contract had materialized (came into being). In these peculiar circumstances, the intention of the parties (Claimant and Objector) can be determined that while various foreign contracts were entered into, as mentioned hereinabove, but in the intervening period, due to withdrawal letter from Objectors side, all the transactions in question had in fact became the

responsibility of Claimants. Not only this, the Claimant exported the said goods to various foreign buyers in consideration of sale price, of which the Claimant (TCP) was the sole beneficiary. All these foreign contracts for export of said goods were time bound like any other sale of goods transaction and it does not appeal to a prudent mind that even if the Defendant (Objector) had committed breach of contract by addressing the above mentioned withdrawal letter (of 04.11.1986), then why the Claimant/Plaintiff did not raise any objection by immediately responding to the above said withdrawal letter. On the contrary, the Claimant-TCP acted upon the request of Objector as mentioned in the above withdrawal letter by supplying / exporting the said goods to foreign buyers. It means that Claimant through its conduct accepted the request for transfer of foreign contracts and released the Objector from its initial commitment, which earlier had come into existence in the form of foreign contracts.

22. The above deliberation conclude in deciding the Issue No.1 in Negative and against the Plaintiff, that is, that no concluded contract came into existence between the Plaintiff (Claimant) and Defendants (Objectors). Therefore, Issue No.6 is also answered in Negative and against the Plaintiff and I hold that the Defendant in the absence of back to back contract was not required to supply / tender cotton bales to Plaintiff/Claimant.

23. In view of the above discussion, Issue No.7 is answered accordingly by determining that Objectors did not commit breach of contract as no back to back contract was concluded between Claimant and Objector, therefore, the latter (Defendant) was not under an obligation to tender the cotton bales to Claimant from the stock of Objector for onwards shipment to the foreign buyers. In my considered opinion a well-known case reported in PLD 1975 Supreme Court Page 193 (*Karachi Gas Company Versus Dawood Cotton Mills*), wherein the

rule laid down while interpreting Section 63 of the Contract Act, 1879, squarely applies to the facts of the present case. In this reported Judgment, the Hon'ble Supreme Court has also provided guidance that while interpreting a commercial contract between parties, their respective experience in the business and the business efficacy in that context must also be considered.

ISSUES NO.2, 3 AND 4.

24. The main agreement-Exhibit-6 between the Parties hereto reserves discretionary powers to exchange, reject, export / sale to the Claimant. Similarly various foreign contracts, which have been exhibited in all these consolidated suits have variable price structure and it has been acknowledged by PW-1 in his evidence that price settled between Claimant and foreign buyers were on the basis of prevailing prices in the international market on the date of contract. Relevant portion of the deposition of PW-1 is reproduced herein under_

> **"***The price settled between CEC and foreign buyers was settled on the basis of prices prevailing on the date of contract in the International Market."*

25. In view of the finding that no concluded contract came into existence and Claimant supplied / exported the goods on its own, therefore, Issues No.2 is answered in Negative, whereas, Issue No.3 became irrelevant/redundant.

26. The claim of damages is mentioned in Paragraphs 11 to 14 of the Plaint and basis of claiming damages is Clause-20 of the main Agreement (Exhibit-6) between Claimant and Objector and price difference on which Claimant supplied the said goods to foreign buyers, purportedly, in order to save its business goodwill in the international market, because, as per the Claimants' claim, at the time when the goods were exported / supplied to foreign buyers in various

countries, raw cotton price increased in the international market, therefore, the Claimant would have availed that opportunity of price increase by exporting cotton bales to other foreign buyers had Objector was not negligent in supplying the goods from its own stock. As according to Claimant, due to breach committed by Objector, the cotton stock of Claimant was consumed in fulfilling commitments under the subject foreign contracts, which in fact was the obligation of Objectors.

27. If the stance of Claimant with regard to damages is evaluated in the light of evidence adduced by its witnesses, the conclusion would not be in favour of Claimant for the reasons that:

i) The Plaintiff invoked clause-20 of the Main Agreement (Exhibit-6) that relates to indemnifying the Plaintiff from all losses or damages it may suffer in the event of failure / default of foreign buyers. In the evidence, it has been clearly established that all the contracts for the sale of goods to foreign buyers were completed successfully without any default. Therefore, in these circumstances, the Defendant being export agent is not liable to indemnify the Plaintiff, as none of the factors which can attract the applicability of this clause-20 are present in all these consolidated suits / cases.

ii) The second basis for claim of damages is the price difference as averred by Plaintiff. However, in its evidence, neither any documentary record is produced nor any other mode of evidence was led to prove that prices of the said goods increased in the International Market, when the Claimant had sold / exported the said goods at a lower price in order to salvage its business goodwill in the International Market, as averred by it. On the contrary, P.W.-1 in its deposition has stated that the said goods were sold / exported to various foreign buyers at an agreed price. In addition to this, if different export sales documents (foreign contracts) are examined, they confirm the fact that the Plaintiff exported the said goods at different prices ranging from US Cent twenty four per pound to even US Cent

thirty four per pound, therefore, documentary evidence of Plaintiff itself contradicts its claim that the said goods had to be exported at a reduced price of twenty four US Cent per pound, only.

28. Since admittedly all these export transactions in question were to be regulated under Liverpool Rules as mentioned in Clause-12 of various Export Sale Contracts / foreign contracts (Exhibited and mentioned herein above), therefore, the price prevailing in the International Market had to be proved as a question of fact and the onus was on Claimant to prove such fact, inter alia, by producing at least relevant Pages of some well recognized International Bulletin, but no evidence produced by Claimants with regard to their plea about losses suffered due to increase in price in the International Market. However, the Claimant attempted to overcome this shortcoming in their evidence by filing relevant pages (from a Magazine Cotton Outlook) with their present written arguments and assigned Page Nos. 13 to 21 by Plaintiff's (TCP) side. Although, these documents cannot be considered as part of evidence at this stage, but even for the arguments sake, if are perused, it shows that the price mentioned in this Cotton Outlook Magazine, as prevalent at that time (November 1986), is based on Cost, Insurance and Freight, whereas admittedly all the export transactions in question of the said goods were based on FOB; Free On Board. In this Magazine, prices of raw cotton (1986/87 Crop) were quoted as 42 US Cent per pound to 44 US Cent per pound for the November, 1986, but as mentioned earlier that the basis of these prices was CIF. There is a marked difference between FOB and CIF contracts, as in CIF transaction, the seller (in the instant case the Claimant), had to pay for marine insurance coverage as well as costs of the freight and would be exposed to the risk of price fluctuation of these costs, whereas, in FOB Contract, the buyer has to pay the costs of carriage and insurance of the goods and thus has to bear the risk of any changing in these costs. Therefore, even these

documents relating to price structure of said goods on CIF basis do not prove the stance of Claimant. Therefore, even this document-Cotton Outlook, cannot lend any support to Plaintiff's case for its claim for damages, *inter alia*, as there was hardly any difference of price fluctuation which in fact had caused losses to Plaintiff/Claimant, in order to justify its claim for awarding damages. A guidance can be taken from a reported Judgment of the Hon'ble Supreme Court handed down in Syed Saeed Kirmani Versus Muslim Commercial Bank (MCB)-1993 SCMR Page-441; the principle laid down is squarely applicable to the present case, that a claim of damages suffered due to breach of contract must establish the contract, (**underlining for emphasis**), the breach thereof and the extent of damages. It has already been decided in the preceding paragraphs that no concluded agreement that can be enforceable, came into existence between Claimant and Objector, consequently, there was no breach committed by Objector. The reported decision relied upon by Claimants would only be relevant if there was a concluded contract came into existence between Claimants and Objectors coupled with contractual obligation. Therefore, these Judgments which relate to Section 73 of the Contract Act (1872) are clearly distinguishable and do not apply to the facts and point of law involved and evolved in the present case. Same is the case with the case law relied upon by Objectors, except a reported decision of this Court-2002 CLD Page-218, wherein, the concept of *consensus ad idem* has been explained vis-à-vis the concluded contracts. With regard to price difference / fluctuation plea, the Claimant could not discharge its onus of proof about this very fact. Consequently, Issue No.4 is answered accordingly by holding that there is no legal basis for claiming damages against Defendants/Objectors.

ISSUE NO.5 AND ADDITIONAL ISSUE:

29. Objector has claimed commission from Claimant on the plea that due to efforts and expertise of Defendant (Objector), the Claimant had earned handsome amount of foreign exchange from the transactions in question. For this reason, Defendants, being export agents of Claimant, have also instituted separate proceedings by filing Suits No.30, 31 and 32 of 1990 (hereinafter referred to as "**Year 1990 Suits**"), which were consolidated with instant suits. Objector (Export agents) have not led convincing evidence to prove their stance about entitlement of commission. If there was any such thing then Objectors would have pursued and agitated their claim of commission, specially after completion of foreign contracts of said goods and upon receiving of sale proceeds by Claimant (TCP). Secondly, there is an irrefutable evidence that in response to the afore-referred legal notice dated 27.02.1988 (Exhibit-16) of Claimant, Objector in their missive of 12.03.1988 (Exhibit 5/7), has clearly mentioned, rather acknowledged that all the subject transactions were past and closed matters. The Objectors would have conveniently mentioned their claim of commission payable by Claimant (TCP) in the above response of 12.03.1988, but they did not. Thirdly, Objectors have opted to file their Suits No.30, 31 and 32 of 1990 almost after two and a half years of subject transactions as a counter blast to the cases filed by Claimant (TCP). The Objectors could not prove their Debit Note/Bill for commission in terms of Article-76 of the Qanoon-e-Shahadat Order, 1984, inter alia, relating to secondary evidence. There is another reason that claims of commission as mentioned in the above suits of Objectors should be refused; as already observed in the forgoing paragraphs that the present one is a peculiar sale of goods transaction, in which though the Objectors were initially involved but subsequently had surrendered all the contracts, or in other words

had transferred subject contracts to Claimant (TCP) on account of some adverse market trends, therefore, they cannot at one hand take defense that they were absolved from all contractual obligations and then on the other hand trying to get benefit from the same subject transactions by taking a plea that since all the foreign contracts in question were materialized due to their efforts, therefore, they may be paid the Commission. No one is allowed to approbate and reprobate at the same time. Acquiescence of Claimant (TCP) did not convert the nature of subject contracts from one scheme to another in such a way that Objector has become entitled for commission. Consequently, Issue No.5 is answered in Negative and against the Objector / Export agent who are Plaintiffs in Suit No.30, 31 and 32 of 1990 and in favour of present Claimant (TCP). Accordingly, Additional Issue is also answered in Negative and accordingly the Suits No.30, 31 and 32 of 1990 are dismissed.

ISSUES NO.8 AND 9:

30. Issue No.8 is irrelevant for deciding the present controversy, hence, it is redundant. Adverting to the Issue No.9, it is necessary that first part of the evidence of P.W.-1 is taken into account, wherein he has acknowledged the fact that no board resolution was passed nor the same has been filed which can confirm that all these suits were duly instituted on behalf of Cotton Exchange Corporation (the Predecessor-in-Interest) of TCP-present Plaintiff (Claimant). In their written arguments the learned counsel for the Plaintiff has attempted to fill up this lacuna by placing on record a Resolution of the Board of Directors of TCP dated 11.11.2003, which is in favour of officers of Plaintiff including P.W.-1, by authorizing them, *inter alia,* for initiating legal proceeding and to adduce evidence. Fact of the matter is that no Board Resolution has been filed or

produced by Plaintiff's side at the time of filing of all these consolidated suits or in the evidence to show and prove that persons / officers who had instituted / filed these consolidates suits were duly authorized and competent for initiating instant proceedings. As an alternative, the Articles of Association were also not produced in order to refute the plea of Objector and to demonstrate that all the suits on behalf of Claimant (TCP) were duly filed by an authorized and a competent person. On this very point of law there are number of reported decisions starting from the famous Australasia case; PLD 1966 Supreme Court 684 (***Messrs Muhammad Siddiq Muhammad Umar and another Versus The Australasia Bank Ltd.,***) and (***PLD 1971 Supreme Court Page-550 (Khan Iftikhar Hussain Khan of Mamdot Versus Messrs Ghulam Nabi Corporation Ltd.***), [***Mamdot Case***].

31. The Hon'ble Supreme Court in the Mamdot case has discussed in detail while laying down the law that whether the suit was competently filed by Khursheed Mehmood who claimed to be the Director Incharge of the Respondent's Company (of the above case) against the Appellant-Khan Iftikhar Hussain Khan of Mamdot. The Hon'ble Apex Court has even considered the fact that whether the Board Meeting in which the said Resolution was passed was duly convened or not. After minutely examining the record of the case, it was held that the Meeting of 28th September, 1951, in which the Board Resolution stated to be passed, was not properly convened, as notice whereof was never served upon the Appellant (of the above case), who was one of the Directors of the Respondent at that time. In this regard, the Hon'ble Supreme Court has also referred the Halsbury's Laws of England, Third Edition, Volume 6, page 315, wherein the following statement of law is made : -

> *"A meeting of directors is not duly convened unless due notice has been given to all the directors, and the business put through at a meeting not duly convened is invlaid. Whether or not there was a regular board meeting is immaterial for purposes of binding the company if all the shareholders consent to what is done. It is not necessary to give notice of an adjourned meeting. If no fixed notice is required, the notice must be fair and reasonable."*

32. Ultimately it was held by the Hon'ble Supreme Court in above Mamdot case that the suit of the Respondent's Company was rightly dismissed by the learned trial Judge.

33. The scope and applicability of Order XXIX Rule 1 of CPC, was deliberated upon in a decision handed down by the learned Division Bench of this Court reported in PLD 1997 Karachi Page-62 (*Abdul Raheem Versus UBL*) [**Abdul Raheem case**]. After taking into account the entire plethora of case law on the above provision, this point of law has been summarized in paragraph-37 of the above decision, the crux of which is (**i**) an objection with regard to institution of suit can be raised either in the pleadings, or, where an additional issue is framed and evidence is led, or, can even be taken by the Court itself, and (**ii**) if the Articles of Association empowers a Director or any other officer to institute and conduct the litigation, then the absence of Board Resolution is a curable defect, but if neither the Articles of Association contained any such authority, nor there is a valid Board Resolution, being duly passed in a properly convened Board Meeting, then defect is <u>not</u> curable and cannot be ratified subsequently. This view has been further fortified by another reported decision of this Court-2005 CLD Page-1208 [Razo (Pvt.) Limited Versus Director, Karachi City Region Employees Old Age Benefit Institution and others].

34. The Abdul Raheem Case (Supra) has taken note of a decision reported in 1987 CLC Page-367 (***Abubakar Saley Mayet Versus Abbot Laboratories***), wherein, it was held, inter alia, that if a suit is instituted by an unauthorized person then it means that the Plaint is not existent for all intents and purposes.

35. The upshot of the above discussion is that in addition to the findings given on the Court Issues, all these consolidated suits of Claimants/Plaintiffs were not instituted under a valid authorization and being filed incompetently are consequently hereby dismissed.

36. Parties are left to bear their own costs.

JUDGE

M.Javaid.P.A.