IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1090 of 1991

Sunray Corporation (Private) Limited
Versus
M/s. Total Parco Marketing Ltd

Plaintiff	:	Through M/s. Syed Shahenshah Hussain and Syed Arshad Ali, Advocates.
Defendant	:	Through Mr. Muhammad Siddique Shehzad, Advocate.
Date of hearing	:	18.08.2016
Date of Judgment	:	14.10.2016

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present action for damages has been instituted by Plaintiff in respect of his grievance, inter alia, that Defendant in breach of its contractual obligations did not purchase the minimum stipulated quantity of lubricants product from Plaintiff, which has resulted in causing losses to the latter. Following relief has been sought in the Plaint.

"The Plaintiff is therefore, prays as under:-

i) Judgment and Decree directing the defendant to pay to the plaintiff a sum of Rs.3,86,10,077/-as damages for their failure to fulfil and act upon the agreement and the package deal.

ii) Cost of the suit.

iii) Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. Notices were issued to Defendants, which contested the claim of Plaintiff.

3. Relevant background facts are that the Plaintiff was / is in the business of, inter alia, blending and selling lubricants and lube oil products and at the relevant time had associated Companies, namely, (**i**) Mehran Oils (Private) Limited, having a blending plant at Hyderabad and (**ii**) Faisalabad Lubricants (Private) Limited, wherefrom lubricants of different grades and specifications were supplied / sold to Defendant. The case of Plaintiff as averred is that the above arrangement was in place since 1979 and subsequently by an Agreement dated 01-11-1985 [**Exhibited B**], inter alia, contained a minimum volume purchase clause, that is, Defendant was required to indent and purchase from Plaintiff a minimum quantity of lubricants [90% of its requirement], in order to make the entire transaction viable for both parties. However, Defendant did not fulfil its contractual obligations and failed to indent and purchased the agreed minimum quantity of product from the Plaintiff, which compelled the latter to file a civil action in this Court in the shape of Suit No.945 of 1988, wherein, inter alia, Plaintiff had claimed damages against the Defendant for an amount of Rs.9.7 Million approximately. Subsequently, the suit was withdrawn and admittedly two new agreements of same date-16th February 1989 were executed between the parties hereto, that is, between the above named two associated companies of Plaintiff and Defendant [Caltex Oil (Pakistan) Limited, at that relevant time], where under, the above

mentioned associated companies were to blend, pack and supply lubricant products **{the subject products}** for/to Defendant in accordance with its specified grades and techniques.

4. It is also necessary to mention that at that point in time the production, blending and sale of lubricants and allied products were a regulated activity in terms of the Pakistan Petroleum (Refining Blending Marketing) Rules, 1971, and requisite permission from Ministry of Petroleum was mandatory.

5. The present controversy revolves around Exhibit "M"-the Purchase Agreement dated 12th July, 1989 between the Plaintiff and Defendant, Technical Agreement of same date between the same parties-Exhibit "O" and the said Addendum of the above two Agreements for lifting/purchase of additional quantity of lubricants product by Defendant from Plaintiff, which is available as Exhibit-**"P".**

6. The Defendant in its pleadings has denied that it short indented and under purchased and uplifted the subject products and averred that the that it was actually Plaintiff which short supplied the lubricants to Defendant, as the former [Plaintiff] was selling/supplying in the open market for higher returns. It has been categorically denied that due to correspondence dated 17.03.1991 (Exhibit-**S**), wherein, the Defendant expressed its intention to discontinue its technical assistance to Plaintiff was the main cause of refusal of extension by the Ministry of Petroleum vide their letter dated 10.04.1991 (Exhibit-"**T**"). Maintainability of the subject suit is also questioned as according to Defendant, since the Plaintiff had

withdrawn its earlier Suit No. 945 of 1988 unconditionally, hence, instant suit is barred by law.

7. It is noteworthy to mention that originally the suit proceeding was filed against Caltex Oil (Pakistan) Limited, which has now become Total Parco Marketing Limited and in this regard the defendant counsel has also filed a Certificate dated 14.09.2015 issued by the competent authority-Security and Exchange Commission of Pakistan (SECP) under his Statement dated 15.03.2016, whereafter an amended title of the Plaint was filed.

8. By consent of the learned counsel for the parties following Issues were re-casted by the order dated 26.01.2006:

"1. What is the effect of the unconditional withdrawal of suit No.945 of 1988?

2. What is the effect of two agreements dated 12.07.1989 between the plaintiff and the defendant and between Mehran Oils (Pvt.) Ltd and the defendant and whether the agreement with Mehran Oils (Pvt) Ltd. was made effective from 21.5.1989 or 12.7.1989?

3. What is the effect of change of management of Faisalabad Lubricants (Pvt.) Ltd.?

4. Whether the defendant curtailed its upliftment or whether the plaintiff failed to make adequate supplies in breach of the agreement and sold in the market directly to make higher profits?

5. Whether the drop in upliftment and letter dated 17.03.1991 amounted to breach of agreement on part of the defendant?

6. Whether the plaintiff has suffered any loss and whether the defendant is liable for the same?

7. What is the effect of the full and final settlement arrived at between the parties in August / September 1991?

8. Whether refusal by the Ministry of Petroleum to approve extension of Hyderabad Technical agreement was due to the conduct of the defendant?

9. To what relief, if any, is the plaintiff entitled?''

9. Findings on the above Issues are as under:-

ISSUE NO.1	As under.
ISSUE NO.2	As under.
ISSUE NO.3	As under.
ISSUE NO.4	As under.
ISSUE NO.5.	As under.
ISSUE NO.6	As under.
ISSUE NO.7	As under.
ISSUE NO.8	In Negative
ISSUE NO.9	Suit is decreed to the extent of Rs.1,361,198.50 (Rupees Thirteen Lac Sixty One Thousand One Hundred Ninety Eight and Fifty Paisa Only) together with mark-up at the rate of 12% from the date of institution of the suit till realization of the above amount.

ISSUE NO.1

10. It is necessary to give a finding on Issue No.1 as it relates to the question of maintainability. Mr. Muhammad Siddique Shehzad, learned counsel representing the Defendant has vehemently argued that present Suit is hit by Order II Rule 2 and Order XXIII Rule 1 (3) of Civil Procedure Code, as the earlier suit was withdrawn by the Plaintiff without seeking the permission of the Court to file a fresh one. He has referred to Exhibit-**E**, which is the application for withdrawal of earlier suit simpliciter and on the basis of which the

earlier suit was allowed to be withdrawn. It was next contended by the learned counsel for Defendant that both the above provisions are attracted in the instant case as the present and the earlier suits were between same parties and with regard to the same subject issues. To augment his arguments, the learned counsel has cited the following reported decisions: -

i. 2000 CLC Page-1524
ii. 1987 CLC Page-1020
iii. 1983 PLD Peshawar Page-100
iv. 1989 CLC Page-1625

11. It is not necessary to discuss the above reported decisions in detail, but the gist of it is that although a suit in which a preliminary decree has not been passed, can be withdrawn unconditionally under Order XXIII Rule 1 of CPC, but then the Plaintiff is subsequently precluded from instituting a fresh suit on the same cause of action, inter alia, in order to forestall the abuse of process of court.

12. The above arguments were controverted by Mr. Shahanshah Hussain, learned counsel for Plaintiff, who has been ably assisted by Syed Arshad Ali, Advocate. The learned counsel for Plaintiff has referred to the pleadings of the Defendants and particularly response of Defendant dated June 13, 1991 to the legal notice of Plaintiff, wherein, the Defendant has acknowledged the fact that the technical agreement was signed in February, 1989 and the earlier suit was withdrawn in July 1989.

13. The undisputed version of Defendant's sole witness-Mr. Ifran Ahmed (DW-1) is that during pendency of earlier Suit No.945 of 1988, the negotiations were held between Plaintiff and Defendant.

Record of the proceedings shows that during pendency of above suit, two separate Purchase Agreements and Technical Agreements dated 16.02.1989 (Exhibits-"H" and "I") were executed between parties (Plaintiff and Defendant). Subsequently, on certain directions of Ministry of Petroleum an amendment was incorporated in the said agreements and a new Purchase Agreement of 12.07.1989 and Technical Agreement of same date were entered into between one of the above named subsidiaries of Plaintiff, viz. Mehran Oils (Pvt.) Limited and Defendant. These two agreements have been produced in the evidence as Exhibit M and O. Not only this, the Exhibit-P-the Addendum Agreement of July 12, 1989 lends further supports to the arguments of Plaintiff's counsel that an altogether new relationship in the form of above agreements came into existence and after getting requisite NOC / approval from Ministry of Petroleum, Plaintiff being a prudent corporate entity decided to withdraw its above earlier suit, which admittedly was withdrawn on 18.7.1989. Though the application for withdrawal of suit (Exhibit-E, Page-137 of the Evidence file) shows that the suit was withdrawn unconditionally, but fact of the matter is that the same was withdrawn after entering into the above mentioned agreements and getting the requisite NOC / approval from Ministry of Petroleum. Undisputedly, Defendant by its covering letter dated 14-2-1989, exhibited as G, and addressed to Plaintiff had enclosed number of documents including draft technical agreement and drafts for withdrawal of court case. The other undisputed facts are that the present action is in respect of subsequent transactions between Plaintiff and Defendant, which was penned down in the shape of the above mentioned Agreements-the Purchase Agreement and

Technical Collaboration Agreement of same date (12.07.1989); Exhibit-"**M**", "**O**" and "**P**".

14. This shows that after entering into fresh agreements, the Plaintiff withdrew its earlier suit. Submissions of the learned counsel for Plaintiff has substance that the present suit is not barred by any provision of law, as it rests on a different cause of action and in respect of an altogether new agreements. Consequently, I hold that the present suit is not barred by any provision of law as argued by Defendants and in fact the earlier suit was not withdrawn unconditionally but in consideration of the new arrangement/agreements between the Parties hereto and hence, Issue No.1 is answered accordingly and the present suit is held to be maintainable.

ISSUES NO.2, 3 AND 4.

15. Admittedly followed by an out of Court amicable settlement, two separate Technical Agreements of same date, that is, 16-2-1989 were signed between Defendant and each of the above named associated Companies of Plaintiff. As already mentioned in preceding paragraphs that blending and marketing of lubricants and allied products was a regulated activity at the relevant time, therefore, these agreements were sent to Ministry of Petroleum for its approval, which vide its correspondence dated 21-5-1989 [Exhibit-**J**] accorded its approval [No objection] to renew only one Technical Collaboration Agreement between Defendant and Mehran Oils (Pvt.) Limited. However, the five year term as originally agreed in the above Technical Agreement, was reduced to only two years and both Plaintiff and Defendant were directed to amend their

relevant Clause-9 (in the Agreement). It was further mentioned in the above approval of 21.05.1989 that after this renewal no further extension will be granted to Plaintiff and it was advised to develop its own technical expertise. However, the Ministry refused to give its approval for the second Technical Agreement in respect of another sister concern of the Plaintiff, viz. Faisalabad Lubricants (Pvt.) Limited by its correspondence dated 10-08-1989 [Exhibit **P-2**]. In between the approval given to Mehran Oils Private Limited (one of the sister concerns of Plaintiff) and refusal to renew the other Technical Agreement for Faisalabad Lubricants (Pvt.) Limited, there was a gap of three months. Therefore, in the intervening period Plaintiff and Defendant have agreed that pending decision on the approval of Faisalabad Lubricants Oil, the Defendant will lift / purchase an additional quantity of the subject product from Plaintiff. Consequently, the above referred Addendum dated 12.07.1989 was signed between the above parities, whereunder, the Defendant undertook to uplift 1500 metric ton per quarter of the subject products from Plaintiff.

16. It so happened that the management of the second associated company (subsidiary) of Plaintiff, namely, Faisalabad Lubricants (Private) Limited was changed and this fact has come in evidence that after change of management of Faisalabad Lubricants (Private) Limited, in the year 1990, the Defendant had started purchasing the subject products from the said Company [(Faisalabad Lubricants (Private) Limited)] to the determent of Plaintiff's interest. The PW-1 (Syed Shabbir Ahmed) who was the then Director of Plaintiff has categorically stated on oath about this fact of purchasing lubricants from Faisalabad Lubricants (Private) Limited after it was taken over

by other influential persons. This testimony of PW-1 could not be shaken in the cross examination.

17. The other aspect of the case is that according to Plaintiff their above mentioned Agreements of 12.07.1989 for the period of two years were valid upto 11.07.1991 and the Plaintiff has calculated their claim of losses of short upliftment [short indent/purchase] of subject products on the basis of the above validity date, whereas, the stance of Defendant is that the validity period of above technical agreement was upto 21.05.1991 as the Ministry itself by its subsequent letter dated 25.10.1989 (Exhibit P-4, Page-351 of the Evidence file), has fixed the effective date of above technical agreement as 21.05.1989 and therefore, the two years period should have expired on 20.05.1989. The undisputed documentary evidence is that the Technical and Purchase Agreements both dated 12.7.1989-Exhibits-"M" and "O" (ibid) (available at Pages-225 and 251 of the evidence file) were signed by both Plaintiff and Defendant is for a period of two years in terms of its Clause-9, which were to run concurrently with each other. The above Clause-9 was duly amended under the advice of Ministry of Petroleum as contained in their above mentioned approval of 21.05.1989 (Exhibit-J) and Clauses-9 and 12 of the subject Technical Agreement clearly stipulates that the effective date of the said agreement was 12.07.1989. Similarly, the said Purchase Agreement also contained a Clause-9, mentioning the life of the said Agreement **as two years**, subject to further extension of three years if the subject Technical Agreement is renewed by the Government of Pakistan. It would be beneficial to reproduce Clause-9 of the Purchase Agreement as under: -

> ***"This agreement shall remain in force initially for a period of 2 years and shall run concurrently with the Technical Agreement between Caltex Oil (Pakistan) Limited, and the Blending Plant at Hyderabad [i.e. Mehran Oils (Private) Ltd.] as approved by the Government of Pakistan."***

However, the Ministry of Petroleum issued a subsequent letter dated 25th October, 1989 (Exhibit P-4) wherein it was mentioned that since Plaintiff started production / blending of the lubricants without submitting the amended technical agreement as advised earlier, therefore, the validity period of the afore mentioned subject Technical Agreement will take effect from 21.05.1989, that is, when the approval was accorded by the Ministry of Petroleum. The stance of Defendant has no force. No statutory provision has been relied upon by the Defendant's side to the effect that the Ministry of Petroleum had authority to even decide the validity period of an agreement, even after the same (Technical Agreement) had been duly amended as per the directions of the Ministry. Even otherwise, it is an admitted fact that once both Plaintiff and Defendant had executed the above two agreements for Purchase and Technical Collaboration, which was subsequently amended in the line of the directions given by Ministry of Petroleum in its earlier missive of 21.05.1989-Exhibit-J, (ibid) then subsequently the validity period cannot be changed by Ministry of Petroleum, as it would amount to interference in the contractual obligation of the parties. It is a settled legal principle that a contract entered into between the two parties cannot be interfered with by any third party, including the Government functionaries, unless the contract is ex facie opposed to public policy as envisaged under Section 23 of the Contract Act, 1872. In this regard, a guidance can be taken from a well known reported decision of Hon'ble Supreme Court-PLD 1991 Supreme

Court Page-368 (Commissioner of Income Tax *Versus* Siemen A.G.), wherein after a detail discussion on this point of law, it was held that, **"***Coming to the specific Islamic Rule Of interpretation as was briefly discussed in connection with another fiscal question in the case of Mian Aziz A. Shaikh a fundamental principle, is established that when two contracting parties agree to do something by a mutual valid contract or intend doing so, and it is not prohibited by Islam, a third party, like the Income Tax Department or for that matter the Court has no power to modify either the contract or with what they intended to do with it.*

The most important relevant Injunctions of the Ouran are contained amongst other in Chapter Maida Verse (1) and Chapter Alisra'a Verse (34)--- to the effect that the contracting parties are bound to fulfil their contracts. And that they would remain liable for any contraventions-- obviously both here and hereafter. There are very strong Commands and have been enforced in various legal fields. Recently a major contravention regarding the law of pre-emption was resolved by the Supreme Court and this principle was also applied -- See the case of Said Kamal Shah PLD 1986 Supreme Court 360 at 381 and 418 et seq. What was emphasized regarding prohibition against third party intervention in mutual contracts in the well-established Sunnah Injunction is that: People be left alone in their mutually agreed transactions; "so that they be blessed by Allah through free circulation of (Rizq) (wealth) amongst themselves: (Bokhari; Kitabul-BauaNo.3709; Abu Daud; Kitabul-Ajara No.3442). When parties by mutual free consent enter into a valid contract, then the third parties have no right to intervene either to frustrate the contract or to change its nature-- (Government of N.-W.F.P. v. Said Kamal Shah 360 at 442). The question relating to exceptions has been dealt with separately on the basis of Islamic principles of Zaroorat, Zarar, public interest as such, State policy, State necessity etc. in the case of Land Reforms (Qazilbash Waqf v. Chief Land Commissioner, PLD 1990 SC 99).

As a necessary conclusion drawn from the foregoing, it can be safely held in this case also that on the touchstone of Islamic Rules of interpretation, which unless excluded otherwise, under the present Constitutional set up the Court are bound to apply in preference to the contrary so called accepted rule of interpretation under the other jurisprudential concepts (and the fiscal laws are no exception in this behalf), the income tax authorities cannot change the nature of the contract intended by the parties thereto, under the pretext that the rule of interpretation of a fiscal law in this behalf, is different."

18. The answer to the Issue No.2 is that the validity / tenure of the above mentioned subject agreements between Plaintiff through its subsidiary Mehran Oils (Pvt.) Limited and Defendant was two years effective from 12.07.1989 and not 21.05.1989. Hence the subject agreements between the above parties were to expire on 11.07.1991 and not 21.05.1991 as pleaded by Defendant. Issue No.2 is answered accordingly.

19. Mr. Siddique Shehzad, learned counsel for Defendant has argued that Defendant never curtailed the upliftment of subject products from Plaintiff. According to the learned counsel, it was the contractual obligation of Plaintiff to supply minimum volume of subject products to Defendant, but latter (Defendant) was not saddled with any such contractual obligations. He further contended and read the relevant portion of testimony of PW-1 that the Plaintiff was also supplying lubricants in the open market. He has also referred to Exhibits U-10, which contains "RT-1 FORMS", which basically is a document relating to Excise Department, for the purposes of calculating excise duty while referring to the relevant part of the deposition of PW-1, wherein has been acknowledged that

the excisable goods mentioned in the above RT-1 FORMS were not supplied to the Defendant. The learned counsel for Defendant argued that in fact the Plaintiff has admitted the case of Defendant that it was actually the Plaintiff, which could not supply / sell the lubricants to Defendant and the latter (Defendant) never short uplifted/under purchased the lubricants in violation of its contractual obligations. Learned counsel Mr. Muhammad Siddique Shahzad, has relied upon following case law_

i. PLD 2007 Supreme Court Page-642
(Pakistan Muslim League (N) Versus Federation of Pakistan and others)

ii. 1985 SC Page-695
(Messrs Aslam Saeed and Co. Versus Messrs Trading Corporation of Pakistan).

iii. 1991 CLC Page-32
(Trading Corporation of Pakistan
Limited Versus International Trading and Sales Inc).

iv. 1993 SCMR 1441 (Syed Ahmed Kirmani Versus Muslim Commercial Bank Ltd.)

v. 1963 (W.P.) Karachi Page-766
(Messrs Kaysons Versus Ahmed Juvenile Industries)

vi. PLD 2006 Karachi Page 416
(Mian Manzoor and two others Versus Government of Pakistan)

20. It was further contended by the Defendant's counsel in the light of above case law that there is a marked difference between an undertaking and agreement and latter is only binding but not the former. Similarly, the damages can only be awarded to Plaintiff if the same are proved and onus is also on Plaintiff to show that what measures the Plaintiff has taken to mitigate such damages. In the case of Messrs Kaysons Versus Ahmed Juvenile Industries (supra), a settled legal principle was reaffirmed by expounding Section 74 of

the Contract, Act, 1872, that if a certain amount as liquidated damages is mentioned in the agreement, even then the Plaintiff has to lead the evidence and prove such damages.

21. The above submissions of Defendant are controverted by M/s. Syed Shahenshah Hussain and Syed Arshad Ali, Advocates, the learned counsel representing Plaintiff. Cross-examination of Defendant's sole witness was referred, in order to demonstrate that Defendant witness has admitted the fact that the Defendant had not lifted / indented and purchased the subject product from Plaintiff in accordance with the above referred subject agreements. It would be advantageous to reproduce the relevant portion of testimony of DW1: -

> ***"It is correct that the Caltex lifted the less quantity than the stipulated in the aforesaid agreements.*** ***Voluntarily says the stipulated quantity was to be supplied by the Plaintiff. It is correct that we have not demanded the Plaintiff to supply the required quantity mentioned in the agreements."*** **(*underlining is for emphasis*).**

22. The learned counsel for Plaintiff has cited two well-known Judgments in support of their arguments for awarding damages_

i. PLD 1954 Lahore Page-451 (Mehtab Din and another Vs. Malik Fazal Hussain);

ii. PLD 1973 Supreme Court Page-311 (Messrs A.Z. Company, Karachi Versus Government of Pakistan and another).

23. According to Mr. Shahenshah Hussain, to the facts of the present case, both Sections 73 and 74 of the Contract Act are

applicable. The gist of the above case law is that a supplier (in the instant case the Plaintiff), is entitled to be placed in the same situation while awarding damages, as if the contract had been performed. The issue of opportunity loss and/or loss of profits was also decided favourably in the cited decisions.

24. Adverting to the Issue No.3; after hearing learned counsel representing Plaintiff and Defendant, I am of the considered view that the effect of change of management of Faisalabad Lubricants (Private) Limited should not have adversely affected the above mentioned agreements between Plaintiff and Defendant, particularly in view of an express provision contained in the above referred Addendum Agreement (of 12.07.1989) Exhibit-P, where under Defendant was liable to uplift the additional quantity of 1500 metric ton of lubricants / subject products per quarter from Mehran Oils (Private) Limited upto 11.07.1991; till the validity period of the above agreement, which Defendant failed to do and thus committed breach of contract. Issue No.3 is answered accordingly.

25. Appraisal of the evidence as adduced by respective parties and taking into account the arguments of learned counsel of both sides, leads to the conclusion that Defendant in breach of the terms of the above mentioned two contracts, in particular the Purchase Agreement of 12.07.1989, had curtailed its upliftment of lubricants from Plaintiff, whereas, it was not proved by Defendant that the act of Plaintiff in selling the subject products in the market directly had caused any loss to the Defendant, or, the same was in violation of any covenant agreed upon by and between the Plaintiff and

Defendant. Therefore, the Issue No.4 is decided accordingly and against the Defendant.

ISSUES NO.5 and 8.

26. Since these two issues are interlinked, therefore, they are decided by a common finding. The stance of Plaintiff is that due to correspondence dated 17.03.1991 (Reference No.LPBU:KAS) addressed to Plaintiff and copied to Ministry of Petroleum, is the main cause on the basis of which the Ministry refused to grant extension of Technical Collaboration Agreement beyond its validity period of two years, which has resulted in causing losses to Plaintiff and which the Plaintiff in paragraph 13 of the Plaint and Affidavit in Evidence have quantified by claiming Rs.2,41,55,625.60 (Rupees Two Crore Forty One Lac Fifty Five Thousand Six Hundred Twenty Five and Sixty Paisas Only). This letter of 17.03.1991 is Exhibit-"S", (Page- 311 of the evidence file), wherein, inter alia, the Defendant informed the Plaintiff that after May 21, 1991 they will not provide further technical assistance / knowhow to Mehran Oils (Private) Limited. A copy of this letter of 17.03.1991 was also sent to the Ministry of Petroleum. Subsequently, by the correspondence dated 10.04.1991 (Reference No.PL-BP(236)/84-Hyd), the Ministry refused to grant its approval to renew the afore mentioned Technical Collaboration Agreement between Plaintiff and Defendant on the ground that Defendant (Caltex Oil Pakistan) itself did not want to continue with the arrangement; this correspondence may be referred to as **refusal letter (Exhibit-T).** However, the pleadings and record is silent that what steps Plaintiff took to safeguard its interest. This refusal letter had also sought confirmation from Plaintiff but no

document in rebuttal has been produced. Admittedly, this refusal letter was not subsequently challenged/questioned by Plaintiff. Secondly, it is an admitted fact that even the earlier approval letter of 21.05.1989-Exhibit-J (supra) from the Ministry of Petroleum, has specifically mentioned that there will be no further extension in the technical services arrangement between the Plaintiff and Defendant, and Plaintiff had to development its indigenous knowhow during the currency of above agreement of Technical Collaboration. Onus is on Plaintiff to prove this fact that due to the above letter of 17.03.1991 (Exhibit-S) issued by Defendant to Plaintiff for discontinuing its technical support to Plaintiff in terms of the subject Technical Collaboration Agreement / Technical Agreement (of 12.07.1989), the Plaintiff suffered losses as the subject Technical Agreement could not be renewed by the Ministry. As discussed above, the Ministry of Petroleum while granting its earlier approval dated 21.05.1989 had already cautioned the Plaintiff that further extension in the Technical Agreement would not be possible. Therefore, whether the above correspondence of 17.03.1991 from Defendant's side (Exhibit-**S**) was the main factor or cause weighed with the Ministry of Petroleum for issuing the afore referred refusal letter, should have been proved by Plaintiff by at least examining some senior officer from Ministry of Petroleum. Had the earlier approval dated 21.05.1989 (Exhibit-J) not mentioned the fact about further extension, the burden to prove that the above correspondence dated 17.03.1991 (Exhibit-**S**) of Defendant was the main cause weighed with Ministry for reaching the impugned decision in the shape of refusal letter, could have been easily proved on the basis of evidence available on record. Thirdly, if Plaintiff is also aggrieved by the

above refusal letter of Ministry of Petroleum, then the latter should have been impleaded as Defendant. Fourthly, the Plaintiff did not question the above correspondence of 17.03.1991 (termination letter) and in this regard, the cross-examination of PW-1 is relevant to reproduce herein below: -

> ***"It is correct to suggest that MOP has granted permission to Mehran Oil (Pvt.) Ltd. on 21.05.1989 and admit the same. I produce the same as Exh.P-3. (This letter came from Defendant's side) It is correct to suggest that the period in the original agreement of purchase was five years as per Ex-3, the MOP has granted permission for technical corroboration for two years."***
>
> ***"It is correct to suggest that after May, 1991 we did not supply the Oil to Defendant."***

27. Fifthly, since it is a admitted fact that at that point in time processing and blending of lubricants was a regulated activity under the Government Policy and more particularly under the Pakistan Petroleum (Refining Blending Marketing) Rules, 1971, and in terms of Rules 16 to 20, the discretion rested with the Ministry of Petroleum to grant or refuse the permission. Therefore, it cannot be said that the above correspondence of Defendant (Caltex at that relevant time) was the main factor, which caused the issuance of refusal letter by Ministry of Petroleum and due to which further extension of Technical Agreement was refused, which resulted in causing financial losses to Plaintiff. Sixthly, the above referred subject Purchase Agreement of 12.07.1989 itself mentions that further renewal of agreement is conditioned upon by Government approval; relevant Clause-9 whereof is reproduced hereinabove. Seventhly, it is also a matter of record that earlier Ministry of Petroleum had refused to renew the Technical Agreement for Faisalabad Lubricants (Pvt.) Limited vide afore referred refusal letter of 10.08.1989

(Exhibit P-2), regarding which it was never pleaded by the Plaintiff that such refusal was also at the behest of Defendant. It means that it was not due to the conduct of Defendant and particularly its Letter of 17-3-1991 [Exhibit S] that the Ministry of Petroleum issued its refusal letter, but, as already observed herein above that even at the stage of granting renewal to Mehran Oil [Pvt.] Limited/Plaintiff vide Approval dated 21-5-1989 [Exhibit J], the Ministry had conveyed its intention to Plaintiff **that no further extension will be granted.** It would be advantageous to reproduce reasons stated in the above refusal letter of 10.08.1989 relating to Faisalabad Lubricants (Pvt.) Limited _

> ***"M/s. Faisalabad Lubricants (Pvt.) Ltd.,***
> ***Hafeez Centre, A/34, K.C.H.S.U.,***
> ***Sharea Faisal,***
> ***Karachi.***
>
> ***Subject:- RENEWAL OF TECHNICAL SERVICES AGREEMENT.***
>
> ***Dear Sir,***
>
> ***I am directed to refer to your letter No.FSL/031/045 dated 16th February, 1989, on the above subject and to state that since you have already availed a period of nine years under Technical Services Agreement with Caltex Oil (Pakistan) Ltd., it is not possible for the Ministry to give any further extension to the Agreement.***
>
> ***Yours faithfully,***
>
> ***(MOHAMMAD NAEEM MALIK)***
> ***Deputy Director (Refining)***
>
> ***c.c. General Manager,***
> ***Caltex Oil (Pakistan) Ltd.,***
> ***Press Trust House,***
> ***I.I. Chundrigar Road,***
> ***G.P.O Box No.219,***
> ***Karachi."***

28. However, drop in upliftment of minimum quantity of the subject product by Defendant was a breach on its part as discussed above, as the Defendant was liable to lift/indent the requisite minimum quantity of subject products of 1500 metric ton per quarter

upto 11.07.1991 in terms of Addenda dated 12-07-1989 and 618.75 metric ton as stipulated in the subject Purchase Agreement between the parties hereto, which were violated by the Defendant. Issue No.5 is answered in the above terms and Issue No.8 is answered in Negative and in favour of Defendant.

ISSUES NO.6 AND 7.

29. Keeping in view the nature of relief claimed, Issue No.7 is to be determined first. The Defendant counsel strenuously argued that no amount left unpaid by Defendant. He has referred to Exhibits-D/5 to D/10. These documents, which are basically correspondence(s) exchanged between Plaintiff and Defendant have been filed with the Affidavit-in-Evidence of DW-1, in order to corroborate its stance that accounts between Plaintiff and Defendant were completely and finally settled long time back in the year 1991. But this contention is categorically refuted by Mr. Shehenshah Hussain, the learned counsel for Plaintiff, who argues that admittedly the above documents relate to sales tax refund of Rs.141,893/- and interest on advances as Rs.55,877/- and do not relate to the issues at hand. He further contends that even Exhibit-D/5, the letter dated September 1, 1991, addressed by Defendant to Plaintiff did mention the fact about Plaintiff's claim of short upliftments, which claim was under consideration with Defendant at that relevant time. Stance of Plaintiff counsel has merits. In addition to this, a debit / credit advice of **18.05.1991-Exhibit-P-6,** is also very relevant. Along with this document a statement is enclosed in which short upliftment of lubricants by Defendant is mentioned. Perusal of the above referred document and taking into consideration the evidence of parties and

arguments of their counsel results in holding that the present controversy of under purchase / short upliftment of subject goods was not settled by virtue of the above correspondence(s) of parties way back in August / September 1991. Issue No.7 is answered accordingly and in favour of Plaintiff.

30. Question now remains that what should be the quantum of damages. Plaintiff has based its claim of damages that due to the above impugned letter of 17.03.1991, the Ministry had issued its refusal letter otherwise the Plaintiff would have got another extension / renewal in the subject Technical Agreement for three years. It is also claimed by Plaintiff that in the intervening period Defendants had switched over from normal premium grade oils to the highest quality long drain oils in order to maximize its profitability, therefore, Plaintiff was duly entitled to upward revision in blending charges from Rupees 0.73 to Rupees 1.23 per litre. This argument is based on a correspondence dated 8.01.1991 (Exhibit-U, Page-313 of the evidence file), wherein, Plaintiff requested the Defendant to increase the blending premium from Rupees 0.73 per litre to Rupees 1.23 per litre (***Underlining for emphasis***). However, in response thereto, the Defendant wrote a letter dated 20.03.1991 (Exhibit-T-5) to Plaintiff, inter alia, wherein the request of increase in blending charges was declined. Therefore, the conclusion is that in presence of the above documentary evidence, it cannot be said that blending charges were increased to Rupees 1.23 per litre. Even otherwise, under the terms of the above mentioned two subject agreements, the Plaintiff had no authority to increase blending charges unilaterally. The criteria for assessing the penalty or liquidated damages is already mentioned in Cause1(e) of the subject

Purchase Agreement dated 12.07.1989 (Exhibit-M), thus the above mentioned Clause-1(e) of the purchase agreement would be applicable for determining the losses. It would be advantageous to reproduce the said Clause-1(e) herein under: -

> ***"In the event that either party under delivers or under indents by more than 10% of the minimum volume specified in this clause, the defaulting party will pay compensation of Rs.0.30 per litre to above 10% tolerance. Performance under this clause will be determined on quarterly basis."***

31. The afore referred debit / credit advise dated 18.5.1991 along with the statement showing the short upliftment by Caltex (Defendant) is available in the evidence file (as Exhibit P-6; page 355 of the evidence file). This is the document of Plaintiff. The authenticity of this document has been acknowledged by PW-1 in his cross-examination and not questioned by Defendant. Perusal of the statement attached with this advice shows the short upliftment quantity [rather unlifted quantity] of subject product from commencement of the agreement, that is, from July, 1989 upto March, 1991. According to this Statement, the Defendant short lifted/indented (under purchased) 1455254 litres of subject product and the amount according to this advice the Defendant was liable to pay is Rs.436,576/= (Rupees Four Lac Thirty Six Thousand Five Hundred Seventy Six Only). This figure has been calculated on the basis of Clause 1(e) as mentioned above. Hence, from Plaintiff's own documentary evidence, it is apparent that short upliftment of quantity of lubricants has to be calculated in terms of Clause-1(e), that is, Rs. 0.30 per litre. As already been held in the preceding

paragraphs that Defendant under its contractual obligation was required to lift the requisite quantity of subject product from Plaintiff till the validity of the above mentioned two agreements, which had expired on 11.07.1991 and not on 21.05.1991 as claimed by Defendant, therefore, Defendant is liable to pay the following amount towards short upliftment of lubricants from Plaintiff' (i) Rs.436,576/= (Rupees Four Lac Thirty Six Thousand Five Hundred Seventy Six Only) in terms of Exhibit P-6, which is an undisputed document. From March to July, 1991 the defendant was bound to uplift at least 2000 metric tons (2,182,000 litres) of lubricants as an additional quantity in terms of the aforementioned Addendum dated 12.7.1989 (Exhibit-P), which stipulates 1500 metric ton per quarter as the minimum quantity. In monetary terms it comes to Rs.654,600/- (Rupees Six Lac Fifty Four Thousand Six Hundred Only); break down of the above is as follows_

1 M. Ton = 1091 Litres.

2000 M. Ton x1091=2,182,000 litres x Rs. 0.30 [as per Clause 1(e) of the subject Purchase Agreement] = Rs.654,600/- (Rupees Six Lac Fifty Four Thousand Six Hundred Only).

32. Similarly, as per the subject Purchase Agreement dated 12.07.1989 {Exhibit-M}, the Defendant had to indent a minimum quantity of 618.75 metric ton per quarter, that is, 206.25 metric ton per month. Admittedly, Defendant was liable to uplift/purchase from Plaintiff the lubricant products up till 20-07-1991, but the above document / advice of 18.05.1991 shows that Defendant in breach of its obligation stopped the purchase / up-liftment after March, 1991

and thus is liable to compensate the Plaintiff for the under purchase/short indented of 825 metric ton [900,075 litres] of lubricants of four months. Hence, applying the afore referred Clause 1(e), in monetary terms the Defendant is liable to pay a sum of Rs.2,70,022.5 (Rupees Two Lac Seventy Thousand Twenty Two and Five Paisa Only).

It is necessary to mention that a Claim Statement [break-up] was earlier filed by Plaintiff along with its Synopsis of Arguments dated 28-2-2013. In this Break-up also the Plaintiff calculated the short up-liftment/under purchase amount by applying the penalty clause 1(e), that is, Rs. 0.30/- per litre and not Rs. 0.73/- as mentioned in the present Break-up Statement filed after conclusion of arguments, a copy whereof has been provided to Defendant.

33. Appraisal of the evidence leads to the conclusion that the subject Agreements were not exclusive and Plaintiff had during the period supplied/sold lubricants products in the market, hence, in my considered view, Plaintiff did not suffer loss of opportunity and profits. Therefore, the damages are confined to the above penalty clause, that is, in the shape of liquidated damages. Consequently, the sum total which the Defendant is liable to pay as damages to the Plaintiff comes to Rs.1,361,198.50 (Rupees Thirteen Lac Sixty One Thousand One Hundred Ninety Eight and Fifty Paisa Only). Hence, Issues No.6 is answered in the above terms.

ISSUE NO.9

34. In view of the above discussion, the present suit is decreed in the sum of Rs.1,361,198.50 (Rupees Thirteen Lac Sixty One Thousand One Hundred Ninety Eight and Fifty Paisa Only) together

with mark-up at the rate of 12% from the date of institution of the suit till realization of the above amount.

35. Parties are left to bear their own costs.

M.Javaid.P.A. JUDGE