THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No. 3 of 2012

(1) Cotton Export Corporation of Pakistan and
(2) C.E.C United Cotton Factory Shahdadpur (Both merged/amalgamated in into Trading Corporation of Pakistan (Pvt.) Limited (TCP). .. . . . Appellants

Versus

M/s Rab Razi Cotton Ginning Processing Factory. . . . . . . Respondent

Appellants	:	Through Mr. Rafique Kalwar, Advocate
Respondent	:	Through Barrister Jawad Ahmed Qureshi, Advocate
Date of hearing and judgment	:	16.10.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J: Through instant IInd Appeal, appellants have impugned the judgments and decree dated 31.10.2011 and 04.11.2011, passed by the learned District Judge Mirpurkhas, dismissing the Civil Appeal No.08/2008 and maintaining the judgment and decree dated 30.05.1996, passed by the learned Ist. Senior Civil Judge, Mirpurkhas, where F.C. Suit No.75 of 1985, filed by the respondent / plaintiff against the appellants / defendants was decreed.

2. Facts as disclosed in the plaint of F.C. Suit No.75 of 1985, are that respondent/plaintiff filed aforementioned suit for Rs.9,66,900/- stating that respondent was a duly registered partnership firm and appellant No.1 was a corporation established by the Government of Pakistan which dealt with the business of cotton and appellant No.2 was one of the factory of appellant No.1. It was further averred that on 08.01.1984, the authorized officer of the

appellant No.2 at Mirpurkhas contracted to purchase 10,000 to 11,000 mounds of cotton of 1983/84 crop of quality N.T at the rate of Rs.395/= per 40 Kg. The goods were to be delivered by 15th January 1984 at the place of appellant No.2. It was further averred that to the knowledge of appellants the first rate quality of enough stock of cotton of P.T was duly pledged and kept stored in the godown of National Bank of Pakistan in order to comply with the terms of contract; that the rate was. Rs.395/= per mound and there was no fluctuation of rate from 08.01.1984 to 20.01.1984 nor there was any rise of rates in favour of respondent or against appellants; and the alleged telegram dated 10.01.1986 was collusively arranged. It was further averred that contractor Haji Ramzan s/o Dur Muhammad shifted the material in caravan of trucks fully loaded, for the delivery at the appellants premises and the labour was readily available at the down loading premises but the appellants deliberately and with malafide and ulterior motives did not allow the entry of loaded truck inside the premises nor goods' quality was checked to ascertain that the quality of the cotton was truly third pick. It is alleged that malafidely on the objection of some officers of appellant, in order to cause undue loss to respondent this episode was fabricated. It was further averred that respondent sent the cotton on 14th January 1984 to appellant No.2 but the recipient refused to accept the delivery of the goods and thereby committed breach of the contract, so also respondent sent the telegraph notice to appellant No.2 on 17.01.1984 but appellant No.2 failed even to reply the same. The consequent to the refusal of the appellants to accept the contracted goods, the respondent has to keep the same in store for two moths where after they sold the same in second fortnight of March 1984 at a lesser rate causing loss of Rs.80/= per 80 Kg, amounting to Rs.8,80,000/=; that during the period of two months when the goods remained with the respondent 2% of the said goods dried up causing a further loss of Rs.86,900/= and thus the total loss of Rs.9,66,900/= was sustained by the respondent. It was further averred that respondent approached the appellants several times but they refused to listen to him resultantly respondent finally sent up a legal notice on 18th July 1984 to both

the appellants calling upon them to pay damages to compensate for his losses, but the appellant No.1 remained silent for long time and sent the reply after 1½ months refusing to honour the respondent's claims. Resultantly, the respondent filed aforementioned suit with the prayer to pass judgment and decree for Rs.9,66,900/= in his favour and against the appellants severally and jointly with interest at 14% per annum with costs of the suit being any other relief that court may also grant.

3. In response to notice issued in the said suit, one Abdul Rehman Abbasi filed amended written statement on behalf of appellants wherein he denied most of the assertions made in the amended plaint and further stated that only one truck load came to the factory gate and that too after office hours at about 6.00 p.m on 14.01.1984; on examination of Phutti loaded in the said truck, it was revealed that same was of third pick, therefore, the truck of the respondent was not admitted in the factory premises and it was returned back and such information was communicated by the factory management to the respondent and no malafide or ulterior motive was involved in the matter. It was further averred that, according to the contract the cotton was to be supplied to the appellant No.2 from 08.01.1984 till 15.01.1984 and since cotton only arrived on 14.01.1984, on 10.01.1984 vide letter No.CEC-UCE-1/83-84 Mr. Nasrullah Pathan Chief of operation of appellant No.2 informed the respondent that from the date of contract till 10.01.1984 they have failed to supply the contracted cotton (Phutti) and the factory was suffering losses due to stoppage of material, and if cotton was not sent then Cotton Export Corporation will have to close the factory. It was further averred that the appellants were not responsible if respondent suffered any loss on account of breach of contract but on the contrary they have suffered loss due to breach of contract on the part of respondent and they have reserved their rights to file suit against the respondent for damages. Lastly he stated that respondent has no cause of action to said suit hence the same was liable to be dismissed with costs.

4. On the pleadings of parties trial court framed the following issues:

1. Whether there is no cause of action and suit is liable to be dismissed?

2. Whether the suit is barred u/s 69 of Partnership Act?

3. Whether the defendant has infringed the contract by not accepting the supply of Phutti which was offered on 14.01.1984?

4. Whether the plaintiff sustained loss to the tune of Rs.9,66,900/= due to the act of violation of contract by the defendant?

5. Whether the Phutti sent on 14.01.1984 was of 3rd pick and whether the defendant was justified in refusing the delivery of 3rd pick Phutti?

6. Whether the defendants are liable to pay any damages to the plaintiff with interest?

7. What should the decree be?

5. Thereafter, both parties led their respective evidence and after hearing parties' counsel, learned trial Court decreed the suit of the respondent as prayed vide its judgment dated 30.05.1996. Being aggrieved by the said judgment, appellants preferred civil appeal bearing No.08/2008, which was dismissed by the learned appellate Court through its judgment dated 31.10.2011 where judgment of the trial Court was maintained; against which, the instant appeal has been preferred.

6. Learned counsel for the appellants submitted that the impugned judgments, passed by the Courts below are against the facts, law and equity; that the impugned judgments are based on no evidence and the same are liable to be reversed; that both the Courts below have ignored and not considered the oral as well as documentary evidence available on record; that the Courts below have taken the plea raised by the respondent in his plaint as gospel truth; that the Courts below failed to consider that the respondent has sent sub-standard / third pick cotton in violation of the agreement executed in between them thus failed to fulfill his part of contract, due to which appellants, which are government functionaries received huge monetary loss; that the Courts below have misapplied and even not considered the evidence on record and have decided the matter on mere surmises and suppositions; that the impugned judgments are liable to be set aside. Learned counsel relied

upon the case of **Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others** (2019 SCMR 524).

7. On the other hand, learned counsel for the respondent while supporting the impugned judgments submitted that both the Courts below have rendered the judgments in proper manner after considering all material aspects as well as evaluating the evidence available on record, therefore, no irregularity or material illegality is apparent on surface of the judgments impugned. He submits that the impugned judgments be maintained and the instant appeal may be dismissed.

8. Heard counsels and reviewed the material available on record.

9. It is admitted that both the Courts below held that the agreement for providing cotton (Phutti) was entered into between both the parties and the question which remained heart of the matter was as to who has committed breach of agreement. The case of the respondent is that contract / agreement dated 08.01.1994 was executed in between the respondent and authorized officer of appellant No.2 to purchase 10,000 / 11,000 mounds (40 Kg.) of cotton (Phutti) for the crop of 1983-84 at the rate of Rs.395/- per 40 Kg.; that the goods were to be delivered by 15.01.1984 at the place of appellant No.2 (C.E.C United Cotton Factory, Shahdadpur); that as per respondent Phutti was sent on 14.01.1984 to appellant No.2, however, same was returned by appellant No.2 and breach of contract was committed by appellant No.2; whereas the appellants are claiming that breach of contract has been committed by respondent. Perusal of record reveals that Ratanlal, representative of the respondent in his evidence before the trial Court deposed that in compliance of the condition of aforementioned contract / agreement sent Phutti on 14.01.1984 through trucks to the factory of appellant No.2 through his contractor Muhammad Ramzan and one clerk, who was serving in National Bank of Pakistan, Mirpurkhas, as the Phutti was pledged with main branch of National Bank; however, the Phutti was not accepted and it was returned from the gate of the factory; that upon such refusal, on 18.01.1984 the attorney of respondent sent legal notice to appellant No.2. In reply dated

03.09.1984, it is mentioned that in terms of the contract dated 08.01.1984 the respondent has to send Phutti of sound quality at the rate of Rs.395/- per 40 kg at factory premises with immediate effect after 08.01.1984; but with malafide intention and with intent to back out with the said contract, respondent did not commence supply in order to sell the same to other customers on higher rates, as price of the Phutti had arosen at that time. It is also mentioned in the said reply that thereafter the spot rates instead of rising further, started falling, therefore, in panic on 14.01.1984 at 06:00 p.m when working hours were over, one truck of Phutti was sent to the appellants' factory; however, on gate quality of Phutti was found to be of third pick, therefore, the appellants refused to accept the same and informed the respondent accordingly. The perusal of said reply shows that it was admitted by the appellant that on 14.01.1984 after 06:00 p.m, truck loaded with Phutti reached the factory gate; however, since it was allegedly of third pick, the truck was returned without taking delivery; while the contract was still open upto 15.01.1984.

10. Learned counsel for the appellants has vehemently argued that respondent was duty bound to send Phutti of sound quality but he attempted to supply third pick quality. Per learned counsel, the core issue involved in this matter is that how much quantity of Phutti was attempted to be supplied by the respondent and how many trucks were dispatched to the appellant No.2's premises which per learned counsel is not addressed by the Courts below. First of all, I am of the firm view that this issue has already been taken up by the trial Court while discussing the issues No.3 and 4, as both were leading to the same point. It is an admitted position that the trucks loaded with Phutti were dispatched as a Carvan and when first truck of the consignment reached the gate of the appellant No.2's factory the same was returned from the gate on the allegation that quality of the Phutti which was of third pick. Since the contract was to expire on 15.01.1984 and the shipment was made on 14.01.1984, and as stated by the learned counsel for respondent, entire contracted Phutti would have been taken up by 30 trucks, there were more

than 30 hours to the supply dead-line, the appellant No.2 having refused to accept the first consignment at the factory gate, in my humble opinion, as upheld by the Courts below was the one who breached the contract. As the claim of appellants with regard to quality of the Phutti / cotton, the same could have been easily examined when the entire shipment / loaded trucks reached the appellant's factory. It is an admitted fact that the respondent took bank loan to procure 10,000 to 11,000 mounds of Phutti and the entire Phutti was mortgaged with National Bank of Pakistan and until close of business on 15.01.1984 the contract executed between appellants remained valid and respondent took all foreseeable steps to supply the entire quantity. As a matter of fact to discharge his liability under the contract, the respondent purchased and stored the entire quantity with the Bank, which fact remained undisputed, therefore, the appellants should have waited for next 30 hours till the sun was setting on the contract to show their bonafide. Conduct of the respondent by refusing to even receive the consignment does not leave any good taste particularly when no advance payment was made to buy the consignment by them as payment was only to be made when complete Phutti was supplied.

11. The instant IInd appeal has been preferred against the concurrent findings of the Courts below. A review of both the judgments suggests that all aspects of the controversies as well as the evidence produced by both the parties have been examined by the Courts below in proper way. It is an established position that second appeal does not lie on the ground of error or question of fact as it could only lie on the ground of law or error in procedure, which might have affected decision of the case upon merits. The decisions delivered by the Courts below clearly are not based on irrelevant or inadmissible evidence or that the evidence in any way was misread by the Courts. Reversal of concurrent findings of fact as a result of re-appraisal of evidence on record under Section 100 of C.P.C. as sought by the appellants is not permissible unless the same was found to be perverse or contrary to the evidence on record, reliance in this context is placed on ***2009 SCMR 254***. Also to be kept in mind is the dictum laid down by the Apex Court in the case of

Amjad Qazi Vs. Saleemullah Fareedi reported as (***2006 PLD 777)*** where the Apex Court held that concurrent findings of facts could not be reversed on surmises and conjectures or merely because another view was also possible. The Apex Court further held that the High Court could not have interfered in concurrent findings of the facts recorded by two Courts below while exercising jurisdiction under Section 100 C.P.C. no matter how erroneous those findings might be, unless such findings had been arrived at the Courts below either by misreading of evidence on record or by ignoring the material piece of evidence on record or through perverse appreciation of evidence, none of these conditions prevail in the case at hand.

12. The case law cited by the learned counsel for the appellants pertains to a suit for specific performance of contract, hence it is quite distinguishable from the facts of the case in hand where in fact as already held by the Courts below the remedy available to the appellants was to institute a suit for specific performance and as evident from the record they did not avail the same.

13. To me, the impugned judgments are rendered after minutely scrutinizing the evidence, legal as well as factual aspects of the case and no illegality or irregularity warranting interference have surfaced.

14. In the given circumstances as well as in the light of the judgments of the Apex Court, referred hereinabove, the instant second appeal which merits no consideration is dismissed alongwith all pending applications.

JUDGE

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