

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1683 of 1997

Date Order with signature of Judge

1. For hearing of CMA No. 4370 of 2016.
 2. For arguments.
 3. For orders on Nazir report.
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18.05.2016

Mr.Kashif Parachi , Advocate for plaintiff.
Mr. Farhatullah, Advocate.
Mr. M.G.Dastagir, Advocate for Defendants.
Mr. Imran Hasan, associate of Mr. Mazhar Jafri, Advocate for Defendant.
Mr. M. Yameen Zuberi, Advocate.

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SALAHUDDIN PANHWAR, J: At the outset, learned counsel for the plaintiff has referred prayer of instant suit, which is that:-

- a. pass a judgment and decree against the Defendant in the sum of Rs.8,666,570/- being the goods supplied and lying in the stores with the plaintiffs.
- b. pass a judgment and decree against the Defendants in the sum of Rs.1,386,651/- being the markup paid by the Plaintiff on the unpaid amount.
- c. to grant cost and damages to the Plaintiff for the sum of Rs.5,000,000.00
- d. to grant costs of the suit.
- e. any other order or orders that this Hon’ble Court may be please to pass on the facts and circumstances of the case.”

as well paragraphs 5, 6, 7 and 8, of plaint are reproduced herewith:

5. That the Defendants on 27/3/97, sent to the Plaintiff a telegram asking them, whether it would be possible for them to

deliver the material earlier than 31/5/97, since they needed the said material urgently.

6. That the Plaintiff vide their letter ME/39/97/069 dated 28/3/97 confirmed that the material had already been imported by the Plaintiffs and could be supplied to the Defendants. The said material was thereafter supplied to the Defendants within three days under cover of the Plaintiff's letter ME/40/97/083 dated 31/3/97.

7. That on 3/4/97 Pakistan Steel sent to the Plaintiff a telegram stating that they had not asked the Plaintiff to supply the material by physically delivered to the Steel Mill. It was said that as the material has been delivered, the Plaintiff should agree that they would not submit their bill before 16.5.197.

8. That the Plaintiff agreed to the request and confirmed that they would submit their bill after 15/5/97 vide letter ME/4619771139 dated 23/4/97. In this letter the Plaintiff also requested the Defendants to issue an amendment to the purchase order deleting payment through an inland L/C and incorporating the fact that payment would be made through normal Billing Department."

He further contends that defendants filed written statement whereby they have not disputed the contents of above referred paras rather they admitted the same. It is further revealed that in instant matter, issues were framed and evidence was recorded and matter was fixed for final arguments since 2004.

2. On 09.02.2016 following order was passed:-

"Para 5 of suit No.1683/1997 is as under:-

"6. That the plaintiff vide their letter ME/39/97/069 dated 28.3.97 confirmed that the material had already been imported by the plaintiffs and could be supplied to the defendants. The said material was thereafter supplied to defendant within three days under cover of the plaintiff's letter No.ME/40/97/083 dated 31.3.97."

Whereas Written Statement filed by defendants reflects admission of above paragraph. At this juncture learned counsel for plaintiff

contends that sine consignment was handed over to defendants inspite of that consideration was not paid to the plaintiff thus he filed suit for recovery, in case, articles are returned back by the defendants he will not pursue this suit. In contra learned counsel or defendants contends that they seek decision on merits and it would be just and proper to issue direction to the Nazir for inspection of the goods delivered to the defendants whether the same are available with the defendants or not. Accordingly before deciding application filed by plaintiff for handing over these items, judicial propriety demands that Nazir shall inspect the defendants' area with the assistance of the defendants and shall submit report whether such articles as mentioned in this plaint are available with the defendants. Nazir would be entitled to receive Rs.15,000/- to be deposited within three days. This exercise shall be completed within ten days."

Pursuant to that Nazir has submitted report dated 02.03.2016 which is that:

**NAZIR REPORT IN COMPLIANCE OF
COURT'S ORDER DATED 25.02.2016**

1. Complying with the above order, notices were issued to the parties concerned for 01-03.2016, when the undersigned with staff member accompanying with Mr. Yamin Zuberi, Advocate for the Defendant reached at site, where Mr. Wajahat, representative of Plaintiff was present.
2. At site, Mr. Saleem Naqvi, Deputy Manager, Stocks was also present and visited the site, where the godown incharge opened the godown No.117 where 21 wooden cases were lying containing the subject copper plates weighing 11379 KG total weight alongwith wooden cases was noted at 11410 kg vide slip No.87295, as per Pakistan Steel weighing scale. The subject wooden cases were found intact and the weight as shown in the plaint was admittedly available at site.
3. Compliance report is submitted for favour of kind perusal and further orders.

After submission of that report plaintiff has moved application [CMA No. 4370/2016] wherein it is prayed that in view of inspection report, this Court may direct the defendant to return the goods to the plaintiff after verification of

the weightage of the goods supplied, under the supervision of Nazir of this Court.

3. At the outset, Mr. Kashif Paracha learned counsel for the plaintiff contends that albeit, he is contesting this suit since 1997; evidence was recorded, claim of damages is prayed, however, if this Court allows instant application, in that eventuality, he would be satisfied and would not claim any prayer of this suit including damages. He refers Order VII Rule 7 CPC and 2014 SCMR 922, PLD 1978 SC 220 and PLD 1963 SC 553.

4. In contra, Mr. M.G. Dastagir, learned counsel for the defendant, while refuting the above contentions, insists that this is not a suit for recovery of goods, no such alternate prayer was made, hence, Order II Rule 2 CPC will come in the way of plaintiff, accordingly, such relief cannot be extended to the plaintiff, he relied upon 1993 SCMR 2397. Learned counsel also placed reliance on annexure "J" available with the plaint i.e. telegram.

5. Heard learned counsel for the respective parties and perused the record.

6. The *peculiar* facts of the instant case coupled with *relief*, sought through instant application (*CMA*), compel me to first have *direct* reference to certain provisions of the '***Sale of Goods Act***' so as to draw a complete picture regarding relationship, *if any*, and liabilities arising there-from.

7. It shall need no much debate that no two person (s) can come or be brought under liabilities / obligations unless there is an *agreement* between

them (*two*); hence no question of claiming any right or obligation shall be available for one, *out of two*, if there exists no such *agreement* between them. A reference to section 4 of the Sale of Goods Act, 1930 shall make it clear which are:

'4. Sale and agreement to sell:

(1) A contract of sale of goods is a *contract* whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute and conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an *agreement to sell*.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.'

From above, it becomes *quite* clear that a *sale* or even an *agreement to sell* shall require '*agreeing of two to buy or sell property (goods) for a price*'. Section 5 of the Act further explains how such *contract / agreement* shall come into existence which for *ease* is referred hereunder:-

'Section 5: Contract of sale how made:

(1) A contract of sale is made by **an offer** to buy or sell **goods for a price** and the acceptance of such offer. The contract may provide the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.'

The above leaves nothing ambiguous that to constitute *an agreement to sell* there must be 'an offer to buy or sell for a price and acceptance thereof'. Thus, I, *without any hesitation*, shall say that in absence of *an agreement* no question of liability, obligation or *breach* thereof shall arise. A reference to the case of *Ghulam Rasool v. Nusrat Rasool* (PLD 2008 SC 146), being relevant, is made hereunder:-

"11. Be that as it may, a promise ripens into an agreement only after an offer is accepted but every promise is not necessarily an agreement. There is difference between the contract and a promise as a valid contract creates obligation and is capable of enforcement in law whereas a mere promise to render service or to hand over certain property immovable or movable to a person without any consideration may not create a contractual obligation to be enforced in law. It is thus necessary for the party claiming the creation of a legal right in the moveable or immovable property under an agreement to prove the existence of such an agreement and its legal force. The transfer of the title of the immovable property for love and affection or for such other reasons by way of gift or will may create right in the property but a promise for transfer of title without any consideration may not constitute a contract capable of enforcement in law. The promise to perform certain act neither creates a contractual obligation nor a legal right and thus a promise in absence of essential terms of consideration may have no binding force and legal effect. The acceptance of a proposal may bring into existence a promise but to have an agreement it is essential that there should be consideration for promise without which the promise may not have the legal status of an agreement. This is settled law that to constitute a binding agreement, the intention of the parties must be proved and an agreement by which the parties do not intend to create any legal obligation is not enforceable in law. In the light thereof, in the present case no such agreement enforceable in law has been proved."

Now, in short, I shall say that in absence of an *agreement* no lis shall sustain with reference to *breach* or *damages* e.t.c.

Having said so, to see existence of '*an agreement*', a referral to para 6 of the plaint, being sufficient, is made hereunder:-

'The Defendants on 27/3/97, sent to the Plaintiff a telegram asking them, **whether it would be possible** for them to deliver the material earlier than 31/5/97, since they needed the said material urgently.'

The above para makes it clear it was not an *offer* from the defendants but it was *only* a question asking about the capability of the plaintiff. Such question, *by any stretch of imagination*, can not be termed as '*offer*'. To make things further clear, a reference to para-6 of the plaint is made hereunder:-

"That the Plaintiff vide their letter ME/39/97/069 dated 28/3/97 confirmed that the material had already been **imported by the Plaintiffs** and.... The said material was thereafter **supplied to the Defendants within three days** under cover of the Plaintiff's letter ME/40/97/083 dated 31/3/97.

The above makes it clear that the plaintiff supplied the *goods* without an *agreement* hence brings the buyer (*defendants*) under no obligation. It is also necessary to mention here that per Section 35 of the Act, the seller is not bound to deliver until the buyer applies for delivery which too shall require existence of an *agreement*.

The above position makes it clear that the plaintiff supplied the *goods* without an *agreement* hence the relief (s), sought in the plaint, were not maintainable. However, since it is not a disputed position that *goods* stood

supplied therefore, if the *defendants* would have accepted the delivery, as defined by Section 42 of the Act i.e :

'Acceptance: The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without **intimating to the seller that he has rejected them.**

Yet the plaintiff could have *claimed* existence of agreement but that *too* shall bring the buyer (*defendants*) under no obligation if the course, provided by Section 43 of the Act has been adopted, which for *ease* is referred hereunder:-

'Buyer not bound to return rejected goods: Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refused to accept them.'

At this point, a reference to annexure "J" available with the plaint i.e. telegram, being material, is reproduced hereunder:-

IL 21 Karachi 29 147
M/SMARIUM ENTERPRISES
21/155 BLOCK 7-8 USMAN ESSA BHAI MEMON ROAD KARACHI
MEMON CO OPERATIVE HOUSING SOCIETY
KARACHI-5

SUBJECT:- PURCHASE ORDER NO11282/CP 4/970210/96-97/CT/CT-526 DATED 29-10-96 (29-10-96) FOR COPPER PLATES (2 ITEMS)

REFERENCE YOUR LETTER NO ME/47/97/188 DATED MAY 20, 1997 AND SUBSEQUENT REMINDER NO ME/48/37/193 DATED MAY 22 1997 IT IS CLARIFIED THAT THE MATERIAL DELIVERED (DELIVERED) BY YOU IS NOT (IS NOT) AS PER INSTRUCTION OF (INSTRUCTION OF) PAKISTAN STEEL.

IN THIS CONECTXT IT IS FI INFORMED THAT ASPER THE PURCHASE ORDER LOCAL LETTER OF CRDIT WAS TO BE ESTABLISHED BY AKISTAN (PAKISTAN) STEEL AGAINST WHICH THE MATTERIAL HAD TO BE DELIVRED HOWEVER LOCAL LC/HASNOT BEEN ESTABLISHED BUT YOUR HAVE DELIVERD THE ITEMS

IT IS AS SUCH ADVISED TO KINDLY COLLECT THE ITEMS FROM OUR STORES AND MAY BE DELIVERED ONLY (DELIVERED ONLY) WHEN ADVISED TO DO SO (.)

PAKISTAN STEEL
PURCHASE DEPTT

The above makes it clear that the buyer (*defendants*), if it is believed that there existed an *agreement*, yet above response of the buyer (*defendants*) was sufficient to consider as a permission to *collect* (take possession by removal from store of defendants).

8. Now, reverting to the merits of the instant application, I find that following things are *undisputed* i.e:

- i) the plaintiff has been owner of the goods;*
- ii) the goods supplied;*
- iii) the goods available with store of the defendants;*
- iv) the defendants rejected (declined to accept) the goods and asked the plaintiff to collect the same without any further claim so far;*

and since the plaintiff has confined its claim only to the extent of collection of the *goods*, therefore, the defendants *legally* cannot and *even* should not resist such request of the plaintiff particularly when ownership of the plaintiff is not disputed. Defendant cannot blow hot and cold in a single breath as is not permissible by law (2011 SCMR 1258). When the defendants do not deny ownership of the plaintiff in respect of supplied articles then either they should

return the goods back or pay the price thereof. One cannot *legally* justify keeping one (*owner*) out of his / her legitimate right to have possession and control of property which *otherwise* is guaranteed by Articles 23 and 24 of Constitution and other *subordinate* laws of the land, which, *in all senses*, is unfair and unjust. Exploring the ways to stamp what is unjust and unfair is not the function of a Court rather the Courts are required to explore the ways and means for undoing what is unjust and unfair, as held in the case of Muhammad Nawaz (2014 SCMR 914).

9. It is also a matter of record that the *defendants* have set-up no claim against the property (*goods*) nor against the plaintiff therefore, it shall serve no purpose of justice, equity and good conscious to decline such request particularly when the Courts have been vested with power to consider *altered circumstances* even to grant / mould the relief, even if not *directly* sought, but subject to *two* condition (s) i.e:

i) *such relief should serve purpose of ‘doing justice’;*

&

ii) *entitlement thereof should not be under any cloud;*

A reference to the case of Amina Begum (PLD 1978 SC 220), for ease is made

wherein it is held that:

‘Indeed in our considered opinion a discretion is vested in this behalf in the Courts to be judiciously exercised in proper case in order to avoid multiplicity or proceedings, to shorten litigation, and to do complete justice between the parties and mould the relief according to the altered circumstances in the larger interest of justice.’

I would also add that the technicalities and procedural requirements are meant to help in reaching and dispensing *justice* but never meant to stand as a hurdle in doing '*justice*'. When it is a question of doing justice it should not be allowed to fall prey to procedural technicalities. (2012 SCMR 1258).

10. As regard the plea of the Order II rule 2 it would suffice to say that it was never a claim of the plaintiff for return of articles nor it was *lis* involving question of ownership of the property but *lis* was based with liabilities under some *agreement* (implied may be) therefore, order II rule 2 of the Code is not applicable because it comes into play only where a person intentionally omits a portion of claim / relief on a same cause of action.

11. Now, if the request of the plaintiff for collection of its own articles (*goods*) is placed in juxta-position to that of annexure-J (*referred above*) it shall qualify the term of an *admission* of such claim of the plaintiff. Not only this, but Annexure-J in *itself* sufficient to entitle the plaintiff for such right. In short, to a conclusion that parties are not at *issue* hence provision of Order XV of the Civil Procedure Code 1908 can well be resorted to.

12. Accordingly, the application of the plaintiff is allowed and as a result thereof instant suit stands decreed but only to extent that the plaintiff is entitled to collect the supplied articles. Defendant shall return the goods under the supervision of the Nazir of this Court. There is no order as to costs.

JUDGE