

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.167 of 2019

(*A & R Associates v. Ahmed Ali Bugti*)

Present:

Muhammad Shafi Siddiqui &
Sana Akram Minhas JJ

Appellant: A & R Associates
Through Mr. Kazim Hussain Mahesar,
Advocate

Respondent: Ahmed Ali Bugti
Through Mr. Mehmood A. H. Baloch,
Advocate

Date of Hearing / Short Order: 29-5-2024

Date of Reasons: 9-7-2024

J U D G M E N T

1. **Sana Akram Minhas, J:** This High Court Appeal (“HCA”) was dismissed by us through a short order dated 29.5.2024.
2. The Appellant is aggrieved by Judgment dated 19.2.2019 and Decree dated 26.2.2019 (signed on 2.3.2019) (“**Impugned Judgment**”) passed by a learned Single Judge in Suit No.605/1995 (*A & R Associates v. Ahmed Ali Bugti*) (“**Suit 605**”), which was instituted on 13.9.1995 by Appellant (as Plaintiff). The Appellant’s Suit 605 (filed for “*Recovery & Damages In The Sum Of Rs.6,282,000/-*”) was dismissed while Respondent’s Counter-Claim was partially allowed.

Essential Facts

3. As per the Plaint filed in Suit 605, Appellant asserts that it was engaged in the business of trading and exporting rice and had entered into a contract with Respondent for the purchase of 850 metric tons (8500 bags of 100 kg each) of “Irri-9 Special” rice at Rs.745/- per bag. The Respondent supplied rice from 12.2.1995 to May 1995. The said rice was required to be of exportable quality for foreign markets, and Respondent was to receive a

commission of Rs.5/- per bag. However, upon inspection, Appellant was dismayed to discover that the rice supplied by Respondent was not Irri-9 Special but a lower quality variety of rice. Furthermore, it was also damaged, mixed with other inferior varieties, discoloured, and entirely unsuitable for export. To mitigate its loss, Appellant sold the substandard rice in June 1995. This prompted Appellant to institute Suit 605, seeking compensation for the losses allegedly incurred by it on account of supply of inferior quality.

4. On 8.11.1995, Respondent filed his Written Statement along with a Counter-Claim of Rs.9,429,338.99/-. No Written Statement or replication was filed by Appellant addressing Respondent's Counter-Claim.
5. Issues¹ were framed/adopted on 10.8.1998 and evidence was thereafter recorded in Suit 605 by a learned Single Judge.
6. On behalf of Appellant firm, its partner (viz. Rasool Bux Bhutto) appeared as the sole witness and submitted his Affidavit-in-Evidence on 29.9.2004. The said witness was partially cross-examined on two occasions but subsequently failed to appear before the Court to complete the cross-examination despite being provided opportunities. Consequently, by order dated 14.3.2006, Appellant's side was closed.
7. The Respondent along with his witness (viz. Noor Muhammad Brohi) filed their respective Affidavit(s)-in-Evidence on 28.3.2006 and were cross-examined by Appellant's Counsel.

Impugned Judgment

8. The Impugned Judgment concludes that:

¹ Following issues were adopted:

- 1) Whether the suit filed by the plaintiff is maintainable according to law?
- 2) Whether the suit filed by the plaintiff is barred by section 69 Partnership Act, and section 56 of Specific Relief Act?
- 3) Whether the suit is bad for misjoinder and non-joinder of parties?
- 4) Whether the suit is in proper form viz. for recovery of money? Or for settlement of accounts?
- 5) Whether the plaintiff after accepting delivery of rice (in weight and quality) and its subsequent sale in local market, is entitled to the amount claimed by him as damages? If so, its legal effect?
- 6) Whether the defendant is liable to be paid the amount of Rs 9,429,338.99 only on account of balance price of rice supplied to plaintiff, loss of profit sustained by the defendant, damages for harming reputation and goodwill of defendant, and the mark up amount, in consequence of his failure to perform part of contract, as claimed by defendant in his Counter-Claim?
- 7) What should the decree be?

“... ..the claim of the plaintiff is dismissed with costs whereas the claim of the defendant is hereby partially decreed to the extent that the defendant is entitled to receive the amount Rs.3,718,772.75/- along with his costs and profit markup thereon at the commercial banking rate from the date of filing of the counter claim i.e. 08-11-1995 till recovery.”

9. Issues No.1 to 4: These issues collectively addressed the maintainability of Appellant’s Suit 605. The Respondent challenged Suit 605 on various grounds including statutory bars and procedural errors. The Impugned Judgment ruled that Respondent failed to substantiate these challenges with evidence. Issues related to misjoinder and non-joinder of parties were deemed irrelevant at that stage. The Impugned Judgment determined these issues in favour of Appellant.
10. Issue No.5: This issue pertained to whether Appellant was entitled to damages after accepting delivery and selling rice in the local market. The Appellant alleged that the Respondent supplied goods not meeting specifications, but failed to prove this due to incomplete cross-examination. The Impugned Judgment found that the Appellant’s failure to reject the goods upon delivery undermined its claim. Issue No.5, was thus, decided against Appellant.
11. Issue No.6: The Respondent’s Counter-Claim sought payment for rice supplied, loss of profit, damages for reputation harm, and mark-up amounting to Rs.9,429,338.99. The Appellant acknowledged the debt but disputed additional claims. The Impugned Judgment partially decreed the Counter-Claim, awarding Rs.3,718,772.75 for unpaid rice supply along with mark-up/profit, rejecting unsupported claims for damages and loss of profit.
12. Issue No.7: Based on the findings, the Single Judge dismissed Appellant’s claim and partially decreed Respondent’s Counter-Claim to the extent of Rs.3,718,772.75 along with costs and mark-up/profit at the commercial banking rate from the date of filing the Counter-Claim.

Respective Arguments

13. For purpose of arguments, both learned Counsel cited their respective pleadings in Suit 605 and restated their contents.

Point For Determination

14. We have duly considered the submissions of each Counsel and have examined the record before us.
15. The primary question to be resolved is whether the Single Judge's dismissal of Appellant's claim and partial decree of Respondent's Counter-Claim were justified based on the evidence and legal arguments presented.

Appellant's Failure To Complete Its Cross-Examination

16. The term "evidence" encompasses examination-in-chief, cross-examination, and re-examination as outlined in Article 132, together with Articles 2(c) and 71 of the *Qanun-e-Shahadat Order, 1984*².
17. A cross-examination is a continuing part of the whole statement and often more crucial than the examination-in-chief³. The right to cross-examine prosecution witnesses is a fundamental and inalienable right of the accused. Without this opportunity, the court cannot rely on the evidence of those witnesses. Cross-examination is crucial for uncovering the truth, and any party must have the chance to cross-examine opposing witnesses. Evidence affecting a party is inadmissible unless the party has had the opportunity to test its truthfulness through cross-examination. If no opportunity is provided to cross-examine a deponent, his testimony would be inadmissible⁴.
18. In the instant case, however, Appellant's witness was substantially cross-examined on two occasions, after which he voluntarily abstained despite being given further opportunities to appear. No reason is documented for his absence.
19. If a party chooses to abstain from taking the witness stand, it can result in an adverse inference being drawn against it, suggesting that the party is withholding testimony because it would be damaging to its case. Moreover, at the very least, the incomplete cross-examination should not be used adversely against the accused or opposing party. However, if there is relevant material, the incomplete cross-examination of the party or witness may be used against them, provided that the existing material or evidence justifies such a conclusion, rather than discarding the incomplete cross-

² 2010 SCMR 1009 (*Muhammad Shah v. The State*)

³ 2003 SCMR 1374 (*Mukhtar Ahmad v. The State*)

⁴ PLD 1983 SC 291 (*Yahya Bakhtiar, Advocate v. The State*); 1986 SCMR 1736 (*Muhammad Afzal v. Muhammad Altaf Hussain*); PLD 2005 SC 63 (*Pir Mazhar ul Haq v. The State*); 2022 PCr.LJ 1088 (*Abid Ali v. The State*)

examination outright. These baseline standards would ensure that parties cannot strategically avoid or abandon cross-examination midway without potential consequences.

Appellant's Incomplete Cross-Examination (without prejudice to the foregoing)

20. The highlights from Appellant's cross-examination include the following significant responses and admissions which undermine its claim:
- i) There was no written contract between Appellant and Respondent regarding the purchase of 850 metric ton of Irri-9 Special rice.
 - ii) Only a Memorandum of Understanding (MOU) existed between Appellant and Respondent (Exhibit No.2/251 dated 7.3.1995) but the quality of rice was not mentioned in it.
 - iii) Appellant admitted that it only made part payment and not full payment to Respondent for the rice received by Appellant.
 - iv) Appellant admitted that there was an outstanding amount owed to Respondent but could not recall the exact sum.
 - v) On 25.3.1995, an employee of Appellant wrote a complaint letter (Exhibit No.2/216) to Respondent about the inferior rice quality. However, there was neither an acknowledgment of receipt from Respondent, and nor the employee was produced as a witness.
 - vi) The rice stored in Appellant's godown was inspected on 3.7.1995 (Exhibit No.2/219) without any prior notice served to Respondent for his participation in the inspection, by either Appellant or the inspection company.
 - vii) Appellant admitted that it had not notified Respondent prior to selling the inferior quality rice supplied by him in the local market.
21. When faced with Appellant's aforementioned cross-examination responses, the Appellant's Counsel could not provide a rebuttal.

Respondent's Counter-Claim & Cross-Examination

22. On 8.11.1995, Respondent filed his Written Statement along with a Counter-Claim. The Appellant did not file any Written Statement or replication in response to Respondent's Counter-Claim.

23. In his Affidavit-in-Evidence, Respondent reiterated his Counter-Claim among other points. However, during his cross-examination, not a single question or suggestion was raised to challenge the validity or genuineness of his Counter-Claim.
24. Additionally, in paragraph 13 of the Affidavit-in-Evidence, Respondent specifically denied any obligation to supply "Irri-9 Special" rice to Appellant (which was alleged by the Appellant in its Pleint as well as in the Affidavit-in-Evidence). Despite this, no questions were posed to Respondent during his cross-examination regarding it. As a result, Respondent's statement about not being contracted to supply "Irri-9 Special" rice has gone unchallenged.
25. The Appellant's failure to reject the goods upon delivery significantly undermined its claim for damages based on the substandard quality of the rice supplied. By accepting the goods without immediate objection or rejection, Appellant effectively indicated its acceptance of the rice. This acceptance, coupled with the subsequent delay in raising a formal complaint or returning the goods, along with sale of the allegedly substandard rice in the local market without notifying Respondent, casts doubt on the validity of Appellant's claim that poor quality rice was delivered. Consequently, Appellant's actions (or lack thereof), impaired its position and claim for compensation for the alleged inferior quality of the rice.

Time Barred High Court Appeal

26. The time limit for filing an appeal prescribed under Article 151 of the *Limitation Act, 1908* is twenty (20) days, starting from the date of the decree or order of a High Court passed in exercise of its original jurisdiction. The instant HCA is overdue by five (5) days⁵, as evidenced by Appellant's CMA No.1185/2019 (an application under section 5 of said Act, 1908 dated 26.3.2019) seeking condonation of the delay. The partner of Appellant firm (viz. Rasool Bux Bhutto) cited his wife's illness as the reason for the late filing. However, no documentary evidence such as medical records confirming her illness or supporting his claim was provided along with the application initially. Later, on 13.4.2019, the Appellant's Advocate presented a Statement (which was neither sworn nor accompanied by the said partner's affidavit) annexing various documents including a medical prescription dated 19.3.2019 and medical certificate dated 27.3.2019. This

⁵ The decree was prepared on 26.2.2019 but signed on 2.3.2019; the Appellant applied for its certified copy on 16.3.2019 which was made ready on the same day (i.e. 16.3.2019); and the instant HCA was presented on 27.3.2019

reason, therefore, cannot be considered a sufficient cause⁶ or a compelling ground for justifying the delay. Importantly, the delay in filing the HCA has vested rights in the Respondent, which cannot be disregarded unless the defaulting party (i.e. Appellant) demonstrates sufficient cause and explains each day's delay.

27. Consequently, we adjudge that the delay in filing this HCA cannot be condoned, and Appellant's aforesaid application for condonation of delay is dismissed. Therefore, the instant HCA is held to be time barred.

Conclusion

28. Taking into account the above circumstances, we hereby uphold the learned Single Judge's Impugned Judgment dated 19.2.2019 and Decree dated 26.2.2019 passed in Suit No.605/1995. The instant High Court Appeal is **dismissed** on both merits and grounds of statutory limitation, with pending application(s), but with no ruling on costs.
29. By our short order dated 29.5.2024 we had dismissed the instant HCA along with all pending applications. Here is why.

JUDGE

JUDGE

Karachi
Dated: 09th July, 2024

⁶ 2022 SCMR 1615 (*KSKB-KNK Joint Venture v. Water & Power Development Authority*)