**ORDER SHEET**
**IN THE HIGH COURT OF SINDH AT KARACHI**
**Suit No.564/1997**

| Date | Order with signature of Judge |
|---|---|

**Date of hearing: 27.11.2007**

**M/s.Trading Corporation**
**Of Pakistan (Pvt) Ltd., through Syed Mamnoon Hussain Plaintiff.** **Plaintiff.**

**M/S.Al-Noor through M/s. Agha**
**Defendant Faquir Muhammad and Agha Zafar Advocate.**

**JUDGEMENT**

**KHALID ALI Z. QAZI.J.- Plaintiff has filed this suit against the defendant for accounts and recovery of Rs.86,989,087/- with markup at the rate of 14% per year from the date of filing suit till recovery plus cost of the bardana found short at the time of final account.**

**2. It is stated by the plaintiff that Plaintiff Corporation is duly registered Corporation under the Companies Act 1913 and Companies Ordinance, 1984 and are owned by the Federal Government. The Plaintiff perform the functions to receiving, sorting, inspecting, handling, clearing, forwarding and shipment of rice for export on behalf of Government of Pakistan.**

**3. It is contended by the plaintiff in plaint that the Defendant is a Proprietor Firm carrying on business as Handling Agents at Karachi.**

**4. It is stated by the plaintiff that tender was invited for handling of crop 1990-91 at their godown at Bin Qasim, Landhi and TPX Godown.**

**5. It is stated by the plaintiff in plaint that the Defendant Firm submitted tender for handling of rice at Bin Qasim Rice Godown and the Plaintiff accepted the tender of the Defendant.**

**6. It is stated by the Plaintiff that plaintiff entered into a written contract with the Defendant on 31th December 1990 bearing No.RECP-5 / M&M / 90-91/3 and appointed the Defendant Contractors / Handling Agents for handling the rice crop 1990-91 at Bin Qasim Rice Godown of the Corporation as well as for the handling of any other rice stock which the Plaintiff may entrust the Defendant during the currency of the said contract. The terms and conditions at the rates for rendering service to the Plaintiff were duly provided for in the contract. The Plaintiff further submitted that the terms and conditions contained in the said Agreement / Contract and tender document may be read as part of the Plaint and the same are not reproduced herein for the sake of brevity.**

**7. It is stated by the plaintiff that as per terms of the contract Defendant have to exercise all care in respect of stocks including its by-products etc, entrusted to them and are liable for and make good any loss or damage therein howsoever caused or arising.**

**8. It is stated by the plaintiff that in pursuance of the said contract the Defendant was entrusted with large quantities of rice of various qualities, gunny bags and dunnages in connection with the performance of the contract for handling rice as per terms of the aforesaid contract.**

**9. It is stated by the plaintiff that as per Clause 4(a) of the tender document the period of contract was for two years from the date of acceptance of tender, and time of contract period was extended from time to time till 30.09.1995.**

**10. It is further stated by the plaintiff that the services rendered and work performed by the Defendant through out the handling of rice crop 1990-91 was found unsatisfactory which fact is evident from the letters addressed by the Plaintiff to the Defendant form time to time.**

**11. It is contended by the plaintiff that the Plaintiff appointed an independent Surveyor in whose presence Plaintiff and Defendant carried out physical verification of the stocks and submitted report.**

**12. It is stated by the plaintiff that vide letter dated 31.10.1996 the plaintiff called upon the Defendant to deposit Rs.80,748,033/- being the cost of shortage of 10,811 M. Tons of rice.**

**13. It is stated by the plaintiff that the Defendant vide his letter dated 16.11.1996 admitted the shortage of 10,811 M. Ton of rice.**

**14. It is stated by the plaintiff that the Defendant as handling agents under the terms and conditions of contract are liable to render account for the stocks entrusted to them under the terms and conditions of the contract in question and are liable to pay to the plaintiff a sum of Rs.80,748,033/- being the value of the shortage and cost of the rice, which was**

**entrusted to the Defendant and remained unaccounted for. The plaintiff held security of the Defendant in contract against the claim in suit.**

**15. It is stated by the plaintiff that the plaintiff reserved its right to add claim, if any, for further shortages came to the notice of the plaintiff and to add claim of shortages of gunny bags etc, as the account is not yet finalized and to add any other and further amount found due and payable by the defendant and same are not included herein.**

**16. It is further contended by the plaintiff that the Defendant failed to render the account of 8,280 – B Twill / Pt Will bags, 324,144 Hessian Bags and 26,732 Heavy Cess Bags (Total 359,156 Bags). The Defendant as Handling Agent under the terms and conditions of contract is liable to render account for the bags entrusted to him and is liable to pay Rs.6,241,054/- being the value of bags found short.**

**17. It appears that upon service defendant appeared and filed written statement, and counter claim against the plaintiffs for recovery of Rs.1,27,38,319.00 (Rupees one crore twenty seven lac thirty eight thousand three hundred and nineteen only).**

**18. It is stated by the defendants that the defendants were appointed handling agents for the crops of 1990-91 at Qasim Rice Godown of the plaintiffs. It is stated that under the said agreement dated 31/12/1990 bearing No.RECP-5/M&M/90-91/3 the defendants were required to give cash security of Rs.31,00,000.00 (Rupees thirty one lakh only) which was accordingly furnished.**

**19. It is stated by the defendant that under the said agreement the defendants were required to submit their running bill for the job completed and 2% of the amount on each running bill was to be deducted by the plaintiff and retained by them as "Retention Money", which was payable by the plaintiffs to the defendants alongwith security amount after completion of the contract. The total amount of retention money, which is still lying with the plaintiff is Rs.31,13,814.00 (Rupees thirty one lacs thirteen thousand eight hundred and fourteen only).**

**20. It is stated by the defendant that the defendants exercised and taken all the care in respect of the stock including its product etc. It is further submitted that the cargo which was entrusted to the defendants for handling purposes had to pass through numerous handling and processing stages i.e. loading, un-loading, screening, polishing, transportation, filling in gunny bags, securing services and prolong storage which are likely to cause shortages/losses in weight, over which the defendants and his servants had no control.**

**21. It is stated by the defendant that the matter was brought into the notice of plaintiffs which was considered by the Board of Directors of the plaintiffs in their meeting held on 19/4/1995. The Board of Directors of the plaintiffs through the working papers and detail deliberations agreed in principle to allow rebate 3% on loss in handling and its storage etc. The Board of Directors of the plaintiffs also directed the plaintiffs to seek their opinion of the well known international reputed firm SGS Pakistan (Private) Ltd. Surveyor.**

**22. It is stated by the defendant that the plaintiffs thereafter as per direction of the Board of Directors approached the said firm M/S SGS Pakistan (Private) Ltd. and obtained their opinion on the subject of loss in weight of rice in R.E.C.P/ godown. The said surveyor gave their report discussing the various stages of multiple handling process and transportation before shipment during long storage and recommended loss of 3.5% to 6%.**

**23. It is stated by the defendant that during the period of contract the defendants received 5,24,547 metric tons of rice in godown and successfully handled the same according to the terms of the contract alongwith the rice from Crop 91-92 which was also received in same R.E.C.P. godown. It is also stated that out of the total huge quantity of 5,24,547 metric tons for the Crop 90-91 plus 2,38,447 metric tons for Crop 91-92 which equals 7,62,994 metric tons a handling loss alleged to have been found to be 22,354 metric tons which comes within expected limits as approved by the international surveyors and Board of Directors of R.E.C.P.**

**24. It is also stated by the defendant that the contract was performed according to the entire satisfaction of the plaintiffs.**

**25. It is stated by the defendant that the directions contained in annexures B, c & D are not correct and the letters have been issued just to make baseless ground for withholding the defendants' security as well as retention amount.**

**26. It is stated by the defendant that the defendants have no notice of the appointment of the surveyor and the survey was conducted by them and the findings of the surveyor are not binding upon the defendants. It is further stated that it was verification report, which was prepared by the plaintiffs own surveyor.**

**27. It is stated that the defendants are not liable to deposit Rs.8,07,18,033.00 being cost of the shortage of 10,811 metric tons of rice or any part thereof. The said letter dated 31.10.1996 has been appropriately replied , by letter dated**

**16.11.1996 and it was pointed out that the alleged said shortage comes within the expected range of 3.5% to 6%, which has been approved by the plaintiffs Board of Directors and defendants are not liable.**

**28. It is stated that defendants are neither liable to any amount mentioned therein nor the plaintiffs are entitled to retain or adjust the security amount against the alleged losses. It is also stated that the defendants completed 2 contracts of the plaintiffs for the Crop 1990-91 and Crop 1991-92 which were handled simultaneously and also demanded their security amount of two contracts together with the Retention Amount.**

**29. It is stated by the defendants that the defendants also by their another letter dated 12.09.1999 demanded their deposit total amounting to Rs.1,84,27,861.00 (Rupees one crore eighty four lacs twenty seven thousand eight hundred and sixty one only) so as to close the matter.**

**30. It is stated by the defendant that the plaintiffs by their letter dated 15.10.1995 admitted the security amount and the Retention Money of the defendants and informed that the amount is adjusted / recovered against the losses. It is submitted that in view of the survey report of M/S SGS Pakistan (Private) Ltd. and the resolution passed by the Board of Directors of the plaintiff, no amount is payable by the defendants to the plaintiffs. It is further stated that the plaintiffs are liable to pay the following amount to the defendants:**

**i. Rs.31,00,000.00 Security amount**
**ii. Rs.31,13,814.00 Retention Money**
**iii.Rs.65,24,505.00 Profits at the rate of 15% w.e.f. 1/1/1995 till 30/9/2001.**
Total **Rs.1,27,38,319.00**

**31. It is stated by the defendant that the plaintiffs have no right to add any shortage and claim the same. It further stated that defendant are not liable to pay to the plaintiffs. It is stated that the plaintiffs have taken over the control in the year 1996 and since then they have been handling themselves, hence no liability can be put upon the defendants.**

**32. It is stated by the defendant that in view of the repeated demand of security amount and the Retention Money which is illegally withheld by the plaintiffs. The plaintiffs are using the said amount of the defendants and making profit thereof, hence the plaintiffs are liable to pay the profit of the said amount to the answering defendants at the rate of 15% per annum since the date of completion of the contract till the amount is paid.**

**33. Defendant in their written statement and counter claims prayed for the following relief.**

**i. The plaintiffs' suit is liable to be dismissed with cost.**

**ii. The defendants may be granted a decree for Rs.1,27,38,319/- against the plaintiffs being counter claim together with 15% profit from the date of filing of this counter claim till payment.**

**34. Out of the pleadings of the parties, the following issues were struck down on 19.4.2004.**

**1. What quantity of rice and bags entrusted to the Defendant by the Plaintiff for handling purpose at the time of contract?**

**2. Whether there was any shortage of rice and bags, if so to what percentage of quantity as to rice and numbers as to bags?**
**3. Whether shortage in rice, if any, comes within the expected range of 3.5.% to 6% if so its effect?**

**4. Whether the Defendants are entitled to claim relaxation benefit under the contract between the parties as to rice bags?**

**5. Whether the Plaintiff had any control, over the management or over the stock of the goods in the godown, if so to its effect?**

**6. Whether the Defendants is liable to pay Plaintiff's claim of shortage of rice and bags? If so what amount?**

**7. Whether the Plaintiffs have illegally retained the security amount and retention money, if so its effect?**

**8. Whether the Plaintiffs are liable to pay any profit to the Defendant on retention money, if so to what amount?**

**9. Whether the Defendant has cause of action and counter claim is maintainable?**

**10. Whether the survey report dated 14.01.1999 is illegal, if so its effect?**

**11. To what relief if any, the parties are entitled to?**

**35. This Court on 16.12.2004 appointed Mr.Abdul Ghafoor Qureshi, advocate as commissioner to record the evidence and parties were allowed to file their respective affidavits-in-evidence.**

**36. The plaintiff filed affidavit-in-evidence of its witeness Mr.Muhammad Atiq Khan, who produced his affidavit-in-evidence as Exh.P/1 alongwith the documents Exh.P/2 to P/19 and after his cross examination by the learned counsel for defendant the side of plaintiff was closed on 7.3.2005.**

**37. The defendant filed the affidavit-in-evidence of its witeness Mr.Kamran Farid, who produced his affidavit-in-evidence as Exh.D/1 alongwith the documents Exh.D/2 and D/3 after cross-examination of its witness the defendant's advocate closed their side on 19.4.2005.**

**38. I have heard the learned counsels for the parties at some lengths, perused the record, written arguments and the relevant case laws. I will deal the issue one by one. My findings are as under:-**

**39. Issue No.1**

**The learned advocate for the defendant submitted that the quantity of rice entrusted to the defendant after handling over the warehouse / godown is not denied. However, important point for consideration of this Court is that at the time of handing over to godown, the account of the defendant was credited with the balance rice as per balance or reserved stock account maintained with the plaintiff in other words physically handing over of the rice was not done by the plaintiff at the time of handing over / at the time of contract therefore in other words they are not responsible for the loss of the shortage of the stock. It may be observed that contention of the learned counsel has no force because the plaintiff had given him rice and bardana on book balance without physical weighment, because physical wighment of huge rice and bardana was not possible at that time by the plaintiff consequently after completion of his work, balance rice should be taken from him as per agreement it may be observed that it was agreed in the terms and conditions by both the parties that subject condition in the contract was that the defendant would take over the rice crop on the basis of book balance, therefore, at this stage he is not entitled for raising the objection about physical handing over the stocks the other condition of the contract was that final account will be rendered by the defendant since there was a clog of the contract that he would render accounts on the basis of physical payment. He had to abide by it, whether it was right or wrong. It may be further observed that according to the terms and conditions of the contract the defendant was under obligation to comply with the provisions of contract as mentioned in Ex.P-2 Annexure III specially Article-13 which reads under:-**

**13. A C C O U N T S**

**(i) The contractors shall maintain separately a complete and faithful record of each variety of rice, its bye-products, refractions, stores and gunny bags ( new, serviceable and unserviceable) received, stored and delivered by them. The record shall include all transactions arising out of or relating to the execution of the contract.**

**(ii) The contractor shall render to the Corporation separately a Monthly Account of each variety of rice, its bye-products and refractions (arising out of milling process or manual preparation) stores and gunny bags (new, serviceable and unserviceable) received, stored and delivered by them including sweeping, empty gunnies (new, serviceable and un-serviceable) tarpaulins, dunnage, etc. utilized.**

**(iii) The contractors shall also maintain separately a complete and faithfull record of rice received, shifted, transported and cleaned by the Mills including its bye-products, and refractions and shall submit monthly Milling Account on the forms prescribed by the Corporation to Manager / DM (Mills) and a copy thereof Accounts Divison, R.S. Accounts Section b y the 15th of the following month alongwith the necessary documents Manager / DM (Mills) shall verify and forward the Milling Accounts to Accounts Division, R.S. Account Section promptly.**

**(iv) The Monthly Accounts shall be prepared on forms prescribed by the Corporation under the Stock Account Rules (copies of which will be made available to the Contractor by the Corportation) and submitted to the Account Division through the Area Officer concerned by 15th of the following month alongwityh necessary documents including Check Weighment Certificate etc. A copy of the Account shall simultaneously be submitted to the Accounts Divison (R.S. Accounts Sectiuon) of the Corporation. The Area Officer shall verify and forward the R.S. Accounts promptly to the Accounts Division R.S. Accounts Section.**

**(v) In addition to the Monthly Accounts, the contractors shall furnish to the Corporation (R.S. Account Section of the Accounts Division) half yearly accounts of stocks and stores referred to in sub-clause-(i), (ii), (iii) above of this clause by 30th April and 31st of October respectively in each year showing particulars of all transactions upto and balance on 31st March and 30th September for all such stocks an d stores received from the up-country or by transfer from other agents, area, crops and mills. The accounts will alos show issue of rice for export, local sale transfer to other agents, area, crops and mill, balance in godowns and at mills separately in the Performa prescribed by the Corporation.**

**(vi) The Contractors shall keep a complete record/account of expenditure incurred by them in the execution of the Contract and shall produce such record before or furnish information therefrom to the Corporation as and when required.**

**(vii) The Contractors shall maintain separately a running account of bags of every type, quality and size ( New, Serviceable and unserviceable) early exhibiting the availability of empty as well as bags filled with rice showing quantity received, dispatched or delivered by them for empty bags separately. All for transfers from new to serviceable, one handling agent to another within or outside the area shall be supported by CWCs.**

**(viii) The Contractors shall also maintain and submit to the Corporation separately a running account of quantities / weight of damaged rice / bags and exhibit the same at each godown, plinth or shed where the damaged rice, bags is stored.**

**(ix) The Contractors shall furnish such daily or weekly returns as may be required by the Corporation from time to time in addition to the monthly or half yearly returns prescribed under the 'STOCK ACCOUNT RULES'.**

**(x) All accounts maintained by the contractors under the terms and conditions of the Contract shall be made available, as and when required for check and audit by a representative of the Corporation and / or by the Audit Officer of the Government of Pakistan. For this purpose the Contractors shall provide all facilities and assistance to the representative of the Corporation and / or the Audit Officer of the Government of Pakistan. The contractors shall keep all records intact in case local audit is not conducted during the currency of the contract. The contractors shall preserve the records for a minimum period of four years from the date of expiry of the contract.**

**(xi) The contractors shall immediately but not later than 90 days after the completion of the contract (i.e on the disposal of entire or almost entire stocks of rice and stores in accordance with the provisions of the contract,) furnish complete and final accounts of stocks and stores to the Corporation and surrender the balance, if any, without any delay. Failure to do so will entitle the Corporation to transfer the stocks and stores in the custody of the contractors to some other agent or contractor and to appoint a stock verifier for the purpose of verification of the ending stocks and stores. In such an event, the Contractors shall be liable for all cost and consequences including shortages, if any, found by the stocks verifier, and the Corporation will have the right to withhold all payments which may be due to the contractors (including the payment Security Deposit and Retention Money) until and Accounts are furnished and settled by the contractors.**

**(xii) If the Contractors fails to render accounts within ninety days from the expiry of the contract, their Security Deposit shall be forfeited and if any further dues are outstanding against them, action would be taken to recover such dues from Retention Money or through Court of Law or through an Arbitrator so appointed by the RECP.**

**(xiii) <u>The contractors shall ensure proper up-keep and use of the Corporation stores and be responsible for any loss / damage which might accrue to such stores due to carelessness or negligence on the part of the Contractors, their employees, agents, servants or the labour engaged by them.</u> (underlining to give emphasis)**

**(xiv) The contractors shall maintain:-**

**(i) Godown-wise stock Register indicating variety-wise stock position in each godowns.**

**(ii) Stack cards to be provided on each and every stack of rice Lot/gunjy of rice and bags indicating its quantity / weight.**

**(iii) Consolidates stock Register.**

**(iv) Arrival Register showing full details of stocks received i.e date of receipt, wagon number, R.R number weight, station of dispatch and godown number where stored etc.**

**(v) Disposal Register showing full details of stocks;**

**(vi) Register of Bye-product and Refractions of each variety of rice;**

**(vii) Register showing the name, address, relevant details etc., of permanent employees of the Contractors employed in connection with the execution of the contract.**

**(xv) The contractors shall maintain accounts in accordance with any new system of accounting that may be introduced by the Corporation during the currency of the contract.**

**(xvi) The contractors shall furnish a statement to the Corporation (R.S. Account Section of the Account Division) by 15th of each Month showing details of arrival of wagons/NLC/Private trucks from the up-country, station-wise and wagon/NLC/Private truck-wise in respect of each variety of rice received during the preceding month, quoting CWC No. and date under which the stocks have been accounted for in R.S Accounts.**

**(xvii) In case the Contractors fail to comply with any of the provisions of Clause-13 for any reason whatsoever, the Corporation shall withhold payment of their running bills until the compliance has been made. This will be without pre-judice to any other punitive of the contract or any law for the time being in force.**

**It appears that total quantity of Rice entrusted to the Defendant for handling purposes under the Contract in question was admittedly 524, 547 M/tons, as accepted by the Defendant vides its Letter dated 16.11.1996 (Exh-P/6) as stated while the total quantity of Bags were 359,156.**

**40. Issue No.2**

**It appears that shortage of Rice was 10,811 M/tons which was specifically mentioned by the Plaintiff in its Letter dated 31.10.1996 (Ex-P/10), which shortage was accepted by the Defendant vide its Letter dated 16.11.1996 (Ex-P/6). The Defendant's witnesses in his Cross-examination admitted that "I see Exh-P/10 and say that on 31.10.1996 the shortage was 10811 M/tons I see Ex-P/6 letter dated 16.11.1996 and say that the Defendants have shown the short of Rice 10811 M/tons and claimed exception as per letter. He further admitted that the Bardana was also part of the Contract, as such, the same stand proved and per Article 113 of the Qanoon-e-Shahadat, 1984 no further proof is required, while the shortage of Bags was total 359,.156 Bags, as is evident from Enquiry Report dated 24.05.1999 (Ex-/19). The quantity of Bags and their value has been specifically mentioned in para 14-A in the amended plaint filed in the above suit and in Affidavit-in-evidence of PW and the PW in his cross-examination affirmed the same by relying that "It is correct that the quantity of Bardana as mentioned in plaint in para-14-A comes to 3,59,156 and the total costs of these Bardana comes to Rs.6,241,054". The Defendant could not shake / advert the evidence of PW with regards to shortage of quantity and value of Bags / Bardana. Thus the shortage and value of Bags in question is legally deemed to be admitted by the Defendant. In this regard Reliance is placed to the cases of (i) Mst. FARROOQ BIBI Vs. ABDUL KHALIQ & others reported in 1999 CLC 1358 (a) rel. at [P.1361] A (Supreme Court (AJ & K), wherein it has been held that "It is a settled principle of law that a piece of evidence or statement of witness which goes against the interest of particular party and that party does not question the correctness of that assertion or the deposition of the witness it shall be deemed to have been admitted.", (ii) CENTRAL BANK OF INDIA Vs. SYED MUHAMMAD ABDUL JALIL SHAH & other reported in 1999 CLC 671 (f) rel. [P.691]E wherein it has been held that "If a fact is asserted in Examination in Chief and is not impeached by way of cross-examination, that assertion is deemed to have been admitted by defaulting party" and (iii) MOHAMMAD AKHTAR Vs. Mst. MANNA & 3 OTHERS reported in 2001 SCMR 1700 (C) wherein it has been held that "Where a fact asserted by one party remains unchallenged, the same amount to admission on the part of the other party."**

**41. Issue No.3 & 4**

**These issues are interconnected and may be dealt with together. It is stated that on the basis of admitted of 10,811 M/tons Rice as compared to admitted total quantity of 524,547 M/tons Rice entrusted to the Defendant for handling purposes for the Crop 1990-1991 under the Contract in question comes to 2.06%. It is stated that even this percentage of loss / shortage is not permissible / allowed as there it is no provisions in the Contract (Exh-P/2) and / or its supplements Annexure I to V between the parties. The referred resolution of Board of Directors of the plaintiff is of not consequences as it was subject to approval of Govt. of Pakistan, Ministry of Commerce, which approval was not accorded. In the result, the Defendant is liable for the admitted shortage of Rice to the plaintiff. The Defendant could avoid this admitted loss / shortage of Rice by taking care as mentioned / quoted / pointed out in supra para herein above but he failed to do so though it was responsibility of the Defendant to protect and take care of the stock of Rice and Bags entrusted to it by the plaintiff, which the defendant has been neglected as "Bailee", as such, the defendant is liable for the shortage in question in terms of clause 13(xiii) of Annexure III supplemented to the contract (Exh-P/2). The defendant as Bailee was liable to discharge of his duty imposed upon him under Section 151 of Contract Act, 1872. Nothing has been stated / deposed by the DW in this regard in evidence. The defendant as Bailee was bound to take as much care of the stocks of Rice in question as a man of ordinary prudence would, under similar circumstances, take of his own goods. It was duty of the defendant to take all reasonable, precaution to obviate risks, which may be reasonably apprehended or foreseeable, his duty would be to take proper measures for the protection of goods when such risks were imminent or had actually occurred. The defendant has failed to discharge his Onus as cast upon him as Bailee under Section 151 R/w. Section 152 of the Contract Act, 1872, as such, per Section 176 ibid is responsible to the plaintiff for the shortage of Rice and Bags in question and he cannot legally avoid his liability thereto on any excuse. Reliance may be placed on the cases of M/s.MASTER SONS ..VS.. M/s. EBRAHIM ENTERPRISES and another**

**reported 1988 CLC 1381 (a) relevant page 1386-A and (ii) Q.B.E INSURANCE LTD., ..Vs.. THE TRUSTEES OF THE PORT OF KARACHI through Chairman and others reported in 1992 CLC pages 904(f).**

**42. Issues No.5**

**It appears that the burden was on the defendant to prove that the plaintiff had any Contract over the management or over the stock of the goods in the godown, which the defendant has failed to discharge. The defendant under clause 7(a), (c), (k) & (m) of the said annexure III supplemented to the Contract in question was required to take proper care and precaution to protect the stocks of Rice and to prevent from deterioration and not to allow any unauthorized person to enter into godown he failed / neglected to do so, as such, the answer of this issue is to be against the defendant.**

**43. Issue No.6.**

**In view of the submission made on issues No.2, to 4 the defendant is liable to pay plaitniff's claim as claimed in this suit.**

**44. Issue No.7 & 8.**

**I will deal these issues together. It appears that security amount of Rs.3,100,000/- & retention money of Rs.3,034,546/- total amounting to Rs.6,134,546/- has been retained by the plaintiff in accordance with terms and conditions of clause 15 of the said annexure III supplemented to the contract in question between the parties, as such, cannot be held illegal. Clause 15(iii) thereof, inter-alia, provides that the amount of Security deposit plus retention money shall remain with the corporation (plaintiff) until the finalization of accounts after performance of the contract by the Contractor (defendant) and clause 15(iv) thereof provides that the Corporation (plaintiff) shall have lien or charge upon the Security Deposit / retention money and may forfeit the same if contractor (Defendant) commit a breach of contract or fail to perform any of the terms, conditions and convenants contained in the contract or understanding given by them to the contractor (defendant) and that out of the security deposit / retention money, the corporation (plaintiff) may appropriate and reimburse to itself sums due by the Contractor (Defendant) to the Corporation (Plaintiff). If the sum due to the corporation (plaintiff) exceed the amount of the Security Deposit / retention money, the corporation (plaintiff) shall have the right to demand the excess amount from the Contractor (Defendant) and / or recover the same from the Contractor (defendant) out of any other amount that may be payable by the Corporation (plaintiff) to the Contractor (Defendant). Thus the plaintiff was / is legally entitled to retain the security deposit / retention money and since the security amount and retention money has been retained as per agreement between the parties, it cannot be described as illegal, as such, the question of payment of any interest / profit thereon cannot legally arise. Further clause 15(iii) provides that no interest shall be payable to the Contractor (Defendant) on the Security deposit and the amount retained by the corporation (plaintiff) under clause 15(ii), the plaintiff is, in any event, is not liable to pay any interest / profit thereon to the defendant.**

**45. ISSUE NO. 9.**

**It appears that the Defendant has no cause of action for counter claim, which is for refund of Security money and Retention money held / retained by the Plaintiff as per agreement as provided under clause 15 of the said annexure III supplemented to the contract in question. The counter claim of the Defendant is liable / merited to be dismissed with costs.**

**46. ISSUE NO. 10.**

**It appears that there is no survey report dated 14.01.1999. There is enquiry report dated 24.05.1999 (Exh-P/19), which cannot legally be described as illegal and ineffective in absence to the contrary. The enquiry report relates to Gunny Bags/Bardana, which claim was already made in the prayer clause of the original plaint as also high lighted in the Appellate Court's Order dated 10.12.2003.**

**47. Issue No.11.**

**For the foregoing facts, evidence, reasons and discussion, I therefore, decree the suit of the plaintiff against the defendant in the sum of Rs.86,989,087/- with mark up at the rate of 14% per year from 15.12.1997, the date of filing of suit till recovery of decretal amount.**

**JUDGE**

**Karachi**
**Dated:**

//////////////////////////////////////////////////

i. *Whether the defendant have failed to render the accounts of rice of 6374.06 M.Ts and 93 Heavy Cess Bags to the plaintiff against the stocks entrusted to them, if yes, its effect.*

ii. *Whether the alleged losses are within the limit prescribed and approved by the Directors of the Plaintiff, the cabinet Division and international standard?*

iii. *Whether the shortage of rice is due to prolonged storage, improper fumigation, storage conditions, drayage, of moisture of the rice stored in the godown?*

iv. *Whether the defendant is liable to pay the suit amount being the value of the shortage and cost of the rice, if any?*

v. *What should the judgment and decree be?*

**5. It appears that vide order dated 16.12.2004 this Court appointed Mr.Abdul Ghafoor Qureshi, Advocate as Commissioner to record evidence of the parties.**

**6. Plaintiff examined one witness Muhammad Atiq Khan, who produced his affidavit-in-evidence as Ex.P/1 alongwith documents as Ex.P/2 to P/11 and in cross-examination produced documents (Ex.P/12 to P/18), thereafter, closed its side.**

**On the other hand defendant filed affidavit-in-evidence of Mr.Raeesuddin same was exhibited as Ex.D alongwith documents as Ex.D/1 to D/23. after cross-examination the said witness, closed its side.**

**7. The learned counsel for the parties have submitted written arguments.**

**8. I have heard the learned counsels for the parties at some lengths, perused the record and written arguments and the relevant case laws. I will deal the issue one by one. My findings are as under:-**

**ISSUE No.1**

**Learned counsel for the defendant submitted that the quantity of rice entrusted to the defendant after the handing over to the warehouse / godown is not denied. However, important point for consideration of this Court is that at the time of handing over to godown, the account of the defendant was credited with the balance rice as per balance or reserved stock account maintained with the plaintiff in other words physically handing over of the rice was not done by the plaintiff at the time of handing over / at the time of contract therefore in other words they are not responsible for the loss of the shortage of the stock. It may be observed that contention of the learned counsel has no force because the plaintiff had given him rice on book balance without physical payment, because physical payment of huge rice was not possible at that time by the plaintiff consequently after completion of his work, balance rice should be taken from him as per agreement it may be observed that it was agreed in the terms and conditions by both the parties that subject condition in the contract was that the defendant would take over the rice crop on the basis of book balance, therefore, at this stage he is not entitled for raising the objection about physical handing over the stocks the other condition of the contract was that final account will be rendered by the defendant since there was a clog of the contract that he would render accounts on the basis of physical payment. He had to abide by it, whether it was right or wrong. It may be further observed that according to the terms and conditions of the contract the defendant was under obligation to comply with the provisions of contract as mentioned in Ex.P-2 Annexure III specially Article-13 which reads under:-**

**14. A C C O U N T S**

> **(i) The contractors shall maintain separately a complete and faithful record of each variety of rice, its bye-products, refractions, stores and gunny bags ( new, serviceable and unserviceable) received, stored and delivered by them. The record shall include all transactions arising out of or relating to the execution of the contract.**
>
> **(ii) The contractor shall render to the Corporation separately a Monthly Account of each variety of rice, its bye-products and refractions (arising out of milling process or manual preparation) stores and gunny bags (new, serviceable and unserviceable) received, stored and delivered by them including sweeping, empty gunnies (new, serviceable and un-serviceable) tarpaulins, dunnage, etc. utilized.**
>
> **(iii) The contractors shall also maintain separately a complete and faithfull record of rice received, shifted, transported and cleaned by the Mills including its bye-products, and refractions and shall submit monthly Milling Account on the forms prescribed by the Corporation to Manager / DM (Mills) and a copy thereof Accounts Divison, R.S. Accounts Section b y the 15th of the following month alongwith the necessary documents Manager / DM (Mills) shall verify and forward the Milling Accounts to Accounts Division, R.S. Account Section promptly.**
>
> **(iv) The Monthly Accounts shall be prepared on forms prescribed by the Corporation under the Stock Account Rules (copies of which will be made available**

**to the Contractor by the Corportation) and submitted to the Account Division through the Area Officer concerned by 15th of the following month alongwityh necessary documents including Check Weighment Certificate etc. A copy of the Account shall simultaneously be submitted to the Accounts Divison (R.S. Accounts Sectiuon) of the Corporation. The Area Officer shall verify and forward the R.S. Accounts promptly to the Accounts Division R.S. Accounts Section.**

**(v) In addition to the Monthly Accounts, the contractors shall furnish to the Corporation (R.S. Account Section of the Accounts Division) half yearly accounts of stocks and stores referred to in sub-clause-(i), (ii), (iii) above of this clause by 30th April and 31st of October respectively in each year showing particulars of all transactions upto and balance on 31st March and 30th September for all such stocks an d stores received from the up-country or by transfer from other agents, area, crops and mills. The accounts will alos show issue of rice for export, local sale transfer to other agents, area, crops and mill, balance in godowns and at mills separately in the Performa prescribed by the Corporation.**

**(vi) The Contractors shall keep a complete record/account of expenditure incurred by them in the execution of the Contract and shall produce such record before or furnish information therefrom to the Corporation as and when required.**

**(vii) The Contractors shall maintain separately a running account of bags of every type, quality and size ( New, Serviceable and unserviceable) early exhibiting the availability of empty as well as bags filled with rice showing quantity received, dispatched or delivered by them for empty bags separately. All for transfers from new to serviceable, one handling agent to another within or outside the area shall be supported by CWCs.**

**(viii) The Contractors shall also maintain and submit to the Corporation separately a running account of quantities / weight of damaged rice / bags and exhibit the same at each godown, plinth or shed where the damaged rice, bags is stored.**

**(ix) The Contractors shall furnish such daily or weekly returns as may be required by the Corporation from time to time in addition to the monthly or half yearly returns prescribed under the 'STOCK ACCOUNT RULES'.**

**(x) All accounts maintained by the contractors under the terms and conditions of the Contract shall be made available, as and when required for check and audit by a representative of the Corporation and / or by the Audit Officer of the Government of Pakistan. For this purpose the Contractors shall provide all facilities and assistance to the representative of the Corporation and / or the Audit Officer of the Government of Pakistan. The contractors shall keep all records intact in case local audit is not conducted during the currency of the contract. The contractors shall preserve the records for a minimum period of four years from the date of expiry of the contract.**

**(xi) The contractors shall immediately but not later than 90 days after the completion of the contract (i.e on the disposal of entire or almost entire stocks of rice and stores in accordance with the provisions of the contract,) furnish complete and final accounts of stocks and stores to the Corporation and surrender the balance, if any, without any delay. Failure to do so will entitle the Corporation to transfer the stocks and stores in the custody of the contractors to some other agent or contractor and to appoint a stock verifier for the purpose of verification of the ending stocks and stores. In such an event, the Contractors shall be liable for all cost and consequences including shortages, if any, found by the stocks verifier, and the Corporation will have the right to withhold all payments which may be due to the contractors (including the payment Security Deposit and Retention Money) until and Accounts are furnished and settled by the contractors.**

**(xii) If the Contractors fails to render accounts within ninety days from the expiry of the contract, their Security Deposit shall be forfeited and if any further dues are outstanding against them, action would be taken to recover such dues from Retention Money or through Court of Law or through an Arbitrator so appointed by the RECP.**

**(xiii) <u>The contractors shall ensure proper up-keep and use of the Corporation stores and be responsible for any loss / damage which might accrue to such stores due to carelessness or negligence on the part of the Contractors, their employees, agents, servants or the labour engaged by them.</u> (underlining to give emphasis)**

**(xiv) The contractors shall maintain:-**

**(viii) Godown-wise stock Register indicating variety-wise stock position in each godowns.**

**(ix) Stack cards to be provided on each and every stack of rice Lot/gunjy of rice and bags indicating its quantity / weight.**

**(x) Consolidates stock Register.**

**(xi) Arrival Register showing full details of stocks received i.e date of receipt, wagon number, R.R number weight, station of dispatch and godown number where stored etc.**

**(xii) Disposal Register showing full details of stocks;**

**(xiii) Register of Bye-product and Refractions of each variety of rice;**

**(xiv) Register showing the name, address, relevant details etc., of permanent employees of the Contractors employed in connection with the execution of the contract.**

**(xv) The contractors shall maintain accounts in accordance with any new system of accounting that may be introduced by the Corporation during the currency of the contract.**

**(xvi) The contractors shall furnish a statement to the Corporation (R.S. Account Section of the Account Division) by 15th of each Month showing details of arrival of wagons/NLC/Private trucks from the up-country, station-wise and wagon/NLC/Private truck-wise in respect of each variety of rice received during the preceding month, quoting CWC No. and date under which the stocks have been accounted for in R.S Accounts.**

**(xvii) In case the Contractors fail to comply with any of the provisions of Clause-13 for any reason whatsoever, the Corporation shall withhold payment of their running bills until the compliance has been made. This will be without pre-judice to any other punitive of the contract or any law for the time being in force.**

**The figure of 6374.06 M.Ts appearing in Issue No.1 is a result of clerical / typographical error as the actual and admitted figure is 8468.3493 M/tons. The plaintiff claim has been fully corroborated supported by the oral as well as documentary evidence.**

**Apparently the shortage of rice and gunny cess bags has been admitted by the defendant in his DW's cross-examination and in written arguments. The defendant's assertion was only that a shortage / losses between 3.5% to 6.5% is permissible which assertion is misconceived and untenable as it is not provided in the Contract exhibited as Ex.P/2 or in its annxure I to V thereto between the parties. It further appears that in any event the percentage of the said shortage / losses of 84.68.3493 M.T rice against the admitted quantity of 74,577.6260 M.Ts received handled by the defendant against the contract in question comes to 11.35%.**

**On examining the cross-examination of the defendant's witness, it appears that defendant's witness in his cross has admitted which reads as under:-**

***"It is correct that the suit contract relate to the period of 91-92 Crop I have stated Crop of 74,577 M.T for year 1991-92 was dealt with by the defendant. It is correct that physical survey was conducted in my presence (Ex.P/9). I see page 7 of the Survey Report Ex.P/9 and say that the shortage shown on these page is not only for crop year 91-92. It is correct that the Contract for 1989-90 upto 1991-92 were all separate Contracts. It is correct that according to the Contract it is the responsibility of the defendant to protect the good. It is correct that the defendant had to maintain all the record of the goods."***

**Defendant's witness has also admitted in the cross-examination as under:**

***"It is correct that according to the contract in case the final account are not submitted that security deposit will be forfeited.. It is correct that there was shortage of 93 gunny bags."***

**On bare perusal it is crystal clear and proved that the defendant has failed to render the account of the admitted shortage of rice and gunny bags in question to the plaintiff, as such, the answer to the above issue is to be in affirmative.**

**ISSUE NO.2.**

**As regard the issue No.2 from the record it appears that there is no provision in the contract (Ex.P/2) or in its annexures I to V thereto between the parties, which permit / allow any percentage of shortage / loss as alleged or otherwise. As stated by the learned counsel for the plaintiff the approval of the Board of Directors of plaintiff was subject to approval of Government of Pakistan, Ministry of Commerce, which was not accorded. As pointed out by the learned counsel for the plaintiff that in view of the admissions as highlighted in issue No.1 the percentage of the admitted shortage of 8468.3493 M.T rice as compared to admitted total quantity of 74,577.6260 M.Ts Rice received and handled by the Defendant for the crop 1991-92 under the Contract in question comes to 11.35% which in any case is not permissible / allowable. Specific question was put on plaintiff's witness in respect of percentage of shortage relating to the subject case in cross-examination which reads as under:-**

***"It is not correct to suggest that the total shortage against Crop 1991-92 was only 1.73%. he voluntarily stated that the shortage in respect of suit contract was 11.35%".***

**It appears that no further question was put in the cross-examination. The percentage of shortage of rice as stated above is evidently 11.35%, which in no way falls within the limit prescribed as alleged or otherwise. It may be observed that the contents of various reports referred by the learned counsel for the defendants are neither binding nor can condone the agreed terms and conditions in contract regarding loss in the stock of the rice. The answer to this issue, as such is to be negative.**

**ISSUE No.3**

**Mr.Mamnoon Hassan learned counsel for the Plaintiff has advanced his arguments and stated that admittedly it was the responsibility of defendant to protect and take care of the stocks of rice of 74,577.6260 metric tons entrusted to him by the plaintiff under the contract in question in accordance with clauses 7(a) and (c) of Annexure III to the contract (Ex.P/2) which according to Mr.Mamnoon Hassan, defendant has been filed, neglected as such, the defendant is liable**

**for shortage in question and in terms of clause 13(xiii) of the annexure III to the Contract (Ex.P/2) and therefore the defendant was responsible for the loss/damage caused to the plaintiff. He has further submitted that onus to prove that proper steps had been taken by the defendant as bailee for discharge of his duty imposed upon him under Section 151 of Contract, 1872, would initially lie on him and not on the plaintiff but the defendant has failed to discharge his onus as cast upon him as bailee under Section 151 read with Section 152 of the Contract Act, 1872, as such, per Section 176 ibid, the defendant is responsible to the plaintiff for the admitted shortage of 8468.3493 metric tons of rice and 93 heavy cess bags in question.**

**Mr.Agha Faquir Muhammad learned counsel for the defendant controverted the arguments of Mr.Mamnoon Hassan, he submitted that claim of the plaintiff is that the quantity of rice entrusted to the plaintiff was short as per the physical verification carried out by one M/s.Ibrahim Shaikh & Co. (Ex.P/9) and the quantity of bags as per version of the plaintiff was short as per verification conducted by the officers of the plaintiff during the pendency of the suit. He contended that whatever quantity of rice was entrusted to them was delivered back to the plaintiff and as such there is / was no shortages if there is any loss in weight, same is due to inherent vice of the rice, which has a tendency to loose weight. It was their case that 3.5% to 6% loss in weight per annum is a common feature of rice and the same was even approved by the Board of Director, of the plaintiff in their board resolution at page 251 of the evidence file as well as internationally recognized quality assurance firm SGS Pakistan Private Ltd. (at page 249 of the evidence file). Such loss is attributed to prolong storage as commodities like rice are prone to loss in weight due to polishing, moisture, packing etc. He has further submitted that similarly (Ex.P/15) a report prepared by Management Services Division, Cabinet Secretariat, Government of Pakistan regarding "Assessment of Losses' in weight of rice procured for export by plaintiff also states that 3% loss in weight of rice in handling etc is normal.**

**It is pertinent to note that the PW-1 also admitted in his cross-examination that prolong shortage can result in loss in weight:-**

> ***Cross-examination of the PW-1.***
>
> ***"It is correct that insects reduce the weight of the rice voluntarily states it is very nominal.***
>
> ***Q. Is it correct that the sun moisture, bad condition of the godowns rats are the causes of the reducing the quantity of rice?***
>
> ***A. It is correct that the weight is reduced only by moisture, rat and birds of very nominal quantity.***

**It may be observed that the shortage of rice in question is not only due to prolonged storage, improper, improper fumigation, storage conditions, drayage, moisture, of the rice stored in the godown but due to the negligence and carelessness of the defendant as well. It may be observed that the defendant as bailee under the law was bound to take proper care of the stocks of the rice in question as a man of ordinary prudence, would under similar circumstances, take care of his own goods. It was duty of the defendant to take all reasonable precautions to obviate risks which may be reasonably apprehended or foreseeable, his duty would be to take proper measure for the protection of goods when such risks were imminent or had actually accrued. Reliance is placed on the case of M/s.MASTGAR SONS..VS..M/S.EBRAHIM ENTERPRISES and other reported in CLC 1381 and Q.B.E INSURANCE LTD. ..VS.. THE TRUSTEES OF PORT OF KARACHI reported in 1992 CLC 904.**

**Keeping in view the peculiar facts and circumstances of the case in my humble opinion the defendant is entitled 3% rebate on handling losses of rice crop 1991-92 only. It may be observed that the quantity of previous contracts for the crops 1988-89, 1989-90 are not subject matter of the suit in question therefore 3% rebate on handling losses be allowed for crop 1991-92.**

**Admission of Defendant's witness in his cross-examination read as under:-**

> ***"It is correct that according to the contract it is the responsibility of the defendant to protect the good."***

**On bare reading it appears that it was an admitted responsibility of the defendant to protect and take care of the stocks of rice of 74,577.6260 M.T entrusted to him by the plaintiff under the Contract in question, which according to the learned counsel for the plaintiff defendant has been failed, neglected, as such is liable for shortage in question and in terms of clause 13 (xiii) of the annexure III to the Contract (Ex.P/2) was / is responsible for the loss / damage cause to the plaintiff, which again reads as under:-**

***Supra*** ***"13(xiii). The contractors shall ensure proper up keep and use of the corporation stores and be responsible for any loss/damage which might accrue to such stores due to carelessness or negligence on the part of the contractors, their employees, agents, servants or the labour engaged by them.***

**On bare reading the onus to prove that proper steps had been taken by the defendant as bailee for discharge of his duty imposed upon him under Section 151 of Contract Act, 1872 would initially lie on him and not on the plaintiff. Section 151 of the Contract Act, 1872, reads as under:-**

> ***"Section 151 care to be taken by bailee. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary PRUDENCE would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."***

**Defendant's witness in his deposition has been deposed that proper steps had been taken by the defendant in discharge of his duty imposed upon him as bailee under the law. The defendant as bailee was bound to take as much care of the stocks of rice in question as a man of ordinary prudence would, under similar circumstance, take of his own goods. It was duty of the defendant to take all reasonable precautions to obviate risks, which may be reasonably apprehended or foreseeable, his duty would be to take proper measures for the protection of goods when such risks were imminent or had actually occurred.**

**It appears that defendant has failed to discharge his onus as cast upon him as bailee under Section 151 read with Section 152 CPC of the Contract Act, 1872, as such, per Section 176 ibid is responsible to the plaintiff for the admitted shortage of 8468.3493 M/Tons of rice and 93 Heavy Cess Bags in question and defendant cannot legally avoid his liability thereto on any excuse. This issue would therefore, be against the defendant.**

**ISSUE No.4 & 5.**

**-**

**These issues are interconnected and are to be taken together. It appears that on the basis of terms and conditions of the contract and admitted position of shortage 8463.3493 M/Ts of Rice and 93 Heavy Cess Bags gunny bags as pointed out in issues No.1 to 3 and the fact that the shortage in question and their valuation were specifically mentioned in the plaint. It appears that affidavit-in-evidence of Plaintiff witness and the reports as exhibited as Ex.P/9 and P/11 and no question in cross-examination to contradict was put by the defendant to Plaintiff's witness.**

**On bare perusal it appears that the claim of the plaintiff stand proved and will not require any further proof in terms of Article 113 of Qanoon-e-Shahdat 1984. Learned counsel for the plaintiff has placed reliance on the cases reported as MST. FAROOQ BIBI VS.. ABDUL KHALIQ AND OTHERS REPORTED IN 1999 CLC 1358 (A) RELEVNT PAGE [1361]A (Supreme Court (AJ & K) it was held that *"It is a settled principle of law that a piece of evidence or statement of witness which goes against the interest of particular party and that party does not question the correctness of that assertion or the deposition of the witness it shall be deemed to have been admitted."***

**In the case of *CENTRAL BANK OF INDIA ..VS.. SYED MUHAMMAD ABDUL JALIL SHAH and others reported in 1999 CLC 671 (f) [rel.691]F.* It was held wherein that *a fact is asserted in Examination-in-Chief and is not impeached by way of cross-examination, that assertion is deemed to have been admitted by defaulting party"***

**In the case of MUHAMMAD AKHTAR ..VS.. MST. MANNA & 3 OTHERS reported in 2001 SCMR 1700 (C) wherein it has been held by Hon'ble Supreme Court of Pakistan that *where a fact asserted by one party remains unchallenged, the same amount to admission on the part of the other party.***

**For the foregoing facts, evidence, reasons and discussion, I therefore, decree the suit of the plaintiff against the defendant in the sum of Rs.4,81,96,159/- with mark up at the rate of 14% per year from 15.12.1997, the date of filing of suit till recovery of decretal amount.**

**JUDGE**

**Karachi**
**Dated:**