

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1409 of 2001

PRESENT:**Mr. Justice Arshad Hussain Khan.***Trading Corporation of Pakistan (Pvt.) Ltd.*

Vs.

Messrs. Cox & King Agents Ltd.

Plaintiff: Trading Corporation of Pakistan (Pvt.) Ltd.
Through Mr. Ghulam Muhammad Dars, Advocate.

Defendants Messrs. Cox & King Agents Ltd.
None present for the Defendant.

Date of Hg: 17.03.2020.

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was filed on 03.10.2001 against the defendant for Recovery of Rs.46,26,579/- plus interest at the current bank rate with the following prayers:-

- a) Decree this suit against the defendant in favour of the plaintiff in the sum of Rs.46,26,579/-.
- b) Grant interest on the above amount at the current bank rate at the time of decree with effect from 13.04.2001 until actual payment.
- c) Costs throughout.
- d) Further and additional reliefs deemed proper by this Honourable Court.

2. Briefly stated the facts of the present case are that the plaintiff, a Government owned trading entity, acting on the directives of the Federal Government, inter alia, undertakes import of essential commodities to ensure their availability and to stabilize prices in the Country. The plaintiff for the purposes of keeping in safe custody in trust of its Goods namely (i) Red Chilies (ii) Black Gram (iii) White Gram and (iv) Black Matpe, which it had imported from time to time through several vessels and stored at various godowns, on 29.03.1995 appointed defendant as custodian (bailee). It has been stated that the terms of conditions of the appointment were duly specified and accordingly in pursuance of the said letter of appointment and

payments the defendant received for safe custody in part performance the following:-

RED CHILLIES

- i. 93.821 M.T. arrived by M.V. Loyal Bird
- ii. 150.494 M.T. arrived by M.V. Orient Mukarov
- iii. 129.167 M.T. arrived by M.V. Trade Expansion,

BLACK GRAM

- i. 4680.495 M.T. arrived by M.V. Loyal Bird

WHITE GRAM

- i. 3379.080 M.T. arrived by M.V. Funghai,
- ii. 2564.23 M.T. and 434.635 M.T. arrived by M.V. Motovun

BLACK MATPE

- i. 1294.790 M.T. arrived by M.V. STN-1

It has also been stated that under the terms of appointment, the defendant was required to furnish periodical as well as final consignment accounts duly certified by the plaintiff's nominated surveyor so that the same could be checked with the accounts maintained by the plaintiff and reconciled for settlement but due to the failure of the defendant to do so, the accounts have neither been finalized nor reconciled. However, when the defendant's payments were withheld, the defendants started advancing lame excuses that because of infestation, dryness etc. of items in question and natural conditions occur in the godowns the Goods entrusted to them have lost its weight and shortage has occurred. It has also been stated that the defendant instead of submitting correct and comprehensive accounts in respect of all the Goods entrusted to them in order to finalize the accounts, showed its anxiety for settlement of their bills, which could only be possible once the comprehensive and final accounts is submitted by the defendant and the same is checked and reconciled with the plaintiff's record. It has been stated that after a lapse of considerable time when the plaintiff failed to submit the Accounts, the plaintiff itself checked all available records and finalized the Accounts which transpired that an amount Rs.46,26,579/- is payable by the defendant to the plaintiff. The plaintiff immediately communicated a summary of the accounts, showing shortages in respect of the Goods entrusted to the defendant for safe custody and demanded payment. In response thereto, the defendant did not dispute the accounts of the

plaintiff, but refused to admit liability on flimsy and untenable grounds and subsequently changed its stance and requested for waiver. It has been lastly stated that the defendant has failed to make the aforesaid payment in respect of admitted shortages, therefore, the defendant is liable to pay the amount prayed in this case.

3. Upon notice of the present case, the defendant [M/s Cox and Kings (Agents) Ltd.], on 17.01.2002 filed Written Statement through its Chairman Walid Saleem Malik. The defendant in its written statement has taken stance that the defendant is not responsible, if any shortage was found out due to infestation, labour handling, dryness etc. of items in question or any natural conditions occur in the godowns. As such the defendant is not liable to make any sort of payment towards shortage of the weight of any quantity of subject items occurs due to above said reason and as the same was beyond the control of the defendant. It has been stated that all the four items i.e. Red Chilly, White Gram, Black Gram, and Black Matpe could never remained at their actual original weight, the fluctuation in weight is inevitable and always notable when these Goods containing moisture of approximately 6% to 13% at the time of shipment decrease in the weight when dried up by the effect of the climate in the godowns. It has been further stated that the defendant has duly furnished, a comprehensive statement / report of Accounts from time to time to the plaintiff and the shortage of the weight did not take place due to any fault on the part of the defendant, therefore, the defendant is not liable to make any payment in respect thereof. It has also been stated that the account was not being finalized due to the reason that the plaintiff was demanding money of the shortage quantity of items in question whereas shortage occurred was not due to the negligence or fault of the defendant, thus the defendant is not responsible to indemnify the same. It is further stated that the defendant made correspondence regarding finalization of accounts but due to mala fide intention, instead of clearing the pending bills, the plaintiff encashed the Bank Guarantee and filed the present suit just to usurp the money Rs.7,86,819.00 of the defendant. In the last, it has been stated that no cause of action has been accrued to the plaintiff against the defendant to file the present suit and the plaintiff is not entitled to the relief sought by it and the defendant is

not liable to pay any amount to the plaintiff as alleged or otherwise and the suit may be dismissed with compensatory cost under Section 35 of the Civil Procedure Code.

4. On 06.05.2002 out of the pleadings of the parties, following issues have been settled by the Court:-

- i. Whether there was any shortage in plaintiff's Goods stored in the defendant's godown?
- ii. If the issue No.1 is answered in the affirmative then whether shortage was due to negligence of defendant?
- iii. Whether the defendant is liable to pay the plaintiff the price of shortage in Goods under the terms of contract between the parties?
- iv. What should the decree be?

5. After settlement of the issues, affidavit-in-evidence of one Muhammad Sadiq son of Suba Khan, an officer of the plaintiff, was filed and in his examination-in-chief, he had produced the following documents:-

S.NOS.	DESCRIPTIONS	EXHIBITS
1	Affidavit in evidence.	P/1
2	Resolution for filing the suit.	P/2
3	Letter dated 29.03.1995 addressed to Defendants along with two other letters.	P/3, P/4 & P/5
4	Letter from M/s. Cox & King.	P/6
5	Photocopy of Survey Report from Sawant & Co. a/w annexures.	P/7
6	Survey Report from M/s Sawant & Co. dated 17 th September, 1995, a/w annexures.	P/8
7	One page from Stock Register of TCP.	P/9
8	Survey Report No.12258-A/95 dated 22.06.1995 from M/s. Sawant & Co. a/w annexures.	P/10
9	Survey Report from M/s. Sawant & Co. dated 16.05.1995.	P/11
10	Survey Report from M/s. Sawant & Co. dated 15.11.1996 a/w annexures.	P/12
11	Letter addressed to Cox and King dated 03.06.1997.	P/13
12	Letter dated 4.6.1997 of M/s. Cox and King.	P/14
13	Survey Report of M/s. Joseph Lobo (Pvt) Ltd. Dated 17.5.1995.	P/15
14	Import (Cargo) Survey Report of M/s. Joseph Lobo (Pvt.) Ltd. dated	P/16

	7.5.1995 along with annexures.	
15	Letter addressed to Cox & King dated 03.06.1997.	P/17
16	Letter of M/s. Cox & King addressed to TCP dated 04.06.1997.	P/18
17	Report dated 13.1.1996 from M/s. Iqbal A. Nanjee & Co. along with annexures.	P/19
18	Letter dated 3.6.1997 addressed to M/s. Cox and King.	P/20
19	Letter from Cox & King dated 4.6.1997.	P/21
20	Letter dated 5.11.1998 addressed to M/s. Cox and King.	P/22
21	Report dated 9.4.1996 of M/s. Sawant & Co. along with annexures.	P/23
22	Letter dated 3.6.1997 addressed to M/s. Cox and King.	P/24
23	Letter dated 4.6.1997 addressed to M/s. TCS.	P/25
24	Report dated 30.5.1996 of Iqbal A. Nanjee & Co.	P/26
25	Letter dated 4.3.1997 of M/s. Iqbal A. Nanjee & Co. along with annexures.	P/27
26	Letter dated 3.6.1997 of M/s. Cox and King.	P/28
27	Letter dated 4.6.1997 of M/s. Cox and King.	P/29
28	Letter dated 14.9.1999 addressed to M/s. Cox and King.	P/30
29	Letter dated 3.7.1995 addressed to M/s. Cox and King.	P/31
30	Fumigation Certificate dated 15.7.1985.	P/32
31	Letter dated 20.8.1995 addressed to M/s. Aero Past Control Services.	P/33
32	Letter dated 24.10.1995 addressed to M/s. Aero Post Control Services	P/34
33	Letter dated 16.5.1996 addressed to Bahria Fumicon.	P/35
34	Letter dated 16.5.1996 addressed to Bahria Fumicon.	P/36
35	Letter dated 16.5.1996 addressed to M/s. Aero Post Control Services	P/37
36	Letter dated 19.5.1996.	P/38
37	Letter dated 5.6.1996 addressed to TCP by Iqbal A. Nanjee & Co.	P/39
38	Letter dated 6.6.1996 issued to Government of Pakistan.	P/40
39	Letter dated 20.6.1996 issued to Aero M/s. Past Control Services.	P/41
40	Letter dated 5 th August 1996 issued to TCP.	P/42
41	Letter dated 8 th September, 1996 issued to Unique Services.	P/43
42	Letter dated 8.10.1996 issued to Pakistan Fumigation Corporation.	P/44

43	Two Letters from M/s. Iqbal Nanjee and Co. dated 10.10.1996.	P/45 & P/46
44	Letter dated 6.11.1996 from M/s. Sawant & Co.	P/47
45	Letters dated 6.11.1996 and 7.11.1996 from M/s. Iqbal Nanjee & Co.	P/48 & P/49
46	Letter dated 31.12.1996 addressed to Cox & King.	P/50
47	Letter dated 27.1.1997 issued to GM CSD.	P/51

The above-named witness of the plaintiff was cross-examined by the defendant's counsel.

6. On the other hand, on behalf of defendant [M/s. Cox & King (Agents) Ltd.] Walid Salim Malik son of Muhammad Salim Malik, the Chairman of the defendant was examined who had produced his Affidavit-in-evidence as Exh.DW/1. He was also cross-examined by plaintiff's counsel. After completion of the evidence of the parties the matter has come up for arguments.

7. Records transpires that after completion of the evidence, counsel for the defendants chose to remain absent in the matter. Resultantly, notices were repeatedly sent to the defendant and its counsel but none has shown appearance on their behalf. Consequently, this Court heard the learned counsel for the plaintiff and perused the records with his assistance.

8. During the course of arguments, learned counsel for the plaintiff while reiterating the contents of the plaint has argued that the plaintiff vide its letter dated 29.03.1995 appointed defendant as custodian of its Goods namely (i) Red Chillies (ii) Black Gram (iii) White Gram and (iv) Black Matpe arrived at Karachi through different vessels. The terms/ conditions of the appointment were duly specified and accordingly in pursuance thereof, the defendant received safe custody of Goods as mentioned in the plaint in detail. Further argued that under the terms of the appointment as custodian, the defendant was required to furnish periodical as well as final consignment accounts duly certified by the plaintiff's nominated surveyor in order to reconcile the record and finalize the Accounts. However, the defendant failed to furnish the requisite Accounts; resultantly accounts have neither been

finalized nor reconciled. It has further been argued that instead of finalizing and reconciling the accounts in respect of the aforesaid Goods, the defendant showed it anxiety for settlement of its bills. It is further argued that when the defendant despite letters and reminders failed to furnish the requisite accounts, the plaintiff itself checked all available records and finalized the Accounts, which transpired shortages worth Rs.46,26,579/- in the Goods entrusted to the defendant for safe custody. The defendant through letter 13.04.2001, was immediately informed such shortage and also communicated summary of accounts. The defendant by its reply letter dated 23.04.2001, though did not dispute the accounts of the plaintiff, but refused to admit liability. It is also argued that irrespective of the defendant's plea regarding shortage, in matters of bailment, the loss of Goods is prima facie evidence of the negligence of the bailee and the burden of proof in such cases rests upon the Bailee to prove that he was not negligent. Learned counsel has argued that in instant case, the bailee/defendant has miserably failed to discharge its burden to prove that it was not negligent and further it has miserably been failed to shake the evidence of the plaintiff, whereas, in the cross examination they have made admission, which support the claim of the plaintiff. Learned counsel submits that from these admissions, it is cleared that the grounds and reasons of drayage and infestation for shortage of Goods, are afterthought, flimsy and fabricated. It is also argued that the plaintiff has fulfilled all its obligations diligently like payment to the Defendants for custody of the Goods and proper and timely fumigation was carried out by the plaintiff at the godowns as reflected from Exhs. P/31 to P/51. Learned counsel further argued that the defendant was bound to submit periodical statement of Accounts duly certified by the plaintiff's Surveyor, however, the defendant deliberately failed to submit the statements, apparently for the reasons to hide the shortage in the bailed quantity of Goods. It is argued that the loss of Goods is a prima facie evidence of the negligence of the Bailee/Defendant, hence the shortage and the negligence is apparently proved. It is also argued that the defendant has admitted and they have not denied or confronted the amount of loss as claimed in para-11 of the Plaint and para-11 of the Affidavit-in-evidence of the Plaintiff. Learned counsel has referred to Section 161 of the Contract Act, wherein the bailee is responsible for

any loss, destruction or deterioration of the Goods. He has argued that the defendant was contractually bound and responsible for any loss under clause (viii) of letter of appointment of custodianship dated 29th March, 1995 [Exhibit P/3]. Lastly argued that since the defendant has failed to make the aforesaid payment in respect of the admitted shortages, therefore, the defendant is liable to pay the amount as claimed in this suit and as such the suit may be decreed as prayed for. In support of his stance, he has relied upon the cases of *Trading Corporation Of Pakistan (Pvt.) Ltd. v. Messrs Ali Noor (Pvt.) Ltd.* [2008 CLD 395], *P. Rangaraju v. Muthukrishna Lyengar* [AIR 1962 MADRAS 244], *Rice Export Corporation of Pakistan v. Star Trading Company* [SBLR 2016 Sindh 967], *Trading Corporation of Pakistan v. Muhammad Alam* [2016 CLC 1573] and *Messrs Master Sons through its Partner v. Messrs Ebrahim Enterprises and another* [1988 CLC 1381].

9. I have heard learned counsel for the plaintiff, perused the record and have also gone through the relevant law as well as the case law relied upon by learned counsel for the plaintiff and my findings on the above issues are as follows:-

ISSUE NO.1:

From perusal of the record, it appears that the plaintiff entrusted its Goods namely (i) Red Chillies (ii) Black Gram, (iii) White Gram and (iv) Black Matpe, imported through various shipments reached at Karachi from 31.3.1995 to 15.4.1996 to the defendant as custodian. Although there is one letter dated 29.03.1995 [Exh.P/3] available on the record, which transpires that the defendant was appointed as custodian in respect of consignment reached at Karachi through vessel MV. LOYAL BIRD comprising of Grams and Chillies to be stored in TCP Godown SITE, Karachi, however, since the defendant has never disputed such fact it was appointed as custodian for other items as well which were imported by the plaintiff from time to time through other vessels and stored in other godowns and further from the survey reports of different surveyors available on the record also reflects that the defendant was the custodian of the plaintiff's Goods imported from time to time and stored at different godowns, Karachi. Thus, in the circumstances, it can be safely presumed that the defendant was

appointed as custodian in respect of other items as well on the same terms and conditions as that of letter dated 29.03.1995 [Exh.P/3]. For the sake of ready reference the terms of conditions as mentioned in the letter of appointment as custodian dated 29.03.1995 [Exh.P/3], are reproduced as under:

“2. As Custodian you will be responsible for the following jobs /functions:-

- i) To provide polythene dunnage, with prior approval of its sample by TCP surveyor and or TCP officials. The dunnage should be payed spread on godown floors in such a manner that it should protect cargo from seepage etc. payment for dunnage will be at TCP's approved rates of Rs.2/- per Sq.ft. subject to actual measurement and satisfactory works.
- ii) To handle and stock Goods item wise received as in godown. Sufficient spaces should be provided in between stocks for easy movements of labour and to keep bags in countable position. While stacking, the nature of items should be kept into consideration. The number of layer of stacking for each item should be fixed for maximum utilization of space without any damages to the respective stored items.
- iii) To make arrangement in the godown for re-stitching and refilling of torn/damaged bags in the presence of TCP's surveyor. Proper account of such bags should be kept.
- iv) Damaged bags and sweepings of respective items are to be stored separately from such bags sound stock after proper counting the number of bags and their weightment duly verified/certified by TCP nominated surveyors.
- v) To arrange the delivery of red chillies and black grams to the TCP's nominees on production of valid delivery orders to be issued by TCP.
- vi) To forward us daily, weekly, monthly reports item wise of incoming and outgoing deliveries from the godown as per TCP delivery orders, party wise and date wise. For this purpose, necessary ledgers/stock registers should be maintained in the godown for necessary verification/inspection whenever required.
- vii) To submit a comprehensive consignment account the above items after completion of deliveries.
- viii) To make proper security arrangements in the godown premises at your cost and expensive for the safety of TCP's cargo stored therein. Any pilferage shortage, both in number of bags or quantity for any reason whatever will be at your sole responsibility.

- ix) To comply/implement any other directives/instructions given to you by CSD Division in connection with TCP's cargo in the subject godown.

The Goods entrusted to the defendant were stored in different godowns and subsequently delivered to the parties from time to time as per the directions of the plaintiff details whereof are as follows:

RED CHILLIES

- i. Red Chillies arrived at Karachi through M.V. Loyal Bird and stored in Dost Muhammad Cotton Mills. Total quantity handed over to the defendant was 93.821 M.T., out of which the defendant delivered 93.307 M.T. to various parties from time to time and as such a shortage of 0.514 M.T. has emerged. *[Pgs. 31 & 39 of evidence file and the documents are annexed with Exh.P/4]*
- ii. Red Chillies arrived through M.V. Orient Mukarov and stored in Karimi Godown SITE. Total quantity handed over to defendant was 150.494 M.T. out of which the defendant delivered 140.561 M.T. to various parties and as such a shortage of 9.933 M.T. has emerged. *[Pgs. 55 & 81 of evidence file and the documents are annexed with Exh.P/7]*
- iii. Red Chillies arrived through M.V. Trade Expansion and stored in Karimi Godown SITE. Total quantity handed over to the defendant was 129.167 M.T. out of which the defendant delivered 124.954 M.T. to various parties and as such a shortage of 04.213 M.T. has emerged. *[Pg. 89 & 111 of evidence file and the documents are annexed with Exh.P/10]*

BLACK GRAM

- i. Black Gram arrived at Karachi through M.V. Loyal Bird and stored in Dost Muhammad Cotton Mills. Total quantity handed over to the defendant was 4680.495 M.T. out of which the defendant delivered 4533.455 M.T. to various parties and as such a shortage of 147.040 M.T. has emerged. *[Pgs. 123 & 157 of evidence file and the documents are annexed with Exh.P/15]*

WHITE GRAM

- i. White Grams arrived at Karachi through M.V. Funghai and stored at Dost Muhammad Cotton Mills and Karimi Godown, SITE, Karachi total quantity handed over to the defendant was 3379.080 M.T. out of which the defendant delivered 3375.763 M.T. to various parties and as such a shortage of 3.317 M.T. has emerged. *[Pgs. 169 & 205 of evidence file and the documents are annexed with Exh.P/19]*
- ii. White Grams arrived through M.V. Motovun and stored in Zafar Godown, total quantity handed over to the defendant was 2564.230 M.T. out of which the defendant delivered 2545.585 M.T. to various parties and as such a shortage of 18.645 M.T. has emerged. *[Pgs. 217 & 239 of evidence file and the documents are annexed with Exh.P/23]*
- iii. White Grams arrived through M.V. Motovun and stored in Dost Muhammad Godown, total quantity handed over to the

defendant was 434.635 M.T. out of which the defendant delivered 432.614 M.T. to various parties and as such a shortage of 2.021 M.T. has emerged. *[Pgs. 217 & 231 of evidence file and the documents are annexed with Exh.P/23]*

BLACK MATPE

- i. Black Mapte arrived at Karachi through M.V. STN 1 and stored in Dost Muhammad Cotton Mills. Total quantity handed over to the defendant was 1294.790 M.T. out of which the defendant delivered 1286.632 M.T. to various parties and as such a shortage of 8.770 M.T. has emerged. *[Pgs. 249 & 283 of evidence file and the documents are annexed with Exh.P/26]*

Record also transpires that the plaintiff upon coming to know about the above shortage of items addressed a letter dated 13.05.1997 [Exh.P/5], and reminder dated 3.06.1997 [Exh.P/13], to the defendant wherein clarification/justification was sought in respect of above shortages. The defendant in response to the said letters addressed item-wise reply viz. in respect of Red Chillies letter dated 02.06.1997 [Exh.P/6], Black Grams letter dated 4.06.1997 [Exh.P/18], White Grams letter dated 4.06.1997 [Exh.P/21], in respect of Black Mapte letter dated 04.06.1997 [Exh.P/29]. In all the replies, the defendant although did not dispute the shortages in the Goods entrusted to it, yet it took cyclostyled stance that the shortages have been occurred due to various reasons namely, Goods received by it in the shape of bags and not in weights, the whole consignment was not weighed instead surveyors carried out the weighment at random hence can't be guaranteed as 100% exact calculation, due to heavy infestation and bad handling of Goods by the labours. It has also been stated in the replies that loss of weight of the Goods entrusted to it as custodian was not on account of its negligence but on account of above mentioned reasons and as such shortages in respect of the Goods may be waived. The defendant neither in its pleadings nor the evidence produced by it has disputed the shortages as mentioned in the plaint, in the quantity of Goods entrusted to it by the plaintiff. Moreover, from the record it also appears that no question in cross-examination to contradict such stance of the plaintiff was put by the defendant to plaintiff's witness. 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. Reliance in this regard can be placed on the case of *Mst. Farooq Bibi v. Abdul Khaliq and others* [1999 CLC 1358].

In view of the above discussion, it is clear that shortages have been occurred in the Goods entrusted to the defendant during its custody. Accordingly, this issue is answered in affirmative.

10. **ISSUE NO.2:**

From the perusal of the appointment letter [Exh.P/2], it appears that the relationship between the plaintiff and the defendant is that of 'bailor' and 'bailee' as defined in Chapter IX of Bailment under Section 148 of Contract Act 1872, which for convenience sake is reproduced as under:

"148. A "bailment" is the delivery of Goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the Goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation- If a person already in possession of the Goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such Goods although they may not have been delivered by way of bailment."

Pursuant to the terms of Exh.P/3, inter alia, it was the duty/responsibility of the defendant to forward the plaintiff daily, weekly, monthly reports item-wise of incoming and outgoing deliveries from the godown as per TCP delivery orders, party wise and date wise. However, there is nothing available on the record, which could show that the defendant either prepared and/or sent the said reports to the plaintiff. Moreover, when the shortage was communicated to the defendant in the Goods entrusted to it, the defendant came up with the excuses and attributed the loss towards prolong storage, dryness, infestation and that the Goods handed over in terms of bags and not in weight as well as bad handling of Goods by the labours etc. Whereas the record shows that the plaintiff before handing over the subject Goods to the defendant got surveyed the Goods through independent surveyors. The said surveyors conducted the survey in respect the

quantity and quality of Goods in presence of the defendant, thereafter the Goods were handed over to the defendant and at no point in time the defendant raised objections of the nature either before the surveyors or with the plaintiff. Survey reports available on the record as Exh.P/4, P/7, P/10, P/15, P/19, P/23 and P/26 reveals that surveyors during the survey have counted the Goods in both bags and weight wise. Such reports were never disputed by the defendant. The defendant has also not disputed any of the documents placed on the record by the plaintiff. The plaintiff in support of its stance have also placed on the record various fumigation certificates [Exh.P/31 to P/51], which show that the plaintiff, in order to prevent infestation, from time to time, got fumigation of the Goods. Besides the terms of appointment of defendant as custodian, the defendant as Bailee under the law was also bound to take proper care of the stocks entrusted to it as a man of ordinary prudence, would under similar circumstances, take care of his own Goods. It was the duty of the defendant to take all reasonable precautions to obviate risks, which may reasonably / foreseeably be apprehended, and its duty would be to take proper measure for the protection of Goods when such risks were imminent or had actually been occurred.

In terms of section 151 of the Contract Act, 1872, which states that :

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.

And section 161 of Contract Act 1872, states that _

If, by the default of the bailee, the Goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the Goods from that time.

The status of defendant in the instant suit is of bailee for reward and as such under the law the loss of the subject matter of the bailment is a prima facie evidence of the negligence of the bailee. In order to escape from liability for the loss occurred, the onus of proof will be upon the bailee to show that he had taken the necessary standard of care as imposed upon him by the Statute. In Halsbury's Laws of England

Vol. 2, 3rd Edn. Page 117, the rule of law relating to onus to proof is enunciated as under: -

"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this he is not bound to show how or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing."

In the present case, the onus was on the defendant to prove that it had submitted periodical Accounts to the plaintiff in respect of Goods entrusted to it, which, it is evident, the defendant never submitted in terms of Exh.P/3, which is the Subject Contract, in order to keep track of inventory/ stock. If a proper inventory could have maintained, then any shortage would have been easily ascertained at an early stage, followed by remedial measures, which could have saved the plaintiff from sustaining losses.

Appraisal of the evidence leads to the conclusion that the Defendant did in fact neglect to submit periodical Accounts of Goods entrusted to it and even during evidence did not produce any document in respect thereof to discredit the claim of the plaintiff. Consequently, Issue No.2 is answered in Affirmative and against the Defendant.

11. ISSUE NO.3:

The Goods were handed over to the defendant as bailee under the terms of the Exh.P/3, clause VII whereof clearly states that 'Any pilferage, shortage, both in number of bags or quantity, for any reason whatsoever will be at the sole responsibility of the defendant. It is also settled position of law that in the matters of bailment, the loss of Goods is prima facie evidence of the negligence of the bailee and the burden of proof in such cases rest upon the bailee to prove that he was not negligent and in the event if the bailee fails to discharge such onus, he would become liable to make loss of bailor. Reliance in this regard are placed on the cases of *Trading Corporation Of Pakistan (Pvt.) Ltd. v.*

Messrs Ali Noor (Pvt.) Ltd. [2008 CLD 395], Trading Corporation of Pakistan v. Muhammad Alam [2016 CLC 1573] and Messrs Master Sons through its Partner v. Messrs Ebrahim Enterprises and another [1988 CLC 1381].

In the present case, the defendant being a bailee has failed to discharge its burden to prove that it was not negligent. Moreover, in view of the findings of issue No.2 above, the defendant is found responsible for the shortage of items entrusted to it hence the defendant is liable to make good the losses in respect of plaintiffs' claimed shortages. Record also shows that the defendant has not even denied or confronted the amount of loss as claimed in para 11 of the plaint and para-11 of the affidavit in evidence. It is also by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination, shall be deemed to have been admitted. Reliance can be placed in the cases of Farzand Ali v. Khuda Bakhsh and others [PLD 2015 SC 187], Muhammad Akhtar v. Mst. Manna and 3 others [2001 SCMR 1700].

In the circumstances, this issue is also answered in affirmative.

12. ISSUE NO.4:

In the circumstances and in terms of the findings on the Issues No. 1 to 3, I am of the considered view that in the instant matter the plaintiff has established its case in respect of recovery of its amount as claimed in the suit. Accordingly, the suit of the plaintiff is decreed against defendant in sum of **Rs.46,26,579.00** [Rupees Forty-six Lac, Twenty-six Thousand and Five Hundred and Seventy-nine only] with 10% markup per annum from the date of institution of suit till realization of amount. However, the parties are left to bear their own cost.

JUDGE

Karachi
Dated: 29.05.2020