

**2012 C L D 1641**

**[Sindh]**

**Before Shahid Anwar Bajwa, J**

**PROVINCE OF SINDH through Secretary, Food Department, Government of Sindh  
and another----Appellants**

**Versus**

**Messrs JAKHARNI ROLLER FLOUR MILL, JACOBABAD through Manager----  
Respondent**

First Civil Appeal No.3 of 2011, decided on 22nd March, 2012.

**(a) Sale of Goods Act (III of 1930)---**

---Ss. 35 & 36---Delivery of goods in absence of an express agreement/contract between the parties---Scope---Date, place and time of delivery is to be decided by express contract between the parties, but where there is no express contract, delivery will be governed by Ss.35 and 36 of the Sale of Goods Act, 1930, and in such a case it is the duty of the buyer to apply for delivery, however it is available to the seller to deliver the goods without any application in that behalf by the buyer, but the seller is also entitled to wait until buyer applies for the delivery---Seller is not bound to deliver the goods unless the buyer applies for delivery but when the buyer applies for delivery, he must demonstrate that he was ready and willing to perform his part of the contract.

Alapaty Ramamoorthy and others v. Poliseti Satyanarayana AIR(sic), Andhra Pradesh 550;  
Syed A. and M. Wazir Ali v Haji Abu Baker PLD 1957 (W.P) Kar. 913; Seth Mangoomal

Jessassing v Hansraj Kooverjee & Co. AIR 1935 Rangoon 166; Messrs Muhammad Amin Muhammad Bashir Ltd. v. Messrs Muhammad Amin Bros. Ltd. PLD 1969 Kar. 233 and Kamruddin Kadibhair and Co. v. Municipal Committee, Anjangaon, AIR (38) 1951 Nagpur 148 rel.

**(b) Civil Procedure Code (V of 1908)---**

---O. XLI, R. 6---Appeal filed against decree which has been executed---Maintainability---  
In view of O. XLI, R. 6, C.P.C, where appeal is filed against a decree and no stay order is granted, though the decree may be executed, but the appeal does not abate.

**(c) Sale of Goods Act (III of 1930)---**

---S. 35---Buyer to apply for delivery---Scope---Language of the section clearly indicates that the provision is intended for the benefit of the seller---Seller, may, if he chooses, deliver the goods without any application in that behalf by the buyer, but he was also entitled to wait until the buyer applies for delivery, unless he has contracted himself out of this right.

Alapaty Ramamoorthy and others v. Poliseti Satyanarayana, AIR(sic) Andhra Pardesh 550 quoted.

**(d) Sale of Goods Act (III of 1930)---**

---S. 35---Contract for sale of goods---Buyer to apply for delivery---Scope---Section 35 of Sale of Goods Act, 1930, imports into all contracts of sale of goods, a term that the seller is not bound to deliver the goods until the buyer applied for delivery, which may be negative only by the actual words used in the bargain between them or a true consideration of those words.

Alapaty Ramamoorthy and others v. Poliseti Satyanarayana, AIR(sic)Andhra Pardesh 550 quoted.

Abdul Hamid Bhurgi, Additional A.-G. Sindh for Appellants.

Inayatullah Morio for Respondent.

Date of hearing: 2nd February, 2012.

## **JUDGMENT**

**SHAHID ANWAR BAJWA, J.**---A suit for declaration and mandatory injunction was filed by the present respondent (hereinafter called the plaintiff). It was stated in the plaint that the plaintiff is a flour mill and is in the business of grinding wheat and for this purpose it purchases wheat from growers and local market and has also been allotted quota by the Food Department as per policy of Government of Sindh. It is stated that the plaintiff was issued 23 challans between 21-2-2009 to 13-3-2009 at the rate of Rs.1932 per bag of 100 Kgs. and Challan were issued to the plaintiff. Details of the challans and deposits made were as under:-

S. No.	Challan No. with Date of issue	Date of Deposit	Amount	Bags
1.	12 21-2-2009	23-2-2009	19,32,000	1000
2.	13 21-2-2009	23-2-2009	15,45,600	800
3.	14 21-2-2009	23-2-2009	13,52,400	700
4.	15 21-2-2009	23-2-2009	9,66,000	500
5.	16 21-2-2009	23-2-2009	5,69,940	295
6.	17 26-2-2009	28-2-2009	19,32,000	1000
7.	18 26-2-2009	28-2-2009	19,32,000	1000
8.	19 26-2-2009	28-2-2009	19,32,000	1000
9.	20 26-2-2009	28-2-2009	19,32,000	1000
10.	1 3-3-2009	9-3-2009	19,32,000	1000
11.	2 3-3-2009	9-3-2009	19,32,000	1000
12.	3 3-3-2009	9-3-2009	19,32,000	1000
13.	4 3-3-2009	9-3-2009	19,32,000	1000
14.	5 3-3-2009	9-3-2009	5,69,940	295
15.	6 3-3-2009	14-3-2009	19,32,000	1000
16.	7 13-3-2009	14-3-2009	19,32,000	1000
17.	8 13-3-2009	14-3-2009	19,32,000	1000
18.	9 13-3-2009	14-3-2009	19,32,000	1000
19.	10 13-3-2009	14-3-2009	19,32,000	1000
20.	11 13-3-2009	17-3-2009	19,32,000	1000

21.	12 13-3-2009	17-3-2009	19,32,000	1000
22.	13 13-3-2009	17-3-2009	9,66,000	500
23.	14 13-3-2009	17-3-2009	13,96,060	205

Total Bags 19,295

2. Although the plaintiff deposited amount for 19,295 bags but he received only 940 bags till 19-3-2009 and thereafter the defendant, the present appellant, withheld supply of remaining 18355 bags to the plaintiff. Plaintiff approached High Court with C.P. No.D-826 of 2009 and that petition was disposed of vide order dated 5-11-2009. Operative part of the order reads as under:--

"In the present case the petitioners have filed no document to show that within 7 to 15 days period any demand for release of wheat was made. The petitioner has written no letter to respondent No.2 calling upon it to release the stocks of wheat. The last challan was deposited on 17-3-2009 and between then and the filing of present petition on 15-9-2009 no effort was made for release of wheat nor any demand was made for such release which shows that it was deliberate attempt not to get the stocks released. The stand taken by respondent No.2 is that petitioner wanted that wheat from fresh stocks be released. Since the disputed questions of fact has been raised and beyond any shadow of doubt the petitioner has not established that at relevant time the District Food Controller Jacobabad failed to release the stocks, this Court cannot go into disputed questions of facts. However, the petitioner shall be at liberty to seek any other remedy if available under the law. This petition is dismissed in limine."

3. Thereafter the appellant filed this suit and made the following prayers:--

"(i) This Hon'ble Court may be pleased to declare that the plaintiff is entitled to receive 18355 Bags of wheat each containing 100 Kgs. for which the plaintiff has already deposited total price of the said bags under the challans issued by the defendant No.2 and be further pleased to declare that the defendants are legally bound to release and supply the 18355 wheat bags at the same notified rate to the plaintiff.

(ii) This Hon'ble Court may be pleased to issue Mandatory Injunction against the defendants thereby direct the defendants to release supply 18355 wheat bags containing 100 Kgs. each forth with to the plaintiff.

(iii) To grant the costs of the suit along with any other relief which may be deemed fit and proper in the circumstances of the case to meet with ends of justice."

4. On an application under Order VII, Rule 11, C.P.C. plaint was rejected by original Court. Against rejection of the plaint appeal was filed and on appeal the order was set aside and the matter was remanded. Thereafter written-statement was filed by the Government of Sindh. It was admitted in the written statement that challans were issued but contended that they were collusively issued by an officer of the Sindh Government. It was further stated that price was subsequently revised by the Sindh Government and the government is prepared to provide wheat to the plaintiff at the revised price. It was further pleaded that the plaintiff himself failed to lift the remaining wheat bags as per agreement and there was no fault on the part of the defendant. On the other hand it was also stated that there was no contractual bond with the plaintiff.

5. After written statement was filed the following issues were framed by the learned Additional District Judge:--

"(1) Whether the suit of the plaintiff is not maintainable at law? (OPD)

(2) Whether the plaintiff himself failed to lift the remaining wheat bags according to agreement? (OPD)

(3) Whether the circular dated 20-8-2008 is not binding upon the plaintiff? (OPD)

(4.) Whether the defendants are entitled to receive Rs.91,77,500 from the plaintiff? (OPD)

(5) Whether the plaintiff is entitled for relief as claimed? (OPD)

(6) What should the decree be?

6. Thereafter vide judgment dated 9-5-2011 suit of the plaintiff was decreed as prayed and decree was issued on 13-5-2011.

7. This appeal has been filed to challenge and impugn that decree.

8. Learned Additional Advocate-General made the following submissions:--

(1) That the plaintiff should have been filed suit for specific performance and not for declaration because suit for declaration can be filed only when right is claimed and it is an established right.

(2) The plaintiff himself did not come forward to lift the stock. He should have lifted the stock within time. Learned counsel referred to the summary produced as Exh.70-A with evidence and submitted that the price of wheat for 40 Kgs. was increased for Rs.750 to Rs.950 with effect from 17-2-2009 with the approval of Chief Minister and the Government is prepared to release the balance amount of wheat provided differential amount is paid.

(3) Learned A.A.-G. referred to the order passed by this Court in C.P.No.826 of 2009 and submitted that matter has already been concluded as far as responsibility for lifting stock is concerned, because the order of the High Court threw the burden of lifting the stock on respondent and he failed to discharge that burden. He further submitted that the plaintiff remained silent till the price was raised and moment price was raised he came to claim the quantity.

(4) While concluding Additional Advocate-General submitted that if the plaintiff pays the differential amount the government is willing and ready to deliver the balance quantity of wheat.

9. Mr. Inayatullah Morio, learned counsel for the plaintiff/respondent submitted that after the decree was passed execution application was filed and it has been allowed vide order dated 7-10-2011 and therefore the appeal has become infructuous. With his C.M.A. No.224 of 2011 he has enclosed a copy of the order passed in execution application on 7-10-2011 and the order, while concluding states as under:--

"In view of the above discussion, I am of the view that the decree-holder has strong case and the execution application in hand is allowed with the directions to the defendant/judgment-debtor No.2 to pay the decretal amount of Rs.91,77,500 to the decree-holder directly within

ten days from the date of this order under the valid receipt and acknowledgement. In case the judgment debtor No.2 fails to comply with this order, further action will be taken against him as provided under Order XXI, Rule 30, C.P.C."

10. Learned counsel submitted that under section 42 of the Specific Relief Act, a suit is maintainable when one has "interest". Regarding notification for increase of price learned counsel submitted that notification can only be prospective and not retrospective. Learned counsel referred to Exh.68-V and submitted that the plaintiff did approach for supply of wheat. Regarding order passed by this Court in C.P. No.826 of 2009. Learned counsel submitted that order in fact supports his case rather than case of the Provincial Government.

11. While exercising his right of reply Mr. Abdul Hamid Bhurgri, learned A.A.-G. submitted that fact that execution application has been allowed does not make this appeal infructuous. He submitted that it was duty of the plaintiff to produce the agreement on the basis of which he claimed that wheat is supplied to him and he has not produced such an agreement.

12. I have considered the submissions made by the learned counsel and have also gone through the record.

13. There are facts which are not in dispute at all between the parties. First of those facts is that the plaintiff made payment in respect of 19,295 bags of wheat at the rate of Rs.750 per 40 Kg. It is also not in dispute that 940 bags were delivered and 18,355 bags were not delivered. It is also not in dispute that on 17-2-2009 it was decided to enhance issue price of wheat from Rs.750 per 40 Kg to Rs.950 per 40 Kg. with immediate effect. It is also not in dispute and, in fact it is clearly stated in Exhibit 70-A that Sindh Food Department notified the increased price on 25-3-2009. Another fact which may be noted straightaway is that no written agreement has been produced either by the plaintiff or by the defendant.

14. It was contended by learned Additional Advocate-General that the plaintiff did not come forward to lift the stock and he should have lifted the stock within time. On the other hand learned counsel for the plaintiff relied upon Exh.68-V which is letter written on 9-3-2009 to the District Food Controller, Jacobabad and in the letter it is stated (translation from Urdu to English). "It is requested that our 13170 bags of wheat are yet to be issued whereas till delivery challans of 9-3-2009 we have deposited payment in respect of 4295 bags of wheat and so far we are not being issued wheat. It is requested that we may kindly be issued wheat. This shall be an act of kindness."

15. As observed above, none of the two parties has produced the agreement. In absence of agreement reference may be made to the provisions contained in sections 35 and 36 of the Sale of Goods Act, 1930. The said sections are in the following words:--

"35. Buyer to apply for delivery.---(1) Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

36. Rule as to delivery.---(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the same, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller."

16. Words "apart from any express contract" need not detain us because both the parties have chosen not to produce any copy of any written contract between the parties. Section 35 came up for consideration before a Division Bench of Andhra Pradesh High Court in Alapaty Ramamoorthy and others v. Poliseti Satyanarayana, Andhra Pradesh 550. The Division



Bench observed as under:--

"The language of the section clearly indicates that the provision is intended for the benefit of the seller. The seller may, if he chooses, deliver the goods without any application in that behalf by the buyer. But he is also entitled to wait until the buyer applies for delivery, unless he has contracted himself out of this right.

Thus an "express contract" means the reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulations which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties.

Section 35 imports into all contracts of sale of goods, a term that the seller is not bound to deliver the goods until the buyer applies for delivery, which may be negated only by the actual words used in the bargain between them or a true construction of those words.

Under the Indian law, there is a statutory obligation on the buyer to call upon the seller to perform delivery and in the case of an executory contract, unless it can be said otherwise from the words thereof, the buyer must not only be ready and willing to perform his part of the contract but must also have applied for delivery before he can charge the seller with non-delivery."(Underlining is added).

17. In Syed A. and M. Wazir Ali v Haji Abu Baker PLD 1957 (W.P.) Karachi 913, plaintiff filed a suit for damages in respect of purchase of 5000 maunds of cotton pods. It was stipulated that delivery was to be made at Mirpurkhas Railway Station from and payment was to be made upon delivery. Plaintiff stated that in spite of several reminders defendant did not take delivery. It was observed as under:--

"It appears to us that the remark of the Privy Council that the contract price should have been tendered at the same time was with reference to this statement, and that it is not necessary that an application for delivery should always be accompanied by tender of the contract price. It appears to us that the demand for delivery is an indication to the seller that the purchaser wishes to proceed with the contract and the seller will then arrange to make delivery and will be entitled to payment of the contract price at the time of delivery in the absence of any contract to the contrary." (Underlining added.)

18. In *Seth Mangoomal Jessassing v Hansraj Kooverjee & Co.* AIR 1935 Rangoon 166, reference was made to the contract between the parties and it was observed that it was not duty of the purchaser to give notice to the sellers when they would take delivery, but that it was the right of the sellers to select the times at their option when they would give delivery. The seller arranged to give delivery at some mill but there was a failure to give delivery fully. Seller was owner of it but did not take any step to arrange delivery at some other mill. It was held that the Seller could not blame the purchaser for the troubles in which they had fallen.

19. In *Messrs Muhammad Amin Muhammad Bashir Ltd. v. Messrs Muhammad Amin Bros. Ltd.* PLD 1969 Karachi 233. The facts were that parties entered into agreement under which the appellant agreed to purchase a certain number of bales of cotton on an agreed price. Contract was made on June 2nd, 1959 and goods were to be supplied in June with option of the seller after June, 20th, 1959. 10% of the amount was deposited as earnest money by the appellant with the respondent. Part of the goods was supplied while the remainder was not supplied. The bench observed as under:--

"(10) Mr. Shaikh Haider tried to support the view of the trial Court by saying that the tender of the price of 75 bales by the plaintiff-appellant was necessary because delivery of goods and payment of price are concurrent conditions in terms of section 32 of the Sale of Goods Act but this argument does not appear to us to be applicable to the facts of this case because the goods were not delivered by the defendant-respondent and the excuse for not delivering them, which has been pressed by Mr. Shaikh Haider, is that no application for their delivery was made by the plaintiff-appellant. Since we have come to the conclusion that the plaintiff-applicant was under no obligation to make such an application, the question of considering the payment against delivery does not arise in the context of this case."

20. In *Kamruddin Kadibhair and Co. v. Municipal Committee, Anjangaon*, AIR (38) 1951 Nagpur 148, facts were that a suit was filed by Municipal Committee against the defendant, a hardware merchant. Under an agreement the firm was to supply to the Committee sets of weights and measures. The firm prepared weights and measures, delivered some of them and was prepared to deliver the balance but the Committee refused to take delivery. Consequently the firm instituted suit claiming price of goods supplied and ready to be delivered. It obtained a decree and decretal amount was fully paid by the Municipal Committee to the firm. Goods remained with the firm. The Committee sent notices for delivery of goods but the firm repudiated responsibility and consequently suit was filed by the Committee. It was contended by the defendant that he was prepared to deliver subject to payment of rent for care and custody of the goods at certain rate per month. Original Court decreed the suit with rent of Rs.1 per month. A Single Judge of the Nagpur High Court observed as under:--

"(9) To start with, the Committee misconceived their rights and insisted upon the delivery of the goods at the premises of the Committee. Under section 35, Sale of Goods Act, apart from any express contract the seller of the goods is not bound to deliver them until the buyer

applies for delivery. It was not pleaded that there was any express contract that the goods were to be delivered by the firm without any application for delivery by the Committee. Under section 36 goods are normally to be delivered at the place at which they are at the time of the sale. So reading sections 35 and 36 together, the Committee had to apply for delivery of the goods at the place at which they were at the time of the sale. The goods were with the firm. So the question is whether there was a proper application for delivery of the goods by the Committee. It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom the goods can be delivered. As it was not established that the Committee made any effective application for delivery up to 21-4-1942, I hold that the firm was entitled to reasonable charges for care and custody up to that date. Both the Courts were in error that there was a proper application for delivery by the Committee when the notice (Exh.P-6) was sent on 29-1-1942. The firm was entitled to charges for a further period of 2 months and 23 days."

21. A survey of the above case-law indicates the position to be as under:--

(1) Date, place and time of delivery is to be decided by express contract between the parties. If there is no express contract (and in the present case no written contract has been produced) it will be provisions of sections 35 and 36 of the Sale of Goods Act, which shall govern the delivery.

(2) In such cases duty is of the buyer to apply for delivery. However it is available to the seller to deliver the goods without any application in that behalf by the buyer but the seller is also entitled to wait until buyer applies the delivery.

(3) The seller is not bound to deliver the goods unless the buyer applies for delivery but when the buyer applies for delivery he must demonstrate that he was ready and willing to perform his part of the contract.

22. In the present case the record reveals that till 9-3-2009 (excluding 9-3-2009) the plaintiff had paid for 7,295 bags. On 9-3-2009 he made request as contained in Exh.68-V. Therefore, there is no proof that he made any request for delivery in respect of the payments made by him on or after 9-3-2009 (for 12000 bags) but at the best his claim could be in respect of 6355 bags i.e. 7295 minus 940 bags. The question is, is he entitled to these bags. Exh.70-A demonstrates that decision was made in a meeting held in the Ministry of Economic Affairs on 17-2-2009 to enhance issue price of wheat from Rs.750 per 40 Kg to Rs.950 per 40 Kg. It is also stated in that the Government of Sindh proposed the cut-off date of 14-4-2009 but the Government of Pakistan ordered immediate increase in the issue price and consequently the increased price was notified on 25-3-2009.

23. Learned counsel for the plaintiff contended that the notification is to be prospectively implemented. The fact of the matter is that decision was made in a meeting held on 17-2-2009 and it was decided that issue price be increased forthwith. Mr. Ali Asghar, who appeared as a witness produced this document. No objection to the production of this document was raised and the only material question was asked whether it was published in government Gazette or not. It was not denied that any such meeting was held. At least no suggestion to this effect was made. This gets support from the fact that all the challans against which stock have not been issued were issued to the plaintiff after 17-2-2009 therefore in that view of the matter the plaintiff is entitled to the quantity of wheat only if he pays difference in price and not otherwise.

24. Mr. Inayatullah Morio, submitted that the order dated 5-11-2011 has settled the question that the present applicant had not made any steps for release of wheat. Mr. Bhurgri contended that the order held that the plaintiff did not take any steps. I do not think that the order supports the contentions raised either by Mr. Inayatullah Morio or by Mr. Bhurgri, because the order clearly says that disputed questions of acts had been raised and therefore the Court could not go into those questions.

25. Contention of Mr. Morio that since execution application has been decided therefore this appeal has become infructuous carries no weight. Appeal is filed against a decree and if no stay order is granted though the decree may be executed but the appeal does not abate. Order XLI, Rule 6 provides as under:--

"O. XLI: Rule 6. Security in case of order for execution of decree appealed from.---Where an order is made for execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security."

26. A simple reading of the above rule 6 indicates that if order for execution of decree has been passed in consequence the appeal abates then what was the reason for providing security and in case of immovable property stay sale in execution of such a decree.

27. Result of the above discussion is that this appeal is allowed. Judgment dated 9-5-2011 and decree dated 13-5-2011 are set aside and suit filed by the plaintiff is dismissed. However, plaintiff may apply the government within one month either to return to him the

amount deposited or upon payment of the differential amount between Rs.750 per 40 Kg. and price prevailing on the date when such demand is made by the plaintiff to release the balance quantity of wheat in respect of which payment has been made by the plaintiff. If plaintiff does not apply for such release after such payment, the amount deposited by him in respect of 18355 bags shall be refunded to him.

MWA/P-8/K

Appeal allowed.