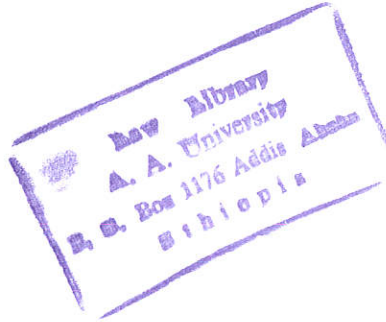


DAMAGES AS REGULATED UNDER THE ETHIOPIAN LAW OF SALES: A CASE ORIENTED ANALYSIS



By:

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Adviser:

Abera Degefa

Submitted to the Faculty of Law

Addis Ababa University

May, 2007

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Addis Ababa University*

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Introduction

In our contemporary world, interpersonal relation through trade reaches its maximum stage due to the advent of free market. Sale of goods is one in which the seller and the buyer contracted for the delivery of goods upon payment of the price. Unfortunately, parties to a contract may face problem in the performance of their obligations in accordance with the term of the agreement. Because of failure on the part of either party, it is obvious that damage caused to the other party. This time the person suffered from the breach of contract is entitled to receive damages from the defaulter.

As its title indicates this paper is basically concerned with the assessment for damage suffered by the plaintiff as a result of a breach of sale contract. Damages for breach of contract are compensation to the innocent party for the damage, loss or injury he has suffered through that breach, he is as far as money can do it to be placed in the same position as if the contract had been performed. This task very often presents problems of considerable difficulty. Hence there is firstly the problem as to which factors may, and which may not be, taken into account in computing damages and secondly, the problem as to what amount should be awarded as damages. The first problem is a matter of legal principle; the second is a matter of judgment up on the facts of the case. Concerning the first problem, the research will investigate the provisions of our civil code in order to identify Articles which need clarity. And also it sets out the gap that the law fails to oversee in a different situation. In view of the second problem the author tries to assess the difficulties faced by courts in the task of entitling or denying for damages as well as in determining the extent of damages.

Thus this senior essay will evaluate the practice in light of the law so as to come up with reasonable understanding of the issue at hand. As far as significance is concerned, this senior essay which is entitled with "*damages as regulated under the Ethiopian law of sales*" is hoped to raise awareness with regard to the assessment of damages in sale contract as provided in the civil code and as practiced in courts. Furthermore, this senior essay can initiate and serve as a reference for those who want to conduct a research in the area.

It has been pointed out that the assessment of damage presents difficult problems. So in our discussion the author does not claim to have exhaustively elaborated all points which are necessary to a clear understanding of the subject. It must be admitted that since the subject is very complicated, it is as well difficult to present in a simplified manner. However, despite all the challenges, an attempt has been made to give some insight to the subject.

Having these in mind, our discussion will be in the following order.

IN chapter one the general notion of damages, definition of damages, various types of damages and the logic behind the award of damages will be dealt briefly.

The research will also consider the basic provisions of our civil code with regard to the assessment of damages in breach of contract of sale under chapter two. When does damages be claimed, Damages where the sale contract is cancelled and damages when the sale contract is not cancelled will be the subject matter to be discussed in this chapter.

In chapter three the research tries to investigate the practice in light of the law by considering some cases and interviews. In this part all the facts and issues of the case will be analyzed in order to examine the

practice with regard to the relevant provisions. At last the author has also made conclusion and recommendation.

CHAPTER ONE

NATURE OF DAMAGES

1.1 General Notion on Damages

In the whole field of law there is no right without a remedy. The reason that, this statement is true is that the only useful test as to the existence of a right is that some legal remedy is provided where violation of that right take place. In the progress of any human society, the recognition of new rights and duties by both courts and legislatures, is necessary, this recognition is made effective by providing and enforcing a remedy for a breach. Damages are one class of remedy that awards reparation in money for harm already done.¹

In legal contemplation, the term damages is

*The sum of money which the law awards or imposes as pecuniary compensation for an injury done or a wrong sustained as a consequence of either a breach of contractual obligation or a tortuous act.*²

A detailed examination of the general rules for the assessment of damages for tortuous act must be sought elsewhere. In this work, the general principles on damages will be summarized and examined in detail only to the extent that they have been applied to contracts, by giving special emphasis to contracts for the sale of goods.

1.2 Definition of Damages

The Columbian Encyclopedia defines the word damages as follows: "money award which the judgment of a court requires the defendant in a suit to pay to the plaintiff as a compensation for the injury inflicted."³ According to this definition damages are the form of legal redress most commonly sought. In the law of contract, the term damages is used to

can compensation in money as a substitute for the promised performance. The phrase damages pertaining to contract law can also be explained as;

The remedy that is most commonly obtained for breach of a contract is a judgment for money damages. Such a judgment can be obtained for the breach of any valid contract, which is where the transaction consists of operative facts that satisfy the requirements of the rules with respect to the formation of contracts.⁴

In relation to contract law, it can also be said that, damages for breach of contract are compensation to the innocent party for the damage, loss or injury he has suffered through that breach: he is as far as money can do it, to be placed in the same position as if the contract had been performed.⁵

What one can understand from the above mentioned fact is, damages are primarily intended to give the value of promised performance of which the breach deprives the plaintiff, which has been called the plaintiff's "expectation interest", e.g. his expectation of making a profit or receiving a benefit through the transaction.⁶

The plaintiff may also have a 'reliance interest' which should be protected by the award of damages; this interest relates to the expense or loss which the plaintiff has himself incurred in reliance on the expected performance of the contractual promise made by the defendant and which is wasted by the breach.⁷ this reliance interest is illustrated by many cases in the sale of goods.

With regard to damages related to sale contract, our civil code has an explanation under Art, 2360 which provided as follows', "where the nonperformance of one of his obligations by his contracting party is detrimental to him, the seller or the buyer may claim that the damage thus caused be made good by way of damages".⁸

1.3 Terms Allied to Damages

Although the words "damages", "damage" and "Injury" are sometimes used synonymously, there is a material distinction between them. Injury is the illegal invasion of a legal right, damage is the loss, hurt or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered.⁹ There can be damage without injury, those instances in which the loss or harm was not the result of a violation of legal duty.

Remedies of damages are also distinguished from restitution. The term damages is very frequently used to denote any sum of money for which a court gives judgment to an injured party. Even if damages and restitution are nearly always awards reparation in money for harm already done; damages is used to mean compensation in money as a substitute for and the equivalent of the promised performance.

By restitution is meant the return of a specific thing, the restoration of a former legal position, or the payment of the value in money of a performance that has been rendered.¹⁰ In other words, damages and restitution are not the same, the reason for this being that, in the two kinds of cases to which these terms are applied, the rules of law governing both the plaintiff's right of recovery and amount of his recovery are different.¹¹

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When the remedy given for breach of a contract is money damages, the amount awarded is determined with the purpose of putting the injured party in as good position as he would have occupied, had the contract been fully performed by the defendant, in granting restitution as a remedy for breach, however, the purpose to be attained may be no more than the restoration of the injured party to as good position as that occupied by him before the contract was made.¹² In these latter case, the purpose of restitution as a remedy is to put the plaintiff in statu quo ante, the purpose of damages is to put the plaintiff in statu quo post, the position that he reasonably expected and has been unjustly disappointed by not attaining.¹³

In short a claim for restitution may not, strictly speaking, be one for damages; its purpose is not to compensate the plaintiff for a loss, but to deprive the defendant for a benefit. The simplest case of restitution arises where a seller has been paid in advance and he fails to deliver. He is bound to restore the price and the effect of this is to put both parties into the position in which they would have been if the contract had not been made.¹⁴ Therefore, there is significant difference between them, since the amount of damages for a breach of contract is not the amount of consideration paid by the plaintiff for the defendant's promise.

1.4 Various Kinds of Damages

1.4.1 Nominal Damages

Nominal damages are either those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss of any kind, or when from the nature of the case, some compensable injury has been shown but the amount of the injury has not been proved.¹⁵ The law infers some damage from the breach of an agreement of the invasion of a right, and if substantial damage is not

established, or no evidence is given of any particular amount of loss it declares a right by awarding nominal damages.¹⁶

Thus, the allowance of nominal damages is generally based on the ground either that every injury from its very nature legally imports damage or that the injury complained of would in the future be evidence in favor of the wrong doer. If there is no danger of prescription no proof of substantial loss or injury, or willful doing by the defendant, it has been said that there is no purpose for allowing nominal damages, and judgment should be rendered for the defendant.¹⁷

It may also be useful at this point to consider the distinction between nominal damages and a small award. Nominal damages means a sum of money that may be spoken of, but that has no existence in point of quantity.¹⁸ Where as a small award of damages may still be substantial, as far as that sum is sufficient to compensate the injured party for all the damage actually sustained.¹⁹

Nominal damages cannot be awarded for any damage caused by a person who used lawful means to accomplish a legal purpose. Thus nominal damages cannot be awarded where the defendant proves that it handled the transaction properly and the plaintiff suffered no damage.²⁰

As pointed out earlier, the law presumes damages from a breach of a contract and at least nominal damages will be awarded upon the breach of a contract, if no actual or substantial damage resulted from the breach or no damage has been shown.²¹ The recovery for breach of a contract may also be limited to nominal damages where plaintiff's negligence contributed to the loss, where the plaintiff could have prevented any actual loss by the exercise of reasonable diligence, or where it would be physically impossible for him to perform the contract.²² However, the

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plaintiff is shown to have suffered actual damage as a result of the breach; this time, he is entitled to compensatory damages. So to authorize a recovery of more than nominal damages, facts must exist which afford bases for measuring the plaintiff's loss with reasonable certainty.

Apart from the technical truth that an invasion of a right will give the plaintiff judgment for a sum of money that has no existence in point of quantity. Nominal damages have practical advantage. It is the use of a verdict for nominal damages as a means of establishing, determining or protecting a legal right.²³ for example; a seller sued for damages for the buyer's repudiation of a contract for sale of truck thinking erroneously that he was entitled to the agreed purchase price, the seller failed to prove the market value of the truck that he still retained and could sell to others. He was given judgment for one cent.²⁴

1.4.2 Compensatory Damages

Compensatory damages are damages in satisfaction of, or in recompense, loss or injury sustained. An award of compensatory damages connotes the giving of an equivalent or substitute of equal value for a loss or injury.²⁵ In respect of awarding compensation courts begin with the assumption that compensatory damages compensate for those pecuniary losses which resulted from the defendant's breach.²⁶

Compensatory damages can be classified as; General Compensatory damages, which are the natural and necessary result of the breach. In other words, general compensatory damages are those which are traceable to and the probable and necessary result of the injury, or which are presumed by, or implied in law to have resulted therefrom.²⁷ They are the direct, natural, logical and necessary consequence of the

breach. Special compensatory damages on the other hand denote such damages as arise from the special circumstances of the case. Special compensatory damages are the natural but not the necessary result of the breach.²⁸ In a contract case, general compensatory damages are conclusively presumed to have been foreseen by a party as a consequence of his breach of the contract. They include such items as loss of the bargain, and lost profits. But special compensatory damages flow from the failure to achieve a special purpose of the contract or from unusual circumstances which were known to the parties when they are contracted.²⁹ Distinction between general and special compensatory damages arising from the breach of contract are not absolute, but relative, in other words, damage which is general in relation to a contract of one kind may be classified as special in relation to another.³⁰

Therefore, the sole object of compensatory damages is to compensate the injured party for losses actually suffered.

1.4.3 Liquidated Damages

The parties to a contract may, as part of the agreement between them, fix the amount, which is to be paid by way of damages in the event of breach. In some cases this amount will apply to all breaches, in others only to particular breaches, in some cases it will apply to breach by either party, in others only to breach by one particular party.³¹

A provision for liquidated damages is, in effect, an estimate made by parties at the time they make an agreement, for the injury that would be sustained as a result of a breach. Provision for liquidated damages have value in those situations where it would be difficult, to calculate the amount of actual damage. Liquidated damages are an appropriate means

of including due performance, especially where damages are stipulated for a delay in performance.³²

Whether the agreed sum is recoverable from the party in breach depends upon whether it constitutes liquidated damages, when it is recoverable, or penalty, when it is not. As distinguished from liquidated damages, the term penalty as used in contract law is a sum inserted not as a measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages, which may be sustained by reason of non-performance. That is to say, a penalty is an agreement to pay a stipulated sum on breach of contract, irrespective of damage sustained.³³

As we have seen, a penalty is for the purpose of securing performance, while liquidated damages are a sum to be paid in the event of non-performance. The distinction between a penalty and liquidated damages clause is significant in many jurisdictions, since if a provision is considered a penalty, courts find the clause void and limit recovery to actual damages but if the provision is for liquidated damages it will be enforced.³⁴

Exemplary

1.4.4 Exemplary or Punitive Damages

The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are called exemplary damages.³⁵

Exemplary damages are not ordinary recoverable in actions for breach of contract, because, as a general rule, damages for breach of contract are limited to the pecuniary loss sustained. Moreover, punitive damages are

not available for mere breach of contract, because only a private wrong, and not a public right is involved.³⁶

1.5 Types of Losses

The principle that damages are compensatory naturally gives rise to the question; for what that the victim of a breach of contract is entitled to be compensated?

This question calls for an analysis of the various types of losses for which the victim of a breach of contract can recover damages.

1.5.1 Loss of Bargain

The basic object of damages for breach of contract is to put the plaintiff so far as money can do it in the same situation as if the contract had been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected.³⁷

A contract may give rise to two quite separate expectations; that of receiving the promised performance and that of being able to put into some particular use; for example; a buyer of goods (such as machinery or raw materials) may expect not only to receive the goods but also to use them for manufacturing purposes. If the seller fails to deliver, the buyer is entitled to damages based on the value of the goods that he should have received and also to damages for loss of profits suffered as a result of not receiving the promised delivery.³⁸ So in a contractual action the defendant is liable for the loss of expectations created by the very contract for breach of which the action is brought.

1.5.2 Reliance Loss

An alternative principle is to put the plaintiff into the position in which he would have been if the contract had never been made by



compensating him for expenses incurred or other losses suffered in reliance on the contract. Sometimes the expenses are of a kind, which the plaintiff must incur if he is to perform his part of the contract.

For example; if a contract of sale of goods provides that the seller is to deliver or the buyer to collect, the expenses of delivery (or collection) may be recoverable as elements of reliance loss.³⁹

1.6 Measure of Damages

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract, where there is an available market for the goods in question the measure of damages is to be ascertained by the difference between the contract price and the market price at the time when the goods ought to have been accepted or if no time was fixed for acceptance, then at the time of refusal to acceptance.⁴⁰

- mkt price
K.P. - mkt P
at time of
refusal
of part

From the sellers breach of contract where there is an available market for the goods in question the measure of damages is to be ascertained by the difference between the contract price and the market price of the goods at the time when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver.⁴¹

1.7 Object of an-award of Damages

The primary object of an-award of damages is to give the plaintiff compensation for the damage, loss or injury he has suffered.⁴² One who commits a breach of contract must make compensation to the injured party. The philosophy behind awarding compensation in this case is to put the injured party in as good a position as he would have had if performance rendered as promised.⁴³ So the whole purpose of allowing damages in a breach of contract case is the restoration of what the injured party lost by the breach, and what he reasonably could have expected to gain if there had been no breach.⁴⁴ Unfortunately, this aim

can never been exactly attained, the position that one would have occupied is purely hypothetical. And yet this is the problem that the trial court and judges are required to solve.

CHAPTER TWO

DAMAGES AS REGULATED UNDER THE ETHIOPIAN LAW OF SALES

2.1 When does Damages Be Claimed?

Before starting to discuss the detailed provisions of the Ethiopian civil code regarding to damages in sale contract, the paper assumes a general-over-view on this particular issue.

Naturally, a party suffering from effects of non-performance, delay in performance or defective performance can demand that the damage caused be made good. Pertaining to this general principle, it is critical to point out the buyer's claim for damages and the seller's claim for damages in separate sections.

2.1.1 The Buyer's Claim for Damages

I. Damages for non-delivery

"Delivery is the putting of the buyer in possession".¹ similarly, delivery as it is defined under Article 2274 of the civil code consists of the handing over of a thing and its accessories in accordance with the contract so the buyer is entitled to maintain an action for damages against the seller, where the latter wrong fully neglects or refuses to deliver the goods.²

In this case the amount of damages will be the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.³ Where there is an available market for the goods in question the amount of damages will be the difference between the contract price of the goods at the time or times when they ought to have been delivered or if no time was fixed, then at the time of refusal to deliver and the market price.⁴ The court on the application of the buyer

can order the specific performance of the contract, at times when the seller has broken a contract to deliver specific goods. This deprives the options of the seller to retain the goods on payment of damages.⁵

II. Damages for Delay in Delivery

The principle is that delivery should be made on the day indicated by the contract; if the contract is mute on that point the buyer can require that the thing be delivered to him without delay.⁶ Despite the facts that, the seller fails to deliver on the fixed date, the buyer may accept delivery of the goods from the seller at later date.⁷ In this case the amount of damages is the difference between their market value at the time fixed by the contract for delivery and at the time when the goods are in fact delivered to the buyer, provided that there is an available market.⁸

When there is no available market for the goods, the court may use any relevant test to arrive at the value of the goods at the time fixed for delivery and at the actual date of delivery.⁹

III. Damages for Defective Quality

The seller should procure for the buyer a useful possession. He responds therefore for hidden defects, which render the thing unsuitable for any, service or which considerably diminish such use "this is what is called the warranty against vices."¹⁰

So where there is a breach of warranty the buyer can maintain an action for damages against the seller.¹¹ The breach of warranty is the estimated loss directly and actually resulting in the ordinary course of events.¹²

In the case of breach of warranty against defects such loss is the difference between the value of the goods at the time of delivery to the

buyer and the value they would have, had if they had fulfilled the warranty.¹³

Where the market value of the goods cannot be ascertained because there was no market in which they could be disposed of, damages may be awarded on the basis of the cost of bringing the goods up to the contractual standard which would make them saleable.¹⁴ Where purchase in replacement can be effected, the buyer is entitled to claim, as damages for defective quality, the cost of buying substitute goods to perform the function intended to be performed by the contractual goods.¹⁵

2.1.2 Seller's Claim for Damages

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action for damages.¹⁶ The amount of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach. Where compensatory sale is possible the amounts of damages will be the difference between the contract price and the market price at the time when the goods ought to have been accepted or if no time was fixed for acceptance at the time of refusal to accept.¹⁷

- direct
- natural
- ordinary

Under Ethiopian law of sales, pursuant to the general provision of Article 2360, damages may be claimed where:

- a. the non-performance of one of the obligations of the debtor is detrimental to the coeditor (either the buyer or the seller); or
- b. the debtor utterly failed to perform his obligations; or
- c. the debtor failed to perform his contractual obligations regularly (consistently without interruption); or
- d. the debtor failed to perform his obligations exactly as agreed; or
- e. there is delay in performance.

As provided under Article, 2360(2) damages may be claimed whether the contract is cancelled or upheld. In other words, the principle is that any loss due to non-performance of a contractual obligation opens the right to claim damages independently of the issue whether the contract is cancelled or not.¹⁸

In fact Article (2360) may be seen in light of the general provisions of Articles 1771(1) and (2) cumulative with 1790(1). These Articles entitles the plaintiff to claim damages for the damage he has suffered by the other party's failure to perform his obligation, in addition to the enforcement or the cancellation of the contract.¹⁹

enforcement of the contract or the cancellation of the contract

When we consider Articles 2361-67 of the Civil Code they revolve around the amount of damages to be paid to the creditor in two circumstances, that is when the sale contract is cancelled and when it is not cancelled.

In all cases default notice should be given as it is provided by Article 1772 "A party may only invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract. But exceptionally as it is stated under Article 1775 notice need not be given: for instance where there is anticipatory breach of contract."

2.2 Damages where the Sale Contract is not cancelled

*fall over
of the
part of
order*

Where the sale contract, despite the fact that there is failure on the part of one of the parties to perform his obligations, the contract is not cancelled either because there is a legal provision to that effect or because the concerned party didn't request cancellation or didn't him self declare cancellation of the contract. The following instances can clarify the point more:

- If a party late to perform but willing to perform, the contract cannot be cancelled, where the date of payment is not compulsory.
- The contract may however, not be cancelled where the defect is of small importance and it appears that the buyer would have bought the thing had he known of the defect.²⁰
- Mere delivery of the thing by the seller in a place other than the place that he is bound to make delivery, the court shall not cancel the contract on the application of the buyer unless the manner in which the contract was enforced constitutes a fundamental breach of contract.²¹ For example: In one case the seller who is from Nazerite and the buyer who is from Addis Ababa agrees for the delivery of a certain thing by the seller. In the agreement the place of delivery was Arat Killo. Unfortunately, during delivery the seller delivered the thing in Merkato. In this case the contract shall not be cancelled. But if the seller delivers the thing in Deberezyte, it is fundamental breach of contract and it may result cancellation of the contract.
- similarly the contract may not be exposed to cancellation where the buyer would have bought the thing, had he known that he would be dispossessed of some part of the thing in which it has minor importance.²²

E.g. If the buyer of a Tape in which a cassette on it is dispossessed the cassette later on, the contract may not be cancelled because of the presumption that, the buyer would have bought the thing, had he known that he would be dispossessed of the cassette.

All the cases are discussed here in before leads to a conclusion that, non-performance need not always cause a contract to be cancelled.

In this case the court may order specific performance upon showing the particular interest to the party requiring it,²³ Or the debtor may be

In this case the court may order specific performance upon showing the particular interest to the party requiring it,²³ Or the debtor may be

willing to perform his contractual obligation after he was put in default. In addition to these the creditor may require damages by proving the damage.²⁴

The issue of fault is relevant here for claiming damages. As a matter of principle, which stated under Article 1791(1) "The party who fails to perform his obligations shall be liable to pay damages not withstanding that he is not at fault. In other words damages are due for the simple non-performance of the contractual obligation and do not require the demonstration of fault, except in cases of set out under articles 1795 and 1796 that is where there is:

- Obligation to do the best
- Contract made for the exclusive advantage of one party, in which the other party is responsible only when he has committed grave fault.

As we have said earlier the person who fails to perform his contractual obligation is liable to pay damages even if he has not committed fault, but he can be released from liability if he can show that performance was prevented by forcemajeure.²⁵ So under Ethiopian law, a party can escape from liability for failure to perform contractual obligation if and only if he can raise and proof the defense of forcemajeure, Except as Art 1886 in which the parties may extend their liability under the contract and provide that they will be liable for non-performance not with standing that performance is prevented by force majeure. Force majeure results from all occurrences, which the debtor could normally not foresee and which prevented him from performing his obligations. In other words, force majeure is any supervening event, which makes the debtor's performance impossible.

The supervening events and circumstances may take the form of; an un expected act of a 3rd party for whom the debtor is not responsible, or legal

*prohibition which prevents the performance of the contract, or a natural disaster, or death or serious illness of the debtor.*²⁶

Hence, the list provided under Article 1793 can be raised as a defense of force majeure if and only if they fulfilled the two elements of force majeure, which are unforeseeable and absolute impossibility.

The impossibility may take place either due to physical or legal factors. For instance; the obligation of the seller to deliver the goods may be prevented from being executed either because of loss of the goods without the fault of the party, or an act of God or an act of enemy. But an occurrence which makes the performance of the debtor onerous may not constitute forcemajeure,²⁷ e.g. inflation, rise in price.

So where the occurrence of forcemajeure bars the performance of the debtor, the latter would not be liable for damages provided that he had not been placed in default. In other words, damages shall be due where force majeure occurred after the debtor had been placed in default.²⁸

In relation to this the last point is the debtor is required to inform the other party immediately about the occurrence that absolutely prevents him from performing his obligation, otherwise he (the debtor) should be liable for the damage caused to the other party which could have been avoided, had notice been given.²⁹

2.2.1 Amounts to be awarded by way of Damages

The rule is that damages should compensate the damage suffered by the plaintiff. But it is very difficult to know the damage and the consequence of damage may be endless but the person cannot be liable for all. The

main principles relating to the assessment of damages comes first from Hadley V. Baxendale case. We should first recall the memorable sentences in which the main principles laid down in this case are enshrined: "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. "The limb of this sentence prefaced by "either" embodies the so-called first rule; that prefaced by "or" the "second".³⁰ In other words, this case put damages as:

General damages-which are computed objectively without considering individual problem. The rule here is market price less contract price. If the thing has no market price or unsaleable in this case reasonable man standard apply.³¹

Special damages-in this case any information given at the time of conclusion of contract that would increase damage will be considered.³²

This rule is incorporated under our civil code as greater damages and normal damages.

Normal amount of damages as regulated under Article 1799(1) is equal to the damage, which the non-performance would normally have caused to the creditor in the eyes of a reasonable person. But the question here is who the reasonable person is. For that matter the reasonable person should be the judge himself. In this case the nature of the contract, the profession of and the relations between the parties and any



circumstances known to the debtor, which surrounded the making of the contract, shall be taken into consideration in assessing the amount of damages.³³

Greater damages-here the amount of damages shall be equal to the damage actually caused to the creditor where the debtor on entering in to the contract was informed by the creditor of the special circumstances owing to which the damage is greater. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstance outside the ordinary course of things, of such a kind that a breach in those special circumstances would be liable to cause more loss.³⁴

In addition to knowledge of the debtor, his intention to cause damage or to his gross negligence or grave fault, makes him liable for greater damages.³⁵ But the party who invokes non-performance shall take all reasonable measures not involving inconvenience or heavy expenses to limit the extent of the damage caused, where he fails to take such measures, the other party may invoke such failure to enquire that the amount of damages be reduced.³⁶

The task of assessment of damages is not as such easy, obviously courts face difficulty. But it can be remedied by applying Article 2102(1), which empowers the courts to fix the amount of damages equitably, by taking in to account the ordinary course of events and measures taken by the injured party.

To finalize, general contract law provisions regarding damages are relevant to ascertain the amount of damages where the sale contract is not cancelled.

2.2.2 Damages in Relation to Monetary Obligations

Where the violation is only that of being late in paying the price, the buyer will pay interest at the legal rate (art 2361(2)). This article refers the reader back to Article 1803(3), which reads as follows:

"Where the debtor owes a money debt and he is in default, he shall pay interest for default at the rate fixed by law (1751) not with standing that the contract fixes a lower rate interest to be paid before the debt is due".

Similarly, even if higher rate is fixed in the contract, only legal interest is due by the debtor see Article 1803. However, parties can agree for until 12% rate per annum as per Art. 2479 (1)

- In relation to this, the buyer may be liable to pay damages, where the damage caused to the seller is greater than the interest for default, provided that he know of the circumstance before entering in to the contract or where non-performance is due to the debtor's intention to cause damage or to his grave negligence or grave fault.³⁷ But the question here is could we consider the claim of the seller for interest as an equivalent sum by way of damages for breach of contract. The law is not clear since Art 2365(3) provided for the payment of damages separately, where the damage caused to the seller is greater than the interest. As far as the knowledge of the writer is concerned, the payment of interest by the buyer should be considered as damages for breach of contract because there may be no express stipulation in the contract to that effect. In other words in the absence of contractual provision, the right of the seller to obtain interest will arise only from the law as damages.

2.3 Damages when the Sale Contract is cancelled

There are two kinds of cancellation

1. Judicial cancellation
2. Unilateral cancellation

Judicial cancellation is a type of cancellation, which effected in the court of law. There are two requirements for judicial cancellation to take place.

- There shall be fundamental breach-this means the breach would affect the very essence of the contract.³⁸ For example: If the seller agrees to sell his horse with his saddle and if in the date of delivery, he delivers only the saddle, this is a fundamental breach of contract and would result in judicial cancellation.
- Interest of the parties in good faith, what motivate them to enter in to the contract is considered.³⁹ For instance; if the buyer agrees to buy a 3 leg old table for the purpose of fire wood, but if the seller delivers 4 leg table then refusal of the buyer to take delivery and his request for cancellation fails to satisfy the good faith interest requirement because the buyer want the table only for fire wood.

Unilateral cancellation is cancellation by the party without the need to go to court. Unilateral cancellation can be effected in all situations when default notice is not given as provided under Art. 1775

- Anticipatory breach
- Impossibility of performance
- Compulsory date

After having some idea concerning conditions under which the contract of sale can be cancelled. The next step will be assessment of damages that should be awarded for the aggrieved party.

A distinction is made here whether the thing has a current price. This is a notion difficult to define. It refers to the price practiced on the market, which would be "the normal place of business for the buyer or seller". But it only pushes back the difficulty to define what the market and time reference is. The judges will have to lead an investigation to appreciate the problem. There is a wide scope for litigation and waste of time, without really gaining in uniformity or security of jurisprudence.

The time stated for the choice of what constitutes a current price is either the day when the right could be exercised, or it is the following day in the event of a court decision or where the cancellation happens as of right.⁴⁰ of course in the first case, it leads to the question of whether a compulsory date was provided or not.

2.3.1 When the thing Sold has a Current Price

When the thing sold has a current price, damages shall be equal to the difference between the contractual price and the current price on the day of cancellation either by unilateral cancellation or on the day following a judicial cancellation. The defaulter bears in fact the risk of the variation of the market obviously, the innocent party is not supposed to pay such difference if it is negative. The problem is market price fluctuates, and often down wards.

Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such good at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied; for the seller may take his goods in to the market and obtain the current price for them.⁴¹ To

illustrate this, let us take the following example of a failure by the seller to deliver the goods. Suppose that A promises to sell and deliver to B 1,000 tons of coal at \$112 per ton on the 8th February. He fails to carry out his contract on the 8th February the market price of coal of that quality is \$ 120 per ton. B can recover as damages for non-delivery the difference between the contract price and the market price on that day, viz. \$ 8 per ton.⁴² But this principle raises a question of what is the measure of damages if there is no difference between contract and market price. This can be seen from the view of the buyer's failure to accept the goods e.g. if the buyer contracted to buy electronic machines from the seller. The seller was retailer of this type of machines and the price of the machine was fixed by the manufacturers, which he was unable to vary in any way. The buyer refused to accept the machine, so in modern trading conditions the retail price is frequently that recommended by the manufacturers, so that there is no difference between the contract price and a market price even if the seller tries to hold compensatory sale. This seems not logical because the plaintiff had sold one less machine and so were entitled to claim their loss of profit on the transaction.⁴³ In the opinion of the writer, the law should consider this situation so as to entitle the injured party for damages even if there is no difference between contractual and current price.

Similarly, when the seller is in delivering the goods then the buyer is entitled to damages for the difference between the market value at the time they ought to have been delivered and the market value at the time when they actually were delivered. In this case one can invoke that the consequence of late delivery are not the same as that of non-delivery, where the buyer has no option but to buy in the market to fulfill his forward contract. If the goods are actually delivered and accepted and resold by the buyer, he should not be entitled to recover in respect of a

loss which never in fact suffered.⁴⁴ Therefore, the law must be re-regulated in order to fill this gap.

On top of this difference in price, the defaulting party will pay the normal expenses linked to a purchase in replacement or compensatory sale. The exception is of course where the person claiming such expenses has acted in bad faith or in abnormal business conditions.⁴⁵

In this case if the buyer has already carried out a purchase in replacement, the price at which he had bought a thing in replacement of what he ought to have received from the seller shall be taken into consideration for the purposes of calculating the amount of damages. Similarly if the seller has already carried out a compensatory sale, the price he obtained in the latter sale shall be taken in to consideration for the purposes of calculating the amount of damages.⁴⁶ As it has been pointed out earlier, a similar problem involves here that is what if the buyer or seller carried out a purchase in replacement or a compensatory sale in price lower than the contract price could they entitled to damages merely by the breach, the law jumps this point. But as the writer thinks the law must consider all these issues in order to clear itself. On the other hand, if the buyer carries out a purchase in replacement not in a normal course of business and not in a market he normally goes to buy the thing to which the contract relates or carries out, the purchase in replacement is in bad faith:⁴⁷ e.g. The buyer bought 50,000 quintals of coffee from the seller for the purpose of resell. In this case he usually buys 3rd rank washed Harar coffee and resell it. But in case of failure on the side of the seller to deliver the coffee the buyer bought first rank washed Harar coffee from other seller and produced it as an evidence of price of purchase in replacement. This clearly shows that the buyer carries out the purchase in replacement in bad faith for that matter he carries out not in a normal course of business. The damages to be

calculated under sub-art (1) of Art 2363 may be reduced. The question here is would this mutatis-mutandis apply where the seller carries out a compensatory sale? In the writers view this also applies for the seller when he carries out a compensatory sale. This seems logical.

Damages referred to in article 2362 and 2363 seem to be normal damages in light of the provisions of Art, 2364 that are concerned with greater damages.

Accordingly, damages greater than those are ones that may be awarded where the party that has suffered the damage shows that at the time of the making of the contract he had informed the other party of the special circumstances by reason of which the damage caused is greater.⁴⁸ Greater damages for the purpose of the law seem to be equal to the prejudice actually caused by the non-performance Art 1801(1)

The idea here is that the court may only award the total damage in serious cases where the party was informed of the importance of the contract. In other cases, as stated under article 1799, the law only allows a normal amount of damages, which will however be estimated by reference to reality under Art 1799(2).

The exception to the general rule of limited damages is also naturally provided for where the plaintiff proves intention to harm, gross negligence or grave fault. 1801(2)

2.3.2 When the thing doesn't have Current Price

Here there is no term of reference to calculate objectively the amount of damages. In this case the reference point should be the reasonable man standard, the court deems appropriate.

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But this evaluation cannot be equal to the prejudice actually caused, because Article 2365(2) reserves the maximum to the above stated situations of intention to harm, gross negligence, or grave fault. So the amount is usually necessarily below that needed for total damages of prejudice actually caused.

This provision is an exact copy of Article 1799, but the second paragraph of Article 1799(2) was not taken up here. Does it mean that the judge is prohibited from taking in to account the factual circumstances of the case and should rest with the abstract evaluation of what a reasonable person would consider appropriate, the answer is no, because as per Article 1676 2 provisions of contracts in general could have application, in the absence of a contrary specific provision for the contract of sale. Article 2365(2) is badly drafted, and should be read..."where circumstances mentioned in Article 2364 are established: The rule is thus that damages are however, equal to the prejudice effectively suffered if the conditions of Article 2364 are met, that is where either information was given of the importance of performance, or where intention to harm, gross negligence of grave fault are proven.

2.3.3 Damages in Case of Anticipatory Breach of Contract

According to article 2366a given person may refuse the performance, before the due date. There are two options for the other party.

- Cancellation before the due date
- Cancellation after the due date. But the damages in both cases are computed after the due date. For example: assume the due date is Sep. 1, 2006 and they enter into contract on Aug, 2006 and if the seller refused to perform on Aug 15, 2006. The buyer is not expected to give default notice, he can automatically cancel the

contract in Aug, 15 but the damages is computed after the due date, if the market price become less the buyer may not be paid. dX

Here the current price reference will be that in force on the last day of the period fixed in the contract for the performance of the obligation. Where no such period is fixed, the day will be that when right to declare cancellation of the contract could be exercised.⁴⁹ 2nd

Where the thing doesn't have a current price, though the law is silent as to how damages may be calculated in cases of anticipatory breach where the thing to which the sale relates doesn't have a market price; the principles stated under Article 2365 and other relevant general contracts provisions may help without losing sight of the fact that the breach is an anticipatory one and not, as such, a non-performance.

Damages to be awarded for anticipatory breach shall, however, not exceed the price paid by the buyer for purchase in replacement, if he has already carried it out. From the seller's point of view, damages awarded for anticipatory breach shall not exceed the price he has received for compensatory sale, if he has already carried it out.⁵⁰

→ 2.3.4 *Where the Buyer is dispossessed* →

In case he is dispossessed of the thing the buyer may, in addition to the damages he may claim and be awarded under Articles 2361-66 above; claim to be reimbursed the judicial and extra judicial (like food, transport) expenses relating to the proceedings by which he is dispossessed.⁵¹ Take note that from the provisions of Article 2285 the buyer is sued for dispossession, where as in Article 2367 he may, as well, institute proceedings to come back to possession after he has been dispossessed. In both instances, the buyer may get back what he spent in relation to the proceedings except where he could have avoided such expenses by simply informing the seller of the proceedings.

CHAPTER THREE

3. THE PRACTICE IN LIGHT OF THE LAW

3.1 Introductory Remark

The purpose of this chapter is as its title indicates to show the practice that has been taking place in courts regarding damages under contract of sale. The chapter has two major sections; the first part tries to assess the practice by discussing some selected cases. Although it is difficult to get cases which specifically discussed the aim of damages in sale contract, the cases have some how relation with the issue in question in one-way or another. This section also has two sub-sections, which needs special treatment. The first sub-section deals about cases related to buyer's claim for damages in sale contract where as the second discuss about the seller's claim for damages. In each sub-section the writer supposed to put the facts of the case and the judgment rendered by the court in the first place and then gives analysis of the cases according to the factual situation and the pertinent provisions of the code. Most of the cases are decided by appeal so that the research is going to put all the facts raised by the parties in the trial court as well as their memorandum of appeal and replies of the respondent.

The second part of this chapter incorporated interviews of judges. This is because as the writer has said earlier, it is difficult to get real cases that particularly discussed the issue of damages. This means trying to evaluate the practice only be analyzing those cases would cause inconvenience so that it needs additional method of assessing the practice. Interview is the best method, which investigates the experience of judges as well as their way of entertaining cases if they face issues relating to damages. There by the writer has prepared some question that should be answered by the said persons.

3.2 Cases Related to buyer's claim for damages

In one case between Ato Abdulkader Juhare Vs Ambasel Trade Activities PLC¹, the plaintiff sued the defendant for damages in the Federal High Court. In that case, the plaintiff bought 10, 000 Q of sesame from the defendant (seller) by 289.65 Eth birr for each quintals of sesame and for the payment of such purchase price he handed over a cheque valued 1,448,250 birr as a guaranty. The plaintiff alleged that the defendant did not deliver 5,900 quintal on time. So that his factory which does not work properly unless it feeds a minimum of 10,000 quintals of sesame, was closed for two months. The plaintiff also contended that had it been the remaining 5,900 Q of sesame delivered to him he would have obtained 130 birr profit from each quintal of sesame. But the defendant failed to perform his obligation and as a result he lost 76,700 birr. Therefore, he requests the court to order the payment of damages together with the interest.

The defendant in his response contended that the amount of sesame delivered to the plaintiff was 7305.35Q as opposed to 4,100 Q. Pertaining to this the purchase price for each quintals of sesame was 299.65 birr rather than 289.65 birr as mentioned by the plaintiff. He also alleged that the cheque hand over by the plaintiff can only cover the value of 500Q. Not only this but also the cheque declared as it have no money value (ለገንዘብ የለውም) in the civil bench and there is also a proceeding in criminal bench that held against the plaintiff. Lastly, he said there is no any evidence produced on the side of the plaintiff to prove the damage he suffered.

The plaintiff replies for the response by pointing out three facts:

- ☞ The seller (the defendant) did not deliver 7,305Q because the document produced by him to prove this fact is not part of the present contract it is rather a document for the previous contracts.

- ☞ According to the agreement the purchase price for one quintal of sesame is 289.65 birr not 299.65 as the defendant said.
- ☞ He also alleges that, he had already handover two cheques for the value of 10,000Q of sesame. In relation to this the declaration of the cheques as it has no money value in the civil bench and the presence of a proceeding in criminal bench has noting to do with the case at hand.
- ☞ The plaintiff also contended as he has witness who testify the fact that his factory was closed for the last two months and there by he sustain damage.

The trial court up on analyzing the fact and the issue renders judgment against the plaintiff. The court started its argument by saying that the plaintiff himself do not perform his obligation since the cheque he hand over has no money value secondly, the court mentioned Article 2278(2) "The seller may in such case retain the thing until payment is made", the application of which supports non-delivery of the remaining sesame by the defendant. Finally the court reached its final decision by disregarding the claim of the plaintiff for damages for the reason that in the absence of performance on his side, he is not entitled to damages.

Now the present appellant (plaintiff in the High Court) appealed to the Supreme Court to have the decision of the high court reversed. The appellant in his memorandum of appeal shows his grievance against the decision of the high court and he prayed the court to order the payment of damages after having regarded the witnesses.

The respondent (defendant in the High Court) on his part required the Supreme Court to affirm the decision of the high court.

The appellate court considered two issues in the case

1. Whether or not there is breach of contract on the side of the respondent, which causes damage against the appellant.

2. Whether or not the appellant is entitled to damages.

The court held, on the first issue that it is difficult to say that the respondent has failed to perform his obligation because the appellant himself did not perform his obligation since the cheque he handover was declared as it has no money value.

The court continued to argue that the request of the appellant for damages is not in accordance with the law because he himself failed to perform his part of obligation according to the contract.

Now let us see how the duty of the buyer to pay price and the duty of the seller to deliver the thing are illustrated in the above case. As we have said earlier in the second chapter, damages are claimed where the non-performance of one of the contracting party is detrimental to the other. So that the buyer may claim damages if the non-delivery of the seller is detrimental to him. But this takes place as long as the buyer performs his part of obligation or he tried to perform it. In the given case the buyer had given two cheques for the payment of the agreed price. But as the court also holds it, this is not in accordance with the law because the cheques handover by the buyer is declared as no money value by the civil bench. Although, Art 2364(1) and (2) provides for the obligation of the buyer to pay the price shall include bank security for guaranty the payment of the price, as the commercial code provides a cheque shall contain an unconditional order to pay a sum certain in money.² Similarly, an endorsement shall be unconditional, any condition to which it is made subject shall be of no effect.³ When ever a cheque is transferred to a creditor the latter must have the right to negotiate it.

In this case the seller maintains the thing until payment is made as stated under Art 2778 of the civil code. From the above analysis of the case, therefore, both the trial court and the appellate court, which

confirms the decision of the lower court, analyzed the case by considering the pertinent provision as well as the intention of the parties during the conclusion of the contract. So, according to the writer's view, the judgment rendered by both courts is in accordance with the law and denial of the appellant for damages is also a right decision.

In relation to the buyer's claim for damages the second relevant case is the case between Ato Getahun Seifu Vs Ato Teshome Mengesha.⁴ In that case the plaintiff (buyer) sued the defendant (seller) in the high court to refund 95,000 Eth birr he paid including with the damage he sustained due to the failure of the seller to deliver the agreed metals. The defendant, however, in his response replied that the plaintiff did not give default notice as provided under Art 1772 when he failed to perform according to the agreement. He also alleged that even if the suit is not cancelled, non-delivery was due to forcemajeure and the plaintiff had notified this fact. Because of the assumption that the date of performance was lengthened due to forcemajeure, he delivers smooth Lamera, which amounts 88, 600 birr. Furthermore, the defendant shouldn't be liable to pay damages according to Art 1791(2). 1792 and 1793, even if he is liable to pay damages the relevant provision is Art 2362 as opposed to Articles 1790, 1791, 2355 and 2360 in which the plaintiff mentioned them in his statement of claim.

The present trial court, after analyzing the fact and the issue renders judgment in favor of the plaintiff. But, the court rejected the plaintiff's claim for damages for the reason that he did not prove the damage he suffered as well as the extent of damage as to the sufficient understanding of the court. But opposing this decision both the defendant and the plaintiff appealed to the Supreme Court to have this decision reversed.

The appellant ()
the decision of the trial court by listed down an
that matter ignored by the trial court wrongly. He prayed to the appellate
court to have reversed the decision of that court after having considered
the evidences.

The respondent on his part required the Supreme Court to affirm the
decision of the trial court except part of the decision with regard to
damages. He alleged that the lower court denies the claim for damages
unlawfully because witnesses who were workers of his enterprise testified
that they are resign from employment since there is shortage of money in
that enterprise due to the non-delivery of the metals. Therefore, the
decision given by the court is not correct and in accordance with the law.

The appellant responded to the replies of the respondent by changing the
attention of the court on another direction that is even if he would be
liable to pay damages the provisions applicable here should be Articles
from 2360-2367 this is because as far as the respondent claim damages
with respect to the breach of sale contract, Articles from 1799-1805
which provides about contracts in general should not be applicable here.
If this is so the extent of damages should be calculated according to Art
2362(1) "*damages shall be equal to the difference between the price fixed
in the contract and the current price as on the day following that when the
contract was cancelled by the court*". He also alleges that the respondent
did not prove this fact to the satisfaction of the court, he simply request
the court to assess the damages in equity. But the law empowers the
courts in order to assess damages equitably where the exact amount of
damage cannot be calculated. But the appellant could have the chance to
identify the exact amount of damage he sustained. Finally, he prayed the
court to affirm the decision of the high court with regard to damages.

The appellate court considered four issues in the case among others the issue of damages is the one relevant to this paper. After analyzing the issue and the litigation held by the parties, the court said basically, courts assess damage equitably where there is difficulty to determine the extent of damages but in the case at hand, although he didn't show the extent of the damage, the respondent could have the chance to do that. Further more, the contract existed between the parties were contract of sale. If so Articles (1790-1805) should not be applicable here. According to the court the pertinent provisions should be Art's from 2360-2367. Hence, based on Art 2362(1) the extent of damages shall be equal to the difference between the price fixed in the contract and the current price as the day following that when the contract was cancelled. On the other hand, the respondent did not prove to the satisfaction of the court that he sustains damage as well as the amount of damages. Therefore, the court rejected the claim of the respondent that the appellant should make good the damage he sustained.

Now let us see how the courts entertain the case with regard to damages. In proving damages the plaintiff must prove (1) that profits or other gains were denied him, or losses were suffered by him, as the result of the defendants breach, and (2) he must introduce evidence to afford a sufficient basis for estimating their amount in money with reasonable certainty.⁵ Literal certainty is not essential, it is enough if the damages claimed are with the reasonable probabilities.⁶ As it has been held by both courts, the respondent did not put the exact amount of damage he suffered or sustained due to breach of the sale contract. However, he clearly shows the damage he suffered by producing evidence like witnesses who were workers from the enterprise and resign from employment due to the shortage of money faced by the enterprise. Therefore for the knowledge of the writer the court failed to consider this fact. Moreover, both courts argued that provisions of contracts in general

should not have application in cases where the party claims damage from the breach of sale contract. In the writer's opinion, this is not a proper understanding of the law because as per Art 1676(1) and (2) the relevant provisions of contracts in general, shall apply to contracts regardless of the nature thereof as long as they do not affect such special provisions. That means unless provisions of contracts in general not affect the special provisions of sale contract they have effect.⁷ The provisions which regulate damages in case of breach of sale contract (2360-67) has two parts. The first part deals about cases where the contract is not cancelled. In this regard the law provides for the application of the provision of contracts in general as per Art 2361(1) which provides as: *"where the contract is not cancelled the amount of damages shall be fixed in accordance with the provision of the title of this code relating to 'contracts in general' (1790-1805).* In the writer's view, the decision of the court didn't cancel the sale contract concluded between the parties. This is because by cancellation means returning of the parties to their former position as if the contract was not concluded as per Article 2355(1). But the court in considering the second issue renders judgment for the appellant that he has delivered 88,600 amounted metals and he partly performs his obligation. Relating to this issue the appellate court reversed the decision of the high court and rejected the repayment of 95,000 birr because the court believes the delivery of the 88,600 birr amounted metals by the appellant. The court liable the appellant only for the remaining amount.

If this is so the contract is still in force as it is proved that the metals was delivered to the respondent. So if the contract is not cancelled the damages can be calculated according the provisions of contracts in general. Therefore, the final decision of the court is not in accordance with the law.

should not have application in cases where the party claims damage from the breach of sale contract. In the writer's opinion, this is not a proper understanding of the law because as per Art 1676(1) and (2) the relevant provisions of contracts in general, shall apply to contracts regardless of the nature thereof as long as they do not affect such special provisions. That means unless provisions of contracts in general not affect the special provisions of sale contract they have effect.⁷ The provisions which regulate damages in case of breach of sale contract (2360-67) has two parts. The first part deals about cases where the contract is not cancelled. In this regard the law provides for the application of the provision of contracts in general as per Art 2361(1) which provides as: *"where the contract is not cancelled the amount of damages shall be fixed in accordance with the provision of the title of this code relating to 'contracts in general' (1790-1805).* In the writer's view, the decision of the court didn't cancel the sale contract concluded between the parties. This is because by cancellation means returning of the parties to their former position as if the contract was not concluded as per Article 2355(1). But the court in considering the second issue renders judgment for the appellant that he has delivered 88,600 amounted metals and he partly performs his obligation. Relating to this issue the appellate court reversed the decision of the high court and rejected the repayment of 95,000 birr because the court believes the delivery of the 88,600 birr amounted metals by the appellant. The court liable the appellant only for the remaining amount.

If this is so the contract is still in force as it is proved that the metals was delivered to the respondent. So if the contract is not cancelled the damages can be calculated according the provisions of contracts in general. Therefore, the final decision of the court is not in accordance with the law.

The third case is between W/ro Giday Kinfu Vs Ato Kahsay Haile Geiorgis.⁸ the plaintiff (buyer) sued the defendant for the cancellation of the sale contract concluded between them on June 14, 1989 E.c. In that case, the plaintiff bought a cooking machine from the defendant for \$30,000 Eth birr, on the very date of the conclusion of the sale contract the plaintiff paid \$25,000 birr out of the purchase price and took possession of the said machine. According to their agreement the remaining purchase price birr \$5000 was to be paid by the time when the defendant (seller) checks the working condition of the machine and ascertains that it is free from defects.

The parties have agreed in the contract that the defendant (seller) goes to the plaintiff's home in the Adwa town from his residence in Addis Ababa and carries out the examination of the machine when the plaintiff (buyer) calls the defendant. The plaintiff alleged that the defendant didn't carry out the examination of the machine, there by he sustain damage of 1,155,000 birr. That is the profit gained by the plaintiff had it been the defendant perform according to the agreement.

The defendant, however, responded that he has delivered the machine to the plaintiff free from defects having ascertained its working conditions. He also produced witnesses who can testify that the plaintiff took possession of the machine free from defects.

The court considered three issues in the case

1. Whether or not the machine sold to the plaintiff was defective
2. Whether or not the contract should be cancelled because of defect.
3. If the contract is to be cancelled, should the plaintiff entitle to the damages she claimed.

On the first issue the court held that it is difficult to say that the buyer (plaintiff) bought defective machine at the time of the contract. The court said, as it was the plaintiff who alleged that the machine was defective, the burden of indicating and proving to the satisfaction of the court as to the kind and nature of the defect in the machine was on the plaintiff however, the plaintiff did not identify any defect in the machine.

As regards the second issue whether or not the contract is susceptible to cancellation because of defect or not, the court held that the contract should remain in force as it is not proved that the machine was affected by warrantable defect in light of Article 2289 of the civil code.

Concerning to the third issue the court held that it is difficult to say that the defendant did not perform his obligation as the plaintiff failed to inform him according to the agreement. Therefore, the plaintiff cannot claim damages.

In the writer's opinion one cannot say that there was a warrantable defect in the machine within the meaning of Article 2289 of the civil code. But the court should have considered one issue whether the plaintiff performed his duty of examining the machine pursuant to Art 2290 and 2291 of the civil code in order to ascertain that the machine was free from defects. Moreover, the plaintiff did not notify the seller as to the kind and nature of the defect in the machine within as short period of time as possible. This failure of the plaintiff resulted from her failure to examine at the time of delivery.

On the other hand, As per Article 2293(1) of the civil code, the plaintiff may only avail herself of the defect in the machine if and only if she had examined the machine and notified the defendant as to the kind and nature of the defect in the machine. The exception to this is only if the defendant has admitted the existence of defect in the machine. But in the

case at hand the defendant did not admit the defect in the machine. Instead he stated that the plaintiff took possession of the machine free from any defects and produced that he believes would testify to this effect.

From the above analysis of the case, therefore, as it is also held by the court, that there was no a warrantable defect in the machine sold to the plaintiff.

As regards the second issue whether or not the contract is susceptible to cancellation because of defect or not, the court held that the contract should remain in force as it is not proved that the machine was affected by warrantable defect in light of Art 2289 of the civil code. The claim of the plaintiff on the cancellation of the contract was based on the statement that the machine was defective at the time of delivery. But she did not show that there was defect in the machine, which may affect the normal use of the machine.

Under Art 2344 of the civil code, the contract is cancelled only where the thing is affected by warrantable defects coming under Art 2289 for which the seller warranted the buyer. The contract may not be cancelled for minor defects the nature and kind of which are not known. In order to require the cancellation of the contract under Art 2344 of the civil code, the defect should be proved to be the one coming under Art 2289 of the civil code and should be known and noticed to the seller. Breach of warranty by the seller is said to exist only if the seller is notified of the defects in the thing and failed to put right the defects.⁹ Thus in the case under analysis, the cancellation of the contract doesn't seem appropriate.

Having this in mind, the third issue as the court could have considered is the bases for the claim of damages. This is because a party may only

invoke non-performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract as it is provided under Art 1772. But the plaintiff failed to inform the defendant according to the contract. Thus denial of the payment of damages by seller to the buyer seems appropriate.

3.3 Cases Related to seller's claim for damages

Let us consider the case between Egepe Ethiopian Share Company and Alem General Construction PLC.¹⁰ In that case the defendant (buyer) has failed to pay the agreed price of oil products that he purchased from the plaintiff (seller). The total price of the thing amounts 608,311.80 birr. So that the plaintiff requests the payment of the principal including with interest which should be calculated from the due day until the day on which proceedings for recovery are instituted.

The high court, for which the case presents before it, renders judgment for the plaintiff. But the court disregards the question of interest for him. The court disregards the question of interest for the reason that there is no stipulation on the agreement for the payment of interest. The court mentioned Article 2478 to support the argument. This part of the decision gives rise-starting point of appeal for the plaintiff (the present appellant) for the purpose of having reversed that portion of the judgment.

The Supreme Court after critical evaluation of the law and the issue as well as the fact reversed the judgment given by the high court. The appellate court in its argument stated that Article 2478 is wrongly interpreted by the lower court. The court held, Art 2478 is there for interest that should be paid from the conclusion of the contract until the

termination of the contract upon agreement of the parties. The application of this Article does not extend to include interest that should be paid after termination of the contract due to failure to perform by one of the parties. The court finally decides the payment of interest by the respondent to the appellant since Art 2478 is not applied as the high court interprets.

The main issue to be questioned in the judgment of the court is whether interest paid for the appellant is treated as damages that should be paid in case of delay in the payment of the price. According to Art 2361(2), the buyer shall pay interest at the legal rate in case of delay in the payment of price. The parties to a contract may provide in express terms for the payment of interest. Such an agreement may provide for the payment of interest before the maturity of the obligation. In such a case interest is not payable as damages for breach of a contractual duty, but instead, is payable as the agreed compensation for the use of money lent or for credit given.¹¹ If there is no contract, express or tacit, for the payment of interest, it is recoverable only in the cases expressly provided by law, or as damages for the wrongful detention of money or money's worth.¹² In all jurisdictions simple interest at the legal rate is recoverable as damages for non-payment of a liquidated debt from the date of breach if the parties involved have not definite price payable after a period of credit, nothing being said as to interest, on failure to pay as agreed, the seller can recover judgment for the price of the goods, with interest after breach at the legal rate.¹³ Therefore, in the opinion of this writer, even if the final judgment of the appellate court is correct so that interest shall be paid to the appellant, the reasoning can be criticized since the best Art that could solve the given dispute is not Article 2478 which provide as follows; "The borrower shall not owe interest to the lender unless the payment of interest has been stipulated" It is rather Article 2361(2) cum 2489 and 1803-05. This is to say the interest which is payable for the

appellant should be paid for him as damages. Therefore, As Art 2361(2) the buyer shall pay interest at a legal rate. This Article also refers back the application of Art 1803 which stated the payment of interest at the rate fixed by law not with standing that the contract fixes a lower rate in respect of interest to be paid before the debt is due.

The second case is between Ato Taye Belay Vs Ethiopian Importer and Exporter Corporation.¹⁴ In that case, the plaintiff (seller) sued the defendant (buyer) for the payment of the remaining purchase price plus the interest. The parties were conclude a sale contract for the delivery of salt (የገበያ ጨው) which total purchase price amounts 74,325.31 birr but the defendant failed to pay 25,632.95 birr so that the plaintiff institute a court action for the payment of the remaining purchase price including with the interest.

The defendant in his statement of defense responded based on the content of the agreement dated on March 26/79 E.C and March 2/1979 E.C As he said, Art 3.3 of the agreement put a responsibility on the plaintiff (the seller) to announce the price for the buyer within 45 days after the buyer had received the goods. But the plaintiff failed to inform the exact price within the period limited because of this the defendant base his profit and loss on the temporary price. Therefore, he refused to pay the required amount.

The trial court upon analyzing the fact and the issue renders judgment against the defendant and order the payment of the remaining purchase price including the interest starting from the date of institution of the case until payment is made effective.

Now the present appellant (defendant in the High Court) appealed to the Supreme Court to have the decision of the high court reversed. The

appellate court having analyzed the fact and the law identified one basic issue which needs answer. That is whether or not the respondent (plaintiff in the High Court) is entitled to the money he claimed since he failed to inform the exact price within 45 days. Then, the court considered Art 3.3 of the contract in order to answer this issue that is if the respondent believes that he did not announce the exact price within the time fixed then the next step should be that as the thing is bought for resell the exact price of the salt must be known within the time fixed. But the respondent failed to inform the exact price and due to this the appellant base his sale in the price that is temporary during the conclusion of the contract. At last the court reached the decision of that the respondent is not entitled to the money he claimed.

From the above analysis of the case, one can say, as it is also held by the court, that the provisions of the contract lawfully formed shall be binding on the parties as though they were law. This is clearly provided under Art 1731(2) of the civil code. This means contract is law as between the contracting parties. If one of the parties did not respect one of the provisions of the contract then he is liable to that part of his obligation. In the case at hand, the respondent failed to perform his obligation according to the agreement despite this fact he demand the payment of interest. This seems illogical as the court regards. On the other hand interest should be claimed as damages as per Art 2365(2). *"In case of delay in the payment of price, the buyer shall pay interest at a legal rate"*, However In this case as it is provided under Article 1772 the party who fail to perform should be notified. But in the case at hand the respondent did not give notice for the appellant. In this juncture he is not entitled to the interest he demands. So in the opinion of the writer too, the judgment given by the court is correct and in accordance with the law.

On the other hand, as the opinion of this writer also, Art 2306 is pertinent here. This is because the provisions stated as follows When the thing sold is quoted on the market or has a current price, the parties shall be deemed to have concluded the sale at this price, having regard to the time when and place where delivery is to take place.¹⁵ In the case considered above salt is a thing which have current price in the market but the court could not have considered this issue. If the thing sold has current price in the market then as it is provided in the law the presumption is that the parties conclude the sale at this price. Therefore, it is possible to argue that since salt has current price in the market, the buyer should be responsible to pay that current price having regard to the time and place when delivery is to take place.

Let us see the case between national engineers and contractors' enterprise vs. Agricultural equipments and technical service enterprise. The case was commenced in the high court by the respondent at the status of plaintiff in which it sued the appellant (buyer) for the unpaid purchase price of caterpillar materials which amounts 1,362,517.77 Eth birr together which the interest which should be calculated on the bases of the contract.

The defendant responded by pointing out two facts; first the suit is barred by resjudicata. Secondly, the rate of interest claimed by the plaintiff contradicts provisions of the civil code, which provides for the payment of interest.

The trial court upon hearing the litigation gave plaintiff judgment. In relation to this the court said that, interest must be paid whatever it is fixed by the contract since Art 1731 provides for the terms of the agreement should be considered as a law between the contracting parties.

Now the present appellant appealed to the Supreme Court to have the decision of the high court reversed. The appellant in his memorandum of appeal shows his grievance against the decision of the high court. The underlined argument for the appellant was that more than 12% interest should not be claimed when rate of interest is stipulated under the contract.

But the respondent prayed the court to affirm the decision of the high court by the same reason he pointed out in the trial court.

The appellate court considered the issue of whether or not the appellant is liable for 24% interest and come up with analysis of the issue according to the pertinent provisions of the civil code.

The court held that Article 2361(2) is a mandatory provision, which should not be violated by agreement of the parties. This article provides; *"In case of delay in the payment of the price, the buyer shall pay interest at the legal rate"*. On the other hand, Art 2479(3) limits the maximum rate of interest that parties can stipulate in the contract, which is 12% in the respective year. The same Art 2479(3) provides as; if parties stipulate a rate of interest exceeding 12% per annum then the borrower shall pay interest at the legal rate which is 9% per annum where interest is due and the rate has not been fixed.

The court proceed to argue that from the above mentioned articles one can understand that stipulation of 24% interest in the sale contract is not in accordance with the law. So if it violates provisions of the code, it should not be effective. Therefore, the appellant should be liable only for 9% interest based on Art 2479, 2361 and 1751 of the civil code. Moreover, decision of the high court for payment of 24% interest for mere

reason that Art 1731 provides as the provisions of a contract lawfully formed shall be binding on the parties as though they were law is not a valid argument because the contents of the contract shall be considered as though they were laws as long as they are not contrary to the law.¹⁷ In other words, the provisions of a contract shall be subject to the mandatory provisions of the law as provided under Art 1731(2).

At last the Supreme Court reversed the decision of the high court, which liable the appellant for 24% interest and renders judgment for the payment of 9% interest

In the case considered above, even if the high court failed to entertain the case in accordance with the law, the appellate court apply the relevant provisions of the civil code as the fact and the issue requires so.

Summary of the above analyzed cases

Most of the cases that we have discussed are cases in which finally settled by the Supreme Court through the mechanism of appeal. Out of the six cases three of them involved with the buyer's claim for damages while the other three discussed about the seller's claim for damages. Of course, the very purpose of the paper is to provide a general overview on the assessment of damages by considering some selected cases; however, there was difficulty to get cases, which specifically consider the issue of assessment of damages. On top of this difficulty, the writer comes up with these cases which considered the issue of damages as one issue to be analyzed. So these cases will be relevant to provide some insight on the subject matter.

It is obvious that, decisions of lower courts could be reversed or affirmed by the appellate court. Similarly in the cases analyzed above, decisions of

some cases rendered by the high court reversed by the Supreme Court while decisions of the remaining cases are confirmed by the appellate court. It follows, therefore, that appellate courts are there to affirm or reverse the decision of lower courts by realizing the issues again.

With regard to the finding, it is difficult to conclude as the practice conforms with the law or there is discrepancy between the law and the practice merely by considering these six cases. Some more effort is needed so that an interview was held by the author with judges. The interview will be the subject matter of the following section. Returning back to the cases at hand, out of the six cases most of the cases were analyzed in accordance with the law. However, as the writer pointed out in the illustration of each case there was a problem of applying pertinent or relevant provision as the fact and the issue requires. Further more, there was a problem of reasoning that is even if the final decision of the courts is correct, there could be a wrong reasoning. As a result the writer supposed to give conclusion and recommendation after having analyzed the interview done with judges.

3.4 Some answers Related to claim of Damages in Sale Contract

This section of chapter three tries to investigate the problems and difficulties faced by courts during assessment of damages by way of interview for which the writer prepared some questions revolve around the subject matter and received replies from two judges who serve in the civil bench of the Federal High Court.

One of the interviewee's started his speech by saying that, in most cases there is no claim for damages because of two reasons; the first one is, lack of awareness of the parties that means usually parties may only

demand the cancellation of the sale contract or enforcement of the sale contract even if the law provides for damages to be claimed independently or in addition to the enforcement or cancellation of the sale contract.¹⁸ In relation to this courts or judges cannot render judgment which are not claimed by the parties.¹⁹ Secondly, the party who claim the payment of damages bear the burden of proving the damage he suffered due to the non-performance of the other party which is really difficult.²⁰ Pertaining to this point the other interviewee said that determining liability for damages is simple as such comparing with proving the damage suffered by the breach. Because proving damage most of the time bases conditional situations, for example the would be profit had it been the thing sold is delivered.²¹

In relation to the question "does damages always compensate the damage that the victim of the breach of sale contract suffered?" One of the interviewee said that as per Art. 2090 damages supposed to compensate the damage "ለደረሰበት ጉዳት ተመጣጣኝ ካላ" But in practice it is difficult to come up with the exact amount of damage.²⁸ To come across this problem usually judges could have considered witness testimony and documents from different government departments: for example የአገር ውስጥ ገቢ (National Revenue Office).

The interviewee added, sometimes there are cases in which the person who claimed damages suffered damage from the breach by the other party but it may be difficult to calculate the damages due to the thing sold have no current price. In this case, judges have decide the case by equity.²³

As to the distinction between normal and greater damages in our law is not that one is and the other is not the direct and proximate consequence of the breach complained of, but that normal damages are

such as naturally and ordinarily follow the breach, where as greater damages are those that ensue, not necessarily or ordinarily, but because of special circumstances.²⁴ As the root of the problem is the distinction between normal and greater damage as it has been developed in our law.²⁵ There is need to keep in mind that the distinction is not absolute, but relative. To put in other words, damage, which is general in relation to a contract of one kind, may be classified as special in relation to another.²⁶

With regard to the question "does interest recoverable as damages?" Most of the time interest is payable as the agreed money for lent or credit given instead of damages for breach of contractual duty.²⁷

As the interviewee said assessment of damages in general and assessment of damage in sale contract in particular is a difficult task.²⁸ As he said the reason behind may be the complexity of the subject both in the law and in practice. In this regard, the provisions of the Civil Code, which provides about damages in sale contract, are vague and difficult so as to understand them easily and put in to practice.²⁹

Conclusion and Recommendation

It is of course the intent of the law, and the desire of the courts, that abstract justice should prevail in every case, and that judicial declarations should harmonize with logic and reason as inspirations for them; but in the multiplicity of complicated facts found in almost every case, which control its final destiny such a coveted result can not always be obtained by fallible humanity. Obviously, one who commits a breach of contract must make compensation to the injured party. In determining the amount of this compensation as the "damages" to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised. This aim can never be exactly attained due to firstly, the difficulty to put the principles in practice as so stated in the law and secondly, as to the problem of clarity in the law itself. So the discussion in this paper sets out a number of problems, which revolve around the issue of damages in sale contract.

To begin with, the problem related with the application of provisions of contracts in general vis-à-vis sale contracts. As we have already seen from the judgments of some cases, courts have made absolute distinction between them. But, provisions of contracts in general should have application on special contracts as long as they do not affect the nature thereof. In the law of sales, however, there are additional rules, supplementing the more general rules.

The other problem is as to the provisions of the civil code with regard to sale contract. Articles from 2360-2367 are not enough as to the sufficient understanding of the assessment of damages in breach of sale contract for instance; Where the contract is cancelled and the thing has a current price, damages shall be equal to the difference between the price fixed in the contract and the current price as on the day when the right to

declare cancellation of the contract could be exercised or on the day following that when the contract was cancelled by the court or as of right. But the question should be the measure of damages if there is no difference between contract and market price. A similar problem involves in cases of anticipatory breach of contract. That is what if the price of the previous purchase in replacement or compensatory sale is less or there is no difference with contract price.

In like manner, one can invoke the question of whether or not interest is recoverable as damages since the law is silent as to the payment of interest in all cases even in the absence of stipulation in the contract. The law simply provides for the payment of legal interest in case of delay in the payment of interest.

The other relevant point although not clear in the law is the issue of greater damages. That is as the law provides; damages shall be equal to the prejudice actually caused where the party who suffered such prejudice shows that, at the time of the making of the contract, he had informed the other party of the special circumstances by reason of which the prejudice caused is greater. But what is the prejudice actually caused. Should we consider the distinction between greater and normal damages as absolute one since there is an instance for damage, which is general in relation to a contract of one kind, may be classified as special in relation to another.

The law also failed to regulate about liquidated damages whether or not parties can agree for liquidated damages in their contract and its execution if it is greater than actual damage.

All these problems create difficulty in courts to understand the law sufficiently and to put into practice as pointed out earlier, in the analysis of cases and interviews held with judges.

Having this discussion in mind, the writer proceeds to provide the following recommendations.

- ➔ The law must be improved in order to sufficiently answered the questions raised here in before and it should be clearly specified at least by considering the following points
 - In an award of the difference between the market price and the contract price does not function to put the injured party as good a position as performance, the injured party should recover profits that would have been made on the specific contract without regard to the market price and contract price differential.
 - Interest should be awarded as damages for breach of contractual duty, instead of the agreed compensation for the use of money lent.
 - To minimize the difficulty of calculating the actual damages, parties should have freedom of contract for liquidated damages.
 - Finally and most importantly it is necessary to amend the law in a clear terminology.
- ➔ In those instances where courts fail to properly handle cases relating to the assessment of damages, judges has to be courageous enough to appreciate the problem through reading.

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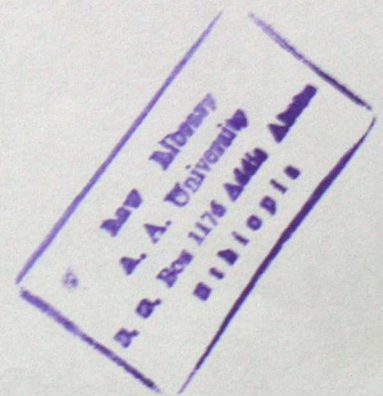
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Interviews

- Interview with Ato Yoseph Amero, A judge at Federal High Court, Ledeta branch, done in his office on Feb 2,2007

- Interview with Ato Tafesse Yerga, a judge at the Federal High Court, Ledeta branch, done in his office on march 10, 2007

APPENDICES

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የፍ/ብ/ይ/መ/ቁ.5051/93
ጥቅምት 19 ቀን 1994 ዓ.ም.

- ዳኞች፡- 1. መንበረፀሃይ ታደሰ
2. ዳኛ መላኩ
3. ጌታቸው ምህረቱ

ይግባኝ ባይ፡- አቶ አብዱልቃድር ጁሃር - ጠበቃ ጥበቡ ብዙኃህ ቀረበ፡፡

መልስ ሰጭ፡- አምባሰል የንግድ ሥራዎች ሃላፊነቱ የተወሰነ የግል ማህበር

መዝገቡን መርምረን የሚከተለው ውሳኔ ሰጥተናል፡፡

ውሳኔ ኔ፣

ይህ ይግባኝ የቀረበው የፌዴራሉ ከፍተኛ ፍ/ቤት በመ.ቁ.83/91 ግንቦት 30 ቀን 1992 ዓ.ም. በዋለው ችሎት የሰጠውን ውሳኔ በመቃወም ይግባኝ ባይ ይግባኝ ስለጠየቁ ነው፡፡===== //

ጉዳዩ በተጀመረበት የከፍተኛው ፍ/ቤት፣ ይግባኝ ባይ በመልስ ሰጭ ላይ የመሠረቱት ክስ እንደሚከተለው ነበር፡፡ ህዳር 30 ቀን 1989 እና ታህሣሥ 1 ቀን 1989 ዓ.ም. ከመልስ ሰጭ ጋር የቀይ ሰሊጥ ሽያጭ ውል አድርገናል፡፡ በዚህም መሠረት አንዱን ኩንታል በ289.65 ብር ሂሳብ በ2 ወር ውስጥ ጉንደር በሚገኘው ፋብሪካዬ 10,000 ኩንታል ቀይ ሰሊጥ ሊያስረክበኝ ግዴታ ገብቷል፡፡ እኔም ለቅድሚያ ክፍያ 1,448,250 ብር ቼክ ፈርሜ አስይዣለሁ ይሁን እንጂ መልስ ሰጭ በግዴታው መሠረት 4,100 ኩንታል አስረክቦቼ ቀሪውን 5,900 ኩንታል ግን አላስረክበኝም፣ በዚህም የተነሣ በትኝጅ 10,000 ኩንታል ሰሊጥ ካላገኘ መንቀሳቀስ የማይችለው ፋብሪካዬ ለ2 ወር ያለሥራ ቆሞ ከሣራ አድርሰብኛል፡፡ መልስ ሰጭ በውሉ መሠረት ግዴታውን ተወጥቶ 5,900 ኩንታሉን ቢያስረክበኝ ኖሮ ከአንዱ ኩንታል ቢያንስ 130 ብር የተጣራ ትርፌ አገኝ ነበር፣ ነገር ግን መልስ ሰጭ ግዴታውን ባለመወጣቱ ማግኘት የሚገባኝን ስላላገኘሁ ብር 767,00፣ ክስ ከቀረበበት ተከፍሎ እስኪያልቅ ከሚኖረው ወለድ ጋር፣ ለዳኝነት አበል፣ ለጠበቃ አበል፣ ለቀረጥ ቱምብር እና ልዩ ልዩ ወጭና ከሣራ ጨምሮ እንዲከፍለኝ ይደረግልኝ የሚል ክስ ነበር፡፡===== //

መልስ ሰጭም በነገረፈጅ አማካኝነት በሰጠው መልስ፣ ያስረክበው ሰሊጥ 4,100 ኩንታል ብቻ ሣይሆን 7,305.35 ኩንታል መሆኑን እና ለዚህም ማስረጃ ያያዘ መሆኑን፣ በውላቸውና በማስረክቢያው ሰነድ መሠረት ይግባኝ ባይ 1 ኩንታል በብር 299.65 ዋጋ የተረከቡ በመሆኑ፣ የሰጡት ቼክ ከተረከቡት ውስጥ የ2305.35 ኩንታል ሰሊጡን የማይሸፍን እና የ5000 ኩንታል ዋጋ ብቻ መሆኑን፣ ይህም ቼክ በቂ ስንት የለውም ተብሎ

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ግልባጭ
[Signature]

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በፍትሐብሔር ክስ አስፈርደው በአፈ.ፃፀም ላይ ሲሆኑ፣ የወንጀሉም የቀጠለ መሆኑን፣ ይህም እንደ ግዴታ መወጣት የሚቆጠር አለመሆኑን፣ ፋብሪካው በ1000 ኩንታል በታች በሆነ የቅባት እህል ሊንቀሳቀስ አለመቻሉና ለ2 ወር መዘጋቱ በማስረጃ ያልተደገፈ መሆኑን በመግለጽ ክሱ እንዲዘጋለት ጠይቋል።=====//

ይግባኝ ባይም፣ ለዚሁ መልስ በሰጡት የመልስ መልስ ፣ መልስ ሰጭ ከገዙት 10,000 ኩንታል ሰሊጥ ውስጥ 7,305.35 ኩንታል ያላስረከባቸው መሆኑን፣ ማስረከቢያ በማለት ያቀረበው ሰነድም ከዚህ ውል ቀደም በነበራቸው ውል መሠረት የተረከቡበት እንጅ የአሁኑን ውል የማይመለከትና ማስረከቢያ ሰነዱ በአሁኑ ውል ላይ ከተቀመጡት ልዩ ልዩ ነገሮች ጋር የማይጣጣም መሆኑን፤ በውላቸው መሠረት የአንድ ኩንታል ሰሊጥ ዋጋ ብር 289.65 እንጅ 299.65 ብሎ አለመሆኑን እና ለተሸጠላቸው 10,000 ኩንታል ሰሊጥ ዋጋ በሁለት ቴኮች በጊዜው የሰጡ መሆኑን፣ ቴኩ ገንዘቡ ስለሌለው በፍትሐብሔር ክስ ለአስፈርጃለሁ በወንጀልም ተከሷል የሚለው ከዚህ ክርክር ጋር ምንም ዓይነት ዝምድና የሌለው መሆኑን፤ ፋብሪካው ለ2 ወር መዘጋቱና የጠየቁት ጉዳት የደረሰባቸው መሆኑ በተቆጠሩት ምስክሮች የሚረጋገጥ መሆኑን በመግለጽ፣ እንደከሳቸው እንዲወሰንላቸው ጠይቀዋል።=====//

ፍ/ቤቱም፣ የግራ ቀኙን ክርክር መርምሮ፣ የተለያዩ ጭብጦችን መሥርቶ፣ ይግባኝ ባይ በውሉ ላይ በገቡት ግዴታ መሠረት የግማሹን ሰሊጥ ዋጋ የከፈሉበት ቴክ ሂሳባቸው ውስጥ ገንዘብ ባለመኖሩ ያልከፈሉ መሆኑ ስለተረጋገጠ ግዴታቸውን በአግባቡ አልተወጡም፣ በዚህ ሁኔታ ላይ መልስ ሰጭ ቀሪውን ሰሊጥ አለማስረከቡ በፍ/ብ/ሕ/ቁ. 2278/2/ መሠረት አግባብ ነው፣ ይግባኝ ባይ በውሉ መሠረት ግዴታቸውን ሳይወጡ ከመልስ ሰጭ የሚጠይቁት ግዴታ አይኖርም፣ በማለት ከሳቸውን ውድቅ አድርጉታል።==//

የአሁኑ ይግባኝ የቀረበው ይህን ውሳኔ በመቃወም ሲሆን፤ ይግባኝ ባይ ሐምሌ 8 ቀን 1992 ዓ.ም. በተፃፈ ማመልከቻ ቅሬታቸውን ገልፀዋል። ቅሬታቸውም፣ በዱቤ ለገዛሁት 10,000 ኩንታል ሰሊጥ ግማሽ ዋጋ ያስያዝኩት ቴክ የመክፈያ ጊዜው በጠቅላላ ሰሊጡን በምረከብበት የካቲት 20 ቀን 1989 ዓ.ም. ሲሆን፣ ፍ/ቤቱ ለውሳኔው መሠረት ያደረገው የፍ/ብ/ሕ/ቁ/2278 አግባብነት የሚኖረው በውላችን የተገለፀ ተቃራኒ ስምምነት በሌላ ጊዜ ነው፣ ነገር ግን በውላችን በተቃራኒ ተደንግጎ ሳል፣ ይህን በማለፍ መልስ ሰጭ ያልተከራከረበትን መሠረት በማድረግ ክሱ ውድቅ የተደረገው አግባብ ነው፤ ቴኩን የሰጠሁት መልስ ሰጭ 10,000 ኩንታሉን ሰሊጥ አስረክቦኝ በፋብሪካዬ አምርጥ ሸጤ ባንክ ገንዘቡን ለማስገባት በቃል ባደረግነው ስምምነት መሠረት ሲሆን፣ ቴክ ለባንክ መቅረብ የነበረበት መልስ ሰጭ በአጠቃላይ ሰሊጡን ካስረከበኝ በኋላ ነበር፣ ቴኩ በቂ ገንዘብ አልነበረም የተባለው ይህን አላገናዘበም፣ የሸጠልኝን ሰሊጥ ባለማስረከቡ ፋብሪካዬ ቆሞ ከፍተኛ ኪሣራ የደረሰብኝ መሆኑን ያስረዱልኛል ያልኳቸው ምስክሮች አልተሰሙም፣ የሚል

ፌዴራል ጠቅላይ ፍርድ ቤት
ጋኅክል ግልባጭ
24/11/92

ሲሆን፣ የከፍተኛው ፍ/ቤት ውሳኔ ተሸር፣ የደረሰባቸውን ጉዳት እንዲያስረዱ የተቆጠሩ ምስክሮች ተስምተው፣ ከሥር ባቀረቡት ክስ መሠረት እንዲወሰን፣ በቂ ኪሣራ፣ የጠበቃ አበል እንዲወሰንላቸው ጠይቀዋል፡፡=====//

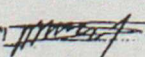
መልስ ሰጭም፣ ለቀረበው ቅሬታ መልስ እንዲሰጡ ተደርጉ፣ ታህሣሥ 2 ቀን 1993 ዓ.ም. በተፃፈ ማመልከቻ መልስ ሰጥተዋል፡፡ በመልሱም ላይ፣ ቼክ እንዳቀረበ የሚከፈል ሰነድ እንጅ ለዋስትና የሚያገለግል ስላልሆነ ቼኩ በቅድሚያ የተሰጠው ለዋስትና ነው የሚባለው ተቀባይነት የሌለው መሆኑን፣ ይግባኝ ባይ ሰሊጡን ተረክበው አምርተው ከሸጡ በኋላ ገንዘቡን ሊከፍሏቸው ያልተስማሙ መሆኑን፣ በውሉ መሠረት የቅድሚያ ክፍያው ጥር 20 ቀን 1989 ዓ.ም. መክፈል እያለበት ክፍያ የፈፀሙበትን ቼክ የካቲት 20 ቀን 1989 ዓ.ም. እንዲከፈል ማድረጋቸው ከመሠረቱ ቅን ልቦና የላቸው መሆኑን የሚያሳይ መሆኑን፣ በ2 ወር ጊዜ ውስጥ ጉዳት ደርሶብኛል ብሎ የቀረበው ገንዘብ የተጋነነ መሆኑን፣ ይግባኝ ባይ ለተረከቡት 500 ኩንታል የሰጡት ቼክ በቂ ስንቅ የለውም ተብሎ በፍትሐብሔር ያስፈረዱና በአፈፃፀም ላይ መሆናቸውን ቀሪ ያልተከፈለበትን 2,305.35 ኩንታል ሰሊጥ በተመለከተ ለማስከፈል ክስ ለመመስረት በዝግጅት ላይ መሆናቸውን፣ ለይግባኝ ባይ ላስረከቡት ሰሊጥ ዋጋ እስካሁን ያልተከፈላቸው መሆኑን፣ የይግባኝ ባይ ምስክሮችን መስማቱ አስፈላጊ አለመሆኑ በሥር ፍ/ቤት ታምኖበት የታለፈ መሆኑን፤ በመግለጽ፣ የሥር ፍ/ቤት ውሳኔ ፀንቶ፣ በቂ ኪሣራ ተቆርጦላቸው መዝገቡ እንዲዘጋ ጠይቀዋል፡፡=====//

ይግባኝ ባይም፣ ጥር 7 ቀን 1993 ዓ.ም. የተፃፈ የመልስ መልስ ሰጥተዋል፡፡ በመልስ መልሳቸው ማመልከቻ ላይም፣ ቼኩን ለመያዣነት መስጠታቸውን፣ መክፈያ ቀኑም የካቲት 20 ቀን 1989 ዓ.ም. መሆኑን ውሉ የሚያሳይ መሆኑ፣ መልስ ሰጭ በገባው ግዴታ መሠረት ግማሽ ያህል እንኳን ያላስረከበና 7305.35 ኩንታል አስፈክቦበታለሁ በማለት ለሥር ፍ/ቤት ያቀረበው የማስረከቢያ ሰነድ ከዚህ ውል ጋር ግንኙነት የሌለው መሆኑን፣ ሽያጩ የዱቤ ሆኖ ለክፍያውም፣ አስረክቦ ሲጨርስ የሚመነከር ቼክ በዋስትና የያዘ ሲሆን ይህም ሰሊጡን አስከቦአቸው አምርተው ከሸጡ በኋላ፣ ገንዘቡን ለባንክ ለማስገባት መስማማታቸውን የሚያሳይ መሆኑን፣ ትክክልኛ በመሆኑ ሁኔታ ኪሣራው የደረሰባቸው ለመሆኑ፣ በሰው ማስረዳት የሚችሉ እና በቼኩ ምክንያት በሌሉበት የተፈረደባቸውን ውሳኔ በመቃወም በይግባኝ በክርክር ላይ መሆናቸውን ወደፊት ይቀርባል ለተባለው ክስ፣ በወቅቱ መልስ የሚሰጡበት መሆኑን፣ በመግለጽ የሥር ፍ/ቤት ውሳኔ ተሸር፣ እንደአቤቱታቸው እንዲወሰንላቸው ጠይቀዋል፡፡=====//

የጉዳዩ አመጣጥና የግራ ቀኙ የይግባኝ ክርክር ከላይ የተመለከተው ሲሆን፤ እኛም የግራ ቀኙን ክርክር በሚገባ መርምረናል፡፡ ይግባኝ ባይ በከፍተኛው ፍርድ ቤት ያቀረበው ክስ መልስ ሰጪ የውል ግዴታውን ባለመፈፀሙ ምክንያት ለደረሰብኝ ጉዳት ብር

ፈዴራል ጠቅላይ ፍርድ ቤት

ትክክል ግልባ ?

ፊርማ  ቀን

767,000.00/ሰባት መቶ ስድሳ ሰባት ሺህ ብር/ ካሳ ይክፈለኝ የሚል ነው። ይግባኝ ባይ ይህን ሂሳብ ስሌት ያቀረበው መልስ ሰጪ በውሉ መሠረት ቀሪውን ሰሊጥ ባለማስረከቡ ፋብሪካው በቆመበት ወቅት ለእያንዳንዱ ቀን አገኝ ነበር ያለውን ብር 130.00/አንድ መቶ ሰላሳ ብር/ መሠረት በማድረግ ነው።=====//

በይግባኝ ባይና በመልስ ሰጪ መካከል 10,000 ኩንታል ሰሊጥ ሽያጭ ስምምነት እንደነበር፣ በዚህ መሠረት ይግባኝ 4100 ኩንታል መረከቡ፣ ሻጭ ጠቅላላውን ሰሊጥ በ2 ወር ጊዜ ውስጥ ለማስረከብ መስማማቱ አላከራከረም። ይግባኝ ባይ በውሉ መሠረት የብር 1,448.250/አንድ ሚሊዮን አራት መቶ አርባ ስምንት ሺህ ሁለት መቶ አምሳ ብር/ በቼክ ቁጥር ብር 042320 እንደሰጠም መልስ ሰጪ የሚክደው አይደለም። መልስ ሰጪ በውሉ እንደተገለፀው ገዥ ያልተረከበው ሰሊጥ እንዳለም አምናል። ይግባኝ ባይ ቀሪውን 5100 ኩንታል አልወሰደውም ሲል ይግባኝ ባይ በበኩሉ ገዢ ከፈልኩ ከሚለው ሂሳብ በላይ የተረከቡ መሆኑን ገልጾ ቀድሞ የተረከበው ቼክም ስንቅ የለውም ተብሎ በመመለሱ የተረከበው ገንዘብ እንደሌለ ይገልጻል። ከፍተኛው ፍርድ ቤት የይግባኝ ባይን ጥያቄ ውድቅ ያደረገውም በውሉ ቃል መሰረት መክፈል የሚገባው ገንዘብ ሳያስረከብ ቀሪውን ነገር መጠየቅ አይችልም በማለት ነው።=====//

ከላይ እንደተገለፀው ይግባኝ ባይ በስር ፍርድ ቤት ያቀረበው ክስ የካሳ ክፍያን የሚመለከት ነው። ይህን የካሳ ጥያቄ ያቀረበውም መልስ ሰጪ በውሉ መሠረት ቀሪውን ሰሊጥ ባለማስረከቡ ፋብሪካዬ ሊቆም ችሏል በማለት ነው። በይግባኝ ባይና በመልስ ሰጪ መካከል ያለው ውል እስካላከራከር ድረስ በዚህ ፍርድ ቤት መታየት የሚኖርበት ነጥብ መልስ ሰጭ የውሉን ቃል ተከትሎ ቀሪውን ሰሊጥ አለማስረከቡ ጥፋት ነው ወይስ አይደለም? ይህ ጥፋት ቢሆን የደረሰው የጉዳት መጠን እንዴት ይለካል? በጥፋትና በድርጊት መካከል ምን ዓይነት ግንኙነት አለ የሚሉት ነጥቦች ናቸው። በይግባኝ ባይና በመልስ ሰጪ መካከል ከተፈፀመው ውል ለመገንዘብ እንደቻለው ሁለቱም ወገኖች ግዴታ ገብተዋል ሻጭ በሁለት ወር ጊዜ ውስጥ 10,000 ኩንታል ሰሊጥ ለይግባኝ ባይ ለማስረከብ ግዴታ ገብቷል። ገዢ ደግሞ በሁለት ክፍያ እያንዳንዱ ብር አንድ ሚሊዮን አራት መቶ አርባ ስምንት ሺህ ሁለት መቶ አምሳ ብር/1448,250.00/ ለመክፈል መስማማቱን ተገንዝበናል በውሉ አንቀፅ 4/2/ መሰረት ገዢ የመጀመሪያውን ክፍያ ጥር 20 ቀን 1989 ለመክፈል ተስማምቷል። ገዢ ቀሪውን ሂሳብ የሚያስረከበው የካቲት 20 ቀን 1989 መሆኑንም አንቀጽ 4/3/ ይደነግጋል።=====//

ገዢ መጀመሪያ መክፈል ያለበትን ብር 1,448,250.⁰⁰/100 የያዘ ቼክ ለሻጩ/ለመልስ ሰጪ/ የሰጠ ቢሆንም ይኸው ቼክ ስንቅ ስላልነበረው ተካፋይ ሊሆን አልቻለም። ይሉትንም መልስ ሰጪ በዚህ ቼክ ምክንያት በይግባኝ ባይ ላይ ክስ መስርቶ የአስፈላጊነት መሆኑ ተረጋግጦአል። ይህ ከሆነ ደግሞ በውል የገባውን ግዴታ በአግባቡ

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ግልባጭ
ፌዴራል ጠቅላይ ፍርድ ቤት

ተወጥቷል ማለት የሚቻል አይደለም። ይግባኝ ባይ የቼኩን አከፋፈል በሚመለከት የቃል ስምምነት ነበረን በማለት የገለፀ ቢሆንም ይህንን ለማስረዳት ያቀርበው ማስረጃ የለም ቼክ የተወሰነ ዓላማና አሰራር ያለው በመሆኑም በእንደዚህ አይነት የቃል ስምምነት ይዘቱንና አከፋፈሉን መቀየር የሚቻልም አይደለም። ይግባኝ ባይ የተሰጠው ቼክ የሚከፈለው መልስ ሰጪ 10,000 ሰሊጥ ገቢ ከዚህ በኋላ ነው በማለት ተከራክሯል። ከላይ የተጠቀሰው የውሉ አንቀጽ ጠቅላላው በውሉ የተጠቀሰው 10,000 ኩንታል ሰሊጥ ገቢ መሆን ሳይጠብቅ የመጀመሪያው ብር 1,448,250⁰⁰/100 ጥር 20 ቀን 1989 ገቢ መደረግ እንዳለበት የሚጠይቅ በመሆኑ ክርክሩን መቀበል የሚቻል አይደለም።=====//

ስለዚህ ይግባኝ ባይ ቀድሞውኑ በውሉ የሚጠበቅበትን ግዴታ የተወጣ አይደለም። በይግባኝ በራሱ ያማነውና ወሰድኩ ያለውን 4100 ኩንታል ሰሊጥ እንኳን ሕጉና ውሉ በሚጠበቅበት መጠን ክፍያውን አልፈፀመም። ለወሰደው ዕቃ ውሉ በሚጠይቀው መጠንና ጊዜ ሳይከፍል ደግሞ መልስ ሰጪ ቀሪውን ሰሊጥ እንዲያስረክበው ሊያስገድደው አይችልም። መልስ ሰጪ ቀሪ የተባለውን ሰሊጥ ለማስረክብ ግዴታ ከሌለበት ደግሞ ይግባኝ ባይ ደረሰብኝ ለሚለው ጉዳት ተጠያቂ ሊሆን አይችልም ወይም ጥፋት ፈፅሟል ሊባል አይችልም። ስለዚህ ከፍተኛው ፍርድ ቤት ይግባኝ ባይ የራሱን ግዴታ ሳይወጣ መልስ ሰጪ ግዴታውን ባለመወጣቱ ለደረሰብኝ ጉዳት ይጠይቃል በማለት ያቀረበውን ክስ ውድቅ መደረጉ የሚነቀፍ ባለመሆኑ ፌዴራል ከፍተኛ ፍ/ቤት የሰጠውን ውሣኔ በፍ/ሥ/ሥ/ሕ/ቁ.348 መሰረት አፅንተናል። መዝገቡንም ዘግተናል።=====//

መልስ ሰጪ በዚህ ፍርድ ቤት ለደረሰበት ወጪና ኪሣራ ዝርዝር የማቅረብ መብቱንም ጠብቀናል።=====//

የማይክብብ የሦስት ዳኞች ፊርማ አለበት።

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ግልባጭ
~~ፊርማ~~ ቀን 21.3.96

/ባ/አ

ዳኞች፡- ሐጎስ ወልዱ
ዳኜ መላኩ
ደስታ ገብሩ

ይግባኝ ባይ፡- አቶ ጌታሁን ሠይፋ ጠበቃ ቀፀላ ሙላት ቀረበ
መልስ ሰጭ፡- አቶ ተሾመ መንገሻ ጠበቃ ታደለ ታምራት ቀረበ

ይህ መዝገብ በይ/መ/ቁ. 563/88 ጋር ተጣምሮ ተከታይ ውሣኔ ሰጥቶአል፡፡

ው ሣ ኔ

ይግባኝ የቀረበው የዞን ፍ/ቤት በፍ/መ/ቁ. 1660/84 መጋቢት 16 ቀን 1986 ዓ.ም. በዋለው ችሎት በሰጠው ውሣኔ ላይ ነው፡፡=====//

በዞን ፍ/ቤት መልስ ሰጭው ከሣሽ ሲሆን፤ ይግባኝ ባይ ተከሣሽ ነበር፡፡=====//

የመልስ ሰጭው የሥር ክስ በአጭሩ ተከሣሹ የካቲት 12/1983 በተፃፈ ውል ልዩ ልዩ ብረታ ብረቶችን አስመጥቼ እሸጥልሁለሁ ብሎ ብር 95,000 /ዘጠና አምስት ሺህ ብር/ የቅድሚያ ክፍያ ተቀብሎ ብረታ ብረቶቹን ስላላስረከበኝ የወሰደውን ገንዘብ በፍ/ሕ/ቁ. 1784 2336 እና 2354 መሠረት ውሉ ፈርሶ ገንዘቡን ሊመልስልኝ ይገባል፡፡=====//

ተከሣሹም በውላችን መሠረት ብረቱን ያስመጣልኛል ብዬ በመተማመን ልዩ ልዩ ሥራዎችን ከተቀበልኩ በኋላ ብረቶቹ በወቅቱ ባለመድረሱ መክንያት ሥራ ስለተቋረጠብኝ ብረቶቹ ቀርበው ቢሆኑ ኖሮ ሥራ ሠርቼ ላገኝ የምችል የነበረውን ጥቅም ብር 30,000 /ሠላሣ ሺህ ብር/ በቅድሚያ ከወሰደው ገንዘብ ጋር ኪሣራዬን ጨምሮ በፍ/ሕ/ቁ. 1790፣ 1791፣ 2355 እና 2360 መሠረት እንዲከፍለኝ የሚል ነው፡፡=====//

የሥር ተከሣሽ የአሁን ይግባኝ ባይም ቀርቦ በፍ/ሕግ ቁጥር 1772 መሠረት እንደውሉ ሣይፈፀምልኝ ቀርቷል በማለት ክርክር ለማቅረብ የሚፈልግ በዋዋይ ወገን ሌላው ተዋዋይ ወገን ግዴታውን እንዲፈጸምለት ለማድረግ አስቀድሞ ማስጠንቀቂያ መስጠት አለበት፡፡=====//

ከሣሽ በፍ/ሕ/ቁ. 1772 መሠረት የቅድሚያ ማስጠንቀቂያ ለተከሣሽ ሣይሰጥ ክስ ቀርቦ በመሆኑ ክሱ ሊሠረዝ ይገባል፡፡=====//

ክሱ የማይሰረዝ ከሆነ ደግሞ ተከሣሽ ከከሣሹ ጋር የሺያጭና የግዢ ውል መፈፀሙ የሚካድ አይደለም፤ ዕቃውንም ተከሣሽ ለከሣሽ ለማስረከብ ግዴታ የገባው እስከ ግንቦት 30/83 ድረስ ነው፡፡=====//

ሀይለማርያም ሙሉ ስም
የብርሃኑ ማህተም
አዲስ አበባ

ይሁን እንጂ በግንቦት ወር 1983 በአገሪቱ ውስጥ በነበረው ሁኔታ የአሰብ ወደብ የማይሠራበት ጊዜ በመሆኑ ዕቃዎቹን ከውጭ አምጥቼ ለማስረከብ ከአቅም በላይ የሆነ ሁኔታ ገጥሞኛል።=====//

ይህንንም ለከሣሽ ገልጭላቸው በፖስታና የያዘውን ቼክ ለባንክ አቅርቦ ገንዘቡን ያለመውሰዱ የውሉ መፈፀሚያ ጊዜ መራዘሙን ከሣሽ አምኖ እንደተቀበለ ያስረዳል።

የውሉ ጊዜ ከተራዘመ በኋላም ውል ከተገባባቸው ዕቃዎች መካከል ብር 88,600 የማያወጣ ልሙጥ ላሚራ ከውጭ አገር በማስመጣት በ2/8/84 ከለገሀር ጉምሩክ በማስወጣት በከሣሽ ግቢ በምስክርነት ፊት ተራግፎ ተረክቧል።=====//

ይሁንና ከሣሽ ለተረከበው ዕቃ ደርሶኝ አንዲሠጥ ቀሪውንም ዕቃ እንደመጣለት ፈቃደኝነቱን እንዲገልጽ ቢጠየቅ መልስ ሳይሰጥ ቀርቶ ክሥ ማቅረቡ እግባብ አይደለም።

በሌላ በኩል ተከሣሹ በቅድሚያ ከወሰደው ገንዘብ ውስጥ የሚቀርበት ብር 6400 ሆኖ ሣለ ከሣሹ ብር 88,600 የሚያወጣ ዕቃ እንዳልተረከበ አስመስሎ በቅድሚያ የከፈለውን ገንዘብ በሙሉ እንዲመለስለት ያቀረበው ጥያቄ ህጋዊነት የለውም።=====//

ኪሣራውንም በተመለከተ ተከሣሽ ግዴታውን በከፊል ስለፈፀመ አይመለከተኝም።

ለውሉ መፍረስ ምክንያት ነህ ከተባለኩም ግዴታዬን በጊዜው ልፈጽም ያልቻልኩት በአገሪቱ ተከስቶ በነበረው የእርስ በርስ ጦርነት ስለሆነና የአሰብ ወደብ ተዘግቶ በመቆየቱ ስለሆነ በፍ/ሕግ ቁጥር 1791/2/1792 እና 1793 /መ/ መሠረት ከሣሽ ደርሶብኛል ለሚለው የጉዳት ኪሣራ ተከሣሽ አላፈ አይደለም።=====//

ለተባለው ጉዳት ተከሣሽ ሀላፊ ነው የሚባል ቢሆን እንኳ የጉዳት ኪሣራው የሚተመነው ከሣሽ በጠቀሰው የፍ/ሕግ ሣይሆን በቁ. 2362 ድንጋጌ መሠረት ነው። በዚህ መሠረት የጉዳት ኪሣራው መጠን የሚወሰነው ውሉ ፈራሽ በሆነበት ቀን ማግሥት በነበረው የዕቃው ዋጋና በውሉ በተጠቀሰው ዋጋ መካከል የለውን የዋጋ ልዩነት በመከተል ነው። ይህንንም ሁኔታ የሚያስረዳ ማስረጃ ከሣሽ ያቀረበ ስለሆነ ተከሣሽ የመከላከል ግዴታ የለበትም በማለት ተከራክሯል።=====//

የሥር ፍ/ቤትም በገራ ቀኙ የቀረበውን የጽሑፍም ሆነ የሰው ማስረጃዎች ከሰማና ከመረመረ በኋላ፦

1ኛ. ተከሣሹ ከሣሽ ማስጠንቀቂያ ሣይሠጠኝ ክስ ያቀረበው ያለ አግባብ ነው ለሚለው በከሣሽና በተከሣሽ መካከል የካቲት 12/1983 በተደረገው ውል የግዴታው መፈፀሚያ ዘመን ግንቦት 30/83 ሲሆን የዚህ ውል መፈፀሚያ ዘመን ስለአለፈ በፍ/ሕግ ቁ. 1775/ለ/ መሠረት ከሣሽ ለተከሣሽ ማስጠንቀቂያ የመስጠት ግዴታ የለበትም።

2ኛ. ተከሣሽ ግዴታዬን ልፈጽም ያልቻልኩት ከአቅም በላይ በሆነ ምክንያት ነው በማለት ያቀረበው ምክንያት በግንቦት ወር 1983 በአገሪቱ ውስጥ በተፈጠረው አለመረጋጋት ነው በሚል ነው።=====//

ሐክማት ገዳም
[Signature]

ይሁንና ክስ የቀረበበትን ላሚራ ከውጭ አገር አስገብቶ እስከ ወደብ በግንቦት ወር 1983 በተፈጠረው አለመረጋጋት ምክንያት ወደ መሀል ሀገር ማስመጣት እንዳልቻለ አላስረዳም። እንዲያውም በማስረጃነት አያይዞ ያቀረበው ዴክላራሲዮን ዕቃው ከግንቦት 1983 ወዲህ በ1984 አሰብ ወደብ መድረሱን የሚያረጋግጥ በመሆኑ ክርክሩን ፍ/ቤቱ ውድቅ አድርጎታል።=====//

ዕቃውን በጊዜው በተፈጠረው ችግር ምክንያት ማንጓዝ ባይችል እንኳን በፍ/ሕግ ቁጥር 1797 ለከሣሽ የማሳወቅ ግዴታውን ስላልተወጣ ግዴታውን ከአቅም በላይ በሆነ ምክንያት ሊወጣ አልቻለም በማለት አይቻልም።=====//

3ኛ. በከሣሽና ተከሣሽ መካከል ከግንቦት 30/1983 በኋላ ውሉ እንዲራዘም ተደርጓል ለሚለው ከሣሹ በዋስትና የያዘውን ቼክ ለባንኩ አቅርቦ ገንዘቡን ያለመውሰዱ የቅድሚያ ማስጠንቀቂያ ያለመስጠቱ ከግንቦት 30/83 ወዲህ ከሣሽ ዕቃዎቹ እንዲወጡለት መጠየቁ የውሉ ጊዜ እንዲራዘም ከሣሽ ፈቅዷል የሚሰኝ ካለመሆኑም በላይ በማስረጃ ያለተደገፈ ክርክር ስለሆነ የውሉ ጊዜ ተራዝሟል ለማለት አልተቻለም።=====//

4ኛ. ተከሣሹ የውሉ ጊዜ ካለፈ በኋላ ግምታቸው ብር 88,600.00 የሆኑ 1000 ላሚራ አስረክቧል አላስረከበም? በውሉ አለመፈፀም የተነሣ በከሣሽ ላይ ጉዳት ደርሷል አልደረሰም? የሚለውን ጭብጥ በተመለከተ፣ ተከሣሽ ከውሉ ጊዜ በኋላ ለከሣሽ 1000 ላሚራ ለማስረክብ የሰው ምስክሮች አለኝ በማለት ቢያስመሰክርም ምስክሮቹ ባልተለያዩ አመሠካከር የካቲት 12/83 ባደረጉት ውል መሠረት 1000 ላሚራ ለከሣሽ ማስረክቡን አልመሠከሩም። ምስክሮቹ በደፈናው የላሚራ ርክክብ ሲደረግ አየን ከሚሉ በቀር በውሉ ላይ የተጠቀሰው የላሚራ ዓይነት መሆኑን አላስረዳም ቃላቸውም የተለያየ ነው። ስለሆነም ምስክሮቹ እምነት ሊጣልባቸው እልቻሉም።=====//

በጽሑፍ ማስረጃነት የቀረበውም ዴክላራሲዮን የካቲት 12/1988 በተፈረመው ውል ላይ ከተገለፀው የላሚራ ዓይነት ጋር ተመሳሳይነት ያለው ሆኖ ስላላገኘው ተከሣሽ ለከሣሽ ግምታቸው ብር 88,600 የሆነ 1000 ላሚላ አስረክቧል ያለውን በበቂ ሁኔታ ያላስረዳ ስለሆነ ፍ/ቤቱ አልተቀበለውም።=====//

በሌላ በኩል ከሣሽ ውሉ በጊዜው ባለመፈፀሙ ምክንያት ደርሶብኛል የሚለውን የጉዳት ኪሣራ በሰው ምስክር ለማስረዳት ምስክሮች አስቀርቦ ምስክሮቹ ከሣሽ የላሚራ ብረት አጣሁ በማለት ከሥራ ያሰናበታቸው ለመሆኑ ከመግለጻቸው በቀር በውሉ መሠረት ተከሣሽ ላሚራ ባለማቅረቡ ከሣሽ ጉዳት የደረሰበት ለመሆኑ ካለማስረዳታቸውም በላይ የጉዳቱን መጠን እንኳ አልገለፀም። ስለዚህ ባለተጣራ ማስረጃ በከሣሽ ላይ በክሱ ግምት ልክ ጉዳት ደርሶበታል ማለት ስለማይቻል ከሣሽ ይህን አስመልክቶ ያቀረበውን አቤቱታ ፍ/ቤቱ ውድቅ አድርጎታል።=====//

ሰላም ላይ ስለሆነ
የክርክሩ ጸሐፊ
ፊርማ

ስለሆነም ተከሣሽ በከሣሽ ላይ በቅድሚያ የወሰደውን ብር 95,000 /ዘጠና አምስት ሺህ ብር/ ወለዱንም ዳኝነቱን የጠበቃ አበል 10% ሌሎች ወጪዎች በቁርጥ ብር 300 /ሦስት መቶ ብር/ ይክፈል በማለት ውሣኔ ሰጥቷል።=====//

ይህን ውሣኔ በመቃወም ይግባኝ ባይም ሆነ መልስ ሰጭ በየግላቸው የይግባኝ ቅሬታ አቅርበዋል።=====//

ይግባኝ ባዩ ተከሣሽ ግንቦት 12 ቀን 1986 ዓ/ም የፃፈው የይግባኝ ቅሬታ ፍሬ ቃል የሚከተለው ነው።=====//

የዞን ፍ/ቤት የግዴታው መፈጸሚያ ዘመን ግንቦት 30/1983 ሲሆን የዚህ ውል መፈጸሚያ ጊዜ ያለፈ ስለሆነ ከሣሽ ለተከሣሹ ማስጠንቀቂያ የመስጠት ግዴታ የለበትም በማለት ወስኗል።=====//

ይህ በዞን ፍ/ቤት ለፍ/ሕግ ቁ. 1775/ለ/ የተሰጠው ትርጉም ሕጋዊ አይደለም። ምክንያቱም በይግባኝ ባይና በመልስ ሰጭ መካከል የተደረገው የሽያጭ ውል ዘግይቶ የሚደረግ የውል መፈጸምን የማይፈቅድ አስገዳጅ አነጋገር ያለው ባለመሆኑ ዘግይቶ የሚደረግን የውል መፈጸም ከሚከለክል አይደለም። የውል መፈጸሚያ ጊዜ በውሉ ውስጥ ከተጠቀሱ የቅድሚያ ማስጠንቀቂያ መስጠት አስፈላጊ አይደለም የሚባል ከሆነ ሕጉ የሚደነግገውን የማስጠንቀቂያ መስጠት አስፈላጊ ፈፅሞ ቀሪ የሚያደርገው ይሆናል።

ስለዚህ መልስ ሰጭ ክሱን ለማቅረብ የቅድሚያ ማስጠንቀቂያ መስጠት አያስፈልግም በማለት ተሰጠው ውሣኔ ሕጋዊ ባለመሆኑ ክሱ ሊቀርብ አይገባም ተብሎ እንዲወስንልኝ።

ይግባኝ ባይ ብር 88,600 የሚያወጣ ላሚራ ለማስረከቤ በበቂ ማስረጃ ያስረዳሁ ሆኖ እያለ በበቂ ሁኔታ አላስረዳም በማለት የዞን ፍ/ቤት የሰጠው ውሣኔ ተቀባይነት የሌለው ነው።=====//

ምክንያቱም የስር ከሣሹ ክርክር ምንም ዓይነት ላሚራ አልተረከብኩም የተረከብኩት እንኳን ቢኖር ከይግባኝ ባይ ጋር ያለኝ ግንኙነት ብዙ ስለሆነ ከሰው ይጠይቁኝ የሚል አንጂ የቁጥር መጉደል ወይም የዓይነት ክርክር አላቀረበም።=====//

የምስክሮቹ የምስክርነት ቃል ሲታይ የተቆጠሩት አራቱም ምስክሮች ሚያዝያ 2/1984 ዓ.ም. በከሣሽ ግቢ ላሚራ መራገፉንና ርክክቡ መደረጉን ባልተለያዩ ቃል መስክረዋል። በተለይ 1ኛው የተከሣሽ ምስክር ዕቃውን በመጋቢት ወር ከአሰብ ወደብ አስጭኖ ማስመጣቱንና ለገሀር ጉምሩክ ካስገባ በኋላ ሚያዝያ 2/1984 ከ3ኛው የተከሣሽ ምስክር ጋር ቆጥሮ 1000 ላሚራ ማስረከቡን መሥክሯል።=====//

ርክክቡ የተፈጸመው ላሚራው በ1ኛውና በ3ኛው የተከሣሽ ምስክር እየተቆጠረ ለመሆኑ 2ኛው የተከሣሽ ምስክር አረጋግጦ መስክሯል። 3ኛው የተከሣሽ ምስክርም ቢሆን ላሚራውን ተረካቢ እንደነበርና በመሐል ቆጠራውን ትተን ነበር ቢልም እየቆጠረ መረከቡን

ተከሣሽ የልዩ
ፊርማ

መስከረም 4ኛው ምስክርም ላሚራው ከመኪና ሲወርድ እየተቆጠረ መጋዘን መግባቱን መስከረም::=====//

የአራቱም ምስክሮች ቃል ይህ ሆኖ ሣለና ላሚራው አልተቆጠረም ብሎ የመሠከረ ምስክር ሣይኖር አንዱ ላሚራዎች ተቆጥረዋል፡- ሲል ሌሎቹ ደግሞ አልተቆጠሩም፤ ሌላው ቆጠራ ተጀምሮ ተቋርጧል በማለት የተለያየ ቃል ሠጥተዋል፡፡ በዚህ ምክንያት ምስክሮቹ ዕ ምነት የሚጣልባቸው አይደሉም ብሎ የዞን ፍ/ቤት ያተተው ምን ያህል ከምስክሮቹ ቃል የራቀ መሆኑን ይግባኝ ሰሚው ፍ/ቤት ሊገነዘበው ይችላል፡፡=====//

3ኛው የተከሣሽ ምስክር የከሣሽ ልጅ ሲሆን በከሣሽ አባቱ ላይ ላለመመስከር አንዳንድ ሁኔታዎችን ለመደበቅ በመሞከር ቆጠራው ተቋርጧል ቢልም በመኪናው ላይ የነበረው ላሚራ በሙሉ መውረዱን ግን ሊሸሽግ አልቻለም፡፡=====//

በዚህ ርክክብ ጊዜ ከሣሽ በቦታው እንደነበር፣ ሌሎቹ ዕቃዎች ለምን እንዳልመጣለት ጠይቆ በውሉ ላይ በተጠቀሱት አምስት ዓይነት ዕቃዎች በመጀመሪያ ለመጣውና ለተረከበው 1000 ልሙጥ ላሚራ እንዲፈርም ሲጠየቅ ቀሪዎቹ ዕቃዎች ማለትም L . T . Z እና 12×12×1.5 የሆኑ ብረቶች ካልደረሱኝ በመጋዘኑ የተራገፈውን ለመቀበሉ ማስረጃ ለመስጠት ፈቃደኛ ያለመሆኑን ላሚራው ከተራገፈ በኋላ በምስክሮቹ ፊት ከተከሣሽ ጋር ያደረጉት የቃል ልውውጥ እና በዚህ ምክንያት የርክክብ ሠነድ እንዳልተፈረመ ተመስክሯል፡፡=====//

ይህም ከሣሽ የተረከበው ላሚራ ክስ በቀረበበት ውል መሠረት ተከሣሽ ያቀረበለት መሆኑን የሚያረጋግጥ ከሣሽ በሌላ ግንኙነት የተራገፈ ሊሆን ይችላል በማለት ያቀረበውን ክርክር ውድቅ የሚያደርግ ነው፡፡=====//

በከዚህም በላይ ከሣሽ ነበረኝ ስለሚለው ሌሎች ግንኙነቶችና በግንኙነቶቹም ምን ዕቃ በጊዜው ተረክቦ እንደነበር ያቀረበው ማስረጃ የለም፡፡=====//

በማስረጃነት የቀረበውን ዴክሌራሲዮን በተመለከተም የዞን ፍ/ቤት በሰጠው ውሣኔ “ላሚራው የካቲት 12/1983 በተፈረመው ውል ላይ ከተገለፁት የላሚራ ዓይነት ጋር ተመሳሳይነት ያላቸው ሆኖ አላገኛቸውም” በማለት የሠነዱን ማስረጃነት ውድቅ አድርጎታል፡፡=====//

በመሠረቱ በውሉና ከሣሽ በተረከበው ላሚራ መካከል ልዩነት አለ የሚል ክርክርም ሆነ ማስረጃ ለፍ/ቤቱ አልቀረበለትም፡፡ ቀደም ሲል እንደገለፅኩት የከሣሽ ክርክር ምንም ላሚራ አልተረከብኩም የሚል ብቻ ነው፡፡=====//

ባቀረብኩት ዴክሌራሲዮን ላይ ከተጠቀሱት ሁለት ዕቃዎች አንዱ 5 ጥቅል ላሚራ እንደሆነና ይህም በቀጥታ ከጉምሩክ ወጥቶ ከሣሽና ተከሣሽ ባሉበት በከሣሽ ግቢ ርክክብ እንደተደረገ በተከሣሽ ምስክሮች ተመስክሯል፡፡ በርክክቡም ጊዜ ላሚራው በውሉ ከተገለፀው የተለየ ነው አልረከብኩም የሚል ተቃውሞ በከሣሽ አልተነሣም፡፡ መዝገቡ የሚያስረዳው ይህን

ሆኖ ሣለ የዞን ፍ/ቤት ለሚራዎቹ ተመሳሳይ ሆነው አላገኘነውም በማለት የዴክሌራሲዮኑን ማስረጃ ነት ውድቅ ያደረገው ያለአግባብ ነው።=====//

ስለዚህ ከሆኑ ብር 88,600 የሚያወጣ ለሚራ መረከቡን በመካድ ክስ ቢመሠረትም ተከሆኖ ባቀረብኩት የዕሑፍና የሰው ማስረጃ ከሆኑ ለሚራውን መረከቡን በበቂ ሁኔታ አስረድቼ እያለ የብር ፍ/ቤት ለከሆኑ ለማስረከብ በበቂ ሁኔታ አላስረዳህም በማለት ከቅድሚያ ክፍያ ላይ ሳይቀንስ በሙሉ እንደከፍል የሰጠው ውሳኔ ያለአግባብ ስለሆነ ከበቂ ኪሣራ ጋር ይሻርልኝ የሚል ነው።=====//

የይግባኝ ቅሬታ ማመልከቻው ከመጥሪያ ጋር ለመልስ ሰጭ ደርሶ መልስ ሰጭ ጥቅምት 23/1987 በተባራ መልስ፤

ባለዕዳው በውሉ ላይ የተመለከተው መሠረት የውሉን ግዴታ የሚፈፀምበት ጊዜ በውሉ ላይ ተመለክቶ እንደሆነና ይህ የተወሰነው የግዴታ መፈፀሚያ ዘመን ያለፈ እንደሆነ ማስጠንቀቂያ መስጠት ጠቃሚ አይሆንም ተብሎ በፍ/ሕግ አንቀጽ 1775/ለ/ ሥር ተደንግጎአል።=====//

ይግባኝ ባይ ከውጭ አገር አስመጣለሁ ያለውን ዕቃዎች በውሉ መሠረት ማስረከብ የሚገባው በ30-9-83 እንደሆነ ውሉ ያስረዳል። በዚህ ውል በተወሰነው ቀን ግዴታውን አልፈፀመም መልስ ሰጭ ክሥ የመሠረትኩት በ22-8-84 ሲሆን እስከዚህ ቀን ድረስም ሆነ አስከ አሁን ድረስ ዕቃውን አላስረከበኝም።=====//

ስለዚህ ማስጠንቀቂያ መስጠቱ ጠቃሚም አስፈላጊም አይደለም።=====//

በፍ/ሕጋችን ማስጠንቀቂያ መስጠት ግዴታ ሊሆንም ላይሆንም ይችላል። በሕጉ መሠረት ማስጠንቀቂያ አለመስጠት ወለድ የመጠየቅ መብት ያስቀራል እንጂ ክሥ የመመሥረት መብት አያስቀርም።=====//

ይግባኝ ባይ በውል የገባውን ግዴታ ለመፈፀም ያልቻለበት ምክንያትና የገጠመውን ችግር በመግለፅ የማራዘሚያ ጊዜ እንዲሠጠው በፍ/ሕግ ቁ. 1797/1/ መሠረት ግዴታ ያለበት ቢሆንም በዚህ ረገድ ከይግባኝ ባይ የደረሰኝ መግለጫ ወይም ማስጠንቀቂያ የለም ውሉም አልተራዘመም።=====//

ስለዚህ በዚህ ነጥብ ላይ የዞን ፍ/ቤት የሰጠው ውሳኔ የህግ ሥህተት ስለሌለበት ሊፀና ይገባዋል።=====//

ስለ ለሚራው ርክክብ በተመለከተም ይግባኝ ባይ በሥር ፍ/ቤት ብር 88,600 የሚያወጣ 1000 ለሚራ ለመልስ ሰጭ ያስረከብኩ ስለሆነ በሰው ላስረዳ በማለት ያቀረበውን አቤቱታ መልስ ሰጭ አጥብቄ የተቃወምኩ ቢሆንም ፍ/ቤቱ ተቃውሞዬን አልፎ የይግባኝ ባይ ምሥክሮች እንዲሠሙ አድርጓል።=====//

ይሁንና ከቀረበው የሰው ማስረጃ መረዳት እንደተቻለው መልስ ሰጭ በይግባኝ ባይ አማካይነት እንዲመጣልኝ የካቲት 12/1983 በተፈረመ ውል ላይ በተዘረዘሩት ዕቃዎች

ሰላላ ጠቅላይ ፍርድ-ቤት
ጥንክሳሪ ገደማ
ረዳ

ውስጥ የተጠቀሰው ውፍረቱ 0.8 ሜ . ሜ የሆነ 1000 ላሜራ ይግባኝ ባይ ለመልስ ሰጭ ለማስረከቡ አልመሠከሩለትም።ይግባኝ ባይ ለመልስ ሰጭ አመጣሁአቸው የሚላቸው ዕቃዎች ወደብ ለመድረሳቸውም ሆነ ከወደብ ለመረከቡ አሰፈላጊውን የጉምሩክ ፎርማሊቲ አማልቶ ከውጭ አገር ወደ አገር ውስጥ የገባ ለመሆኑ ያቀረበው ማስረጃ ስለሌለ ዕቃዎቹ ስለመገዛታቸውና በአገር ውስጥ ስለመግባታቸው እንኳ አጠራጣሪ ነው።=====//

ስለሆነምየዞን ፍ/ቤት የሰጠው ውሣኔ ፀንቶ የጠበቃ አበል እና ለዩ ልዩ ወጭዎች ተከፍሎኝ ልሠናበት በማለት ተከሣክሯል።=====//

ይግባኝ ባይም የይግባኝ ቅሬታውን በማጠናከር ታህሣስ 5/1987 የተፃፈ የመልስ አቅርቧል።=====//

ከዚህ በተጨማሪ የሥር ከሣሽ /መልስ ሰጭ/ በበኩሉ የዞን ፍ/ቤት በፍ/መ/ቁ. 1660/84 መጋቢት 16/1986 ዓ/ም በዋለው ችሎት በሰጠው ውሣኔ ቅር በመሰኘት በፍ/ይ/መ/ቁ 563/88 ግንቦት 24/1986 ዓ.ም. የተፃፈ የይግባኝ ቅሬታ አቅርቧል።

ፍሬ ቃሉም የሥር ተከሣሹ የውል ግዴታውን ባለመፈፀሙ በአንድ በኩል ላሜራና ብረቶች በወቅቱ ባለመቅረቡ፣ በሌላ በኩል ገንዘቡም በተከሣሽ እጅ ተይዞ ልሠራበት ስላልቻልኩ ሥራ ለመሥራት የመጡ ደንበኞቹ ስለተመለሱ የድርጅቱ ሥራ ቀዝቅዞ ለሠራተኞች የምክፍለው ገንዘብ በማጣቱ ከሥራ እስከማሠናበት ድርጅቱአለሁ።=====//

ይህ ሁኔታ በመፈጠሩ በግምት ብር 30,000 /ሠላሣ ሺህ ብር/ ኪሣራ ደርሶብኛል በማለት ፍ/ቤቱ በህግ በተሠጠው ሥልጣን መሠረት በርትዕ ኪሣራዬን እንዲወስንልኝ አቤቱታ አቀረብኩ።=====//

ይህን አቤቱታ ለማስረዳትም በወቅቱ በድርጅቱ ውስጥ ተቀጥረው ይሰሩ የነበሩ ሠራተኞችን በምሥክርነት አቅርቤ ደንበኞቹ በላሜራ ዕጥረት መመለሳቸውንና ሥራ መቀዝገዝን እነሱም ከሥራ የተሰናበቱ መሆኑን በተቀራረበ አነጋገር አረጋግጠው መስክረዋል።=====//

ይሁንና ፍ/ቤቱ ምክሥሮቹ ሲመሰክሩ ተከሣሽ የካቲት 12/1983 በገባው ውል መሠረት ላሜራ ባለማቅረቡ ጉዳት የደረሰበት መሆኑን አላስረዱም፣ የጉዳቱንም መጠን አልገለፀም በሚል ምክንያት አቤቱታዬን ውድቅ አድርጎብኛል።=====//

የኪሣራ አቆራረጥን በመሟመለከት በፍ/ሕግ ቁ. 1799 የሚከፈለው ኪሣራ የሚታሰበው “----- አዕምሮ ያለው ሰው ውሉ ባለመፈፀሙ ይደርሣል ብሎ በሚገምተው አስተያየት ልክ ነው።=====//

ይህንንም ግምት ለመውሰድ የውሉ መሠረቶች ናቸው ተብለው የሚያዙት የውሉን አይነት መመልከት ብቻ ሣይሆን የተዋዋሮቹን የሙያ ሥራ፣ ከዚህ በፊት የነበራቸውን ግንኙነት፣ ባለዕዳው የሚያውቃቸውን ሁኔታዎችና ማንኛዎቹንም አጋጣሚ ሁኔታዎች ሁሉ በመመልከት ነው።=====//

ምስክሮች ማሰረዳት የሚችሉት ተከሣሹ ግዴታውን ሊፈጽም ይገባው በነበረበት ወቅት ድርጅቱ የነበረበትን ሁኔታ ብቻ ነው። የጉዳቱንም መጠን ማወቅ አይገባቸውም የጉዳቱን መጠን እንኳን ምስክሮች እራሱም ብሆን ለማወቅ ስላልቻልኩ ጉዳቱን በግምት አቅርቤ ፍ/ቤቱ በርትዕ እንዲወስንልኝ አቤቱታ ያቀረብኩት።=====//

አንድ ተዋዋይ ወገን በውሉ መሠረት ያለተፈፀመለት መሆኑን እስከአረጋገጠ ድረስ ኪሣራ ለማግኘት ይችላል።=====//

በዚህ ጊዜ ተከሣሹ ጥፋት ፈፅሟል? ወይም አልፈፀመም? የሚሉትን ጥያቄዎች ለክርክር አይቀርቡም።=====//

እነዚህ ነጥቦች ለክርክር የሚቀርቡት በፍ/ሕግ ቁጥር 1795 የተደነገጉት ሁኔታዎች ሲያጋጥሙ ብቻ ነው። በይግባኝ ባይና በመልስ ሰጭ መካከል በተነሣው ክርክር ፍ/ቤቱ ተከሣሹ በገባው የውል ግዴታ መሠረት ሊፈፀም የሚገባውን አለመፈፀሙን በማረጋገጥ ውሣኔ ሰጥቷል።=====//

ኪሣራውን በማስከፈል ረገድ ሊወሰድ የሚገባውን ርምጃ ግን ውሣኔ መስጠት ሲገባው አልፎ ኪሣራ አልደረሰም በማለት አበዳሪ ለተበዳሪ ሊከፍል የሚገባውን ወለድ ብቻ የሥር ተከሣሹ እንዲከፍል መወሰኑ ተገቢ አይደለም።=====//

ምክንያቱም የይግባኝ ባይና የመልስ ሰጭ ግንኙነት ከዚህ አንድ ደረጃ ከፍ ያለ ነው።=====//

እኔ ገንዘቡን ለተከሣሹ የሠጠሁት ለሚራና ብረቶችን አምጥቶ ለመጡት ዕቃዎች ሥራ ሠርቼ ገንዘቡን ባንክ ከማስቀምጠው የበለጠ ጥቅም አገኝብታለሁ በማለት ነው።

ስለሆነም ይገባኛል የምለውን ኪሣራ ገምቼ ያቀረብኩ ከመሆኔም በላይ መልስ ሰጭው እኔ ባቀረብኩት ግምት ላይ የአነሰ በዛ ክርክር ያላቀረበ በመሆኑ ፍ/ቤቱ ኪሣራ አይገባህም ብሎ መወሰኑ አግባብ ስለሆነ ውሣኔው ተሸሮ የጠየትሁትን ኪሣራ የሥር ተከሣሽ እንዲከፍልኝ እንዲፈረድልኝ።=====//

የወለድ መቶኛን በሚመለከት የሥር ፍ/ቤት ውሣኔ ሲሠጥ ተከሣሹ ከከሣሽ በቅድሚያ የወሰደውን ብር 95,000 /ዘጠና አምስት ሺህ ብር/ ከወሰደበት ጊዜ አንስቶ ተከፍሎ አለቀ ድረስ 9% ይክፈል ብሎ ወስኗል። ይሁንና ወለዱ የተመሠረተው በባንክ አሠራር ላይ ተመሥርቶ ቢሆንም የባንኩ ወለድ ከመስከረም 21/1985 ጀምሮ ወደ 15%ከፍ የተደረገ በመሆኑ የባንኩ የወለድ መቶኛ ከተለወጠበት ጊዜ ጀምሮ ዕዳው ተከፈሎ አለቀ ድረስ 15%ወለድ ታስቦ እንዲከፈልኝ የዞን ፍ/ቤት ውሣኔ ተሻሽሎ እንዲወስንልኝ የሚል ነው።=====//

የቅሬታ ማመልከቻው ከመጥሪያ ጋር ለሥር ተከሣሽ ደርሶ ህዳር 16/1987 በተፃፈ መልስ፤

ሰነድ መመሪያ
የወጣው
ፊርማ

በ1983 ዕቃዎቹን ከውጭ በማስመጣት ለማስረከብ ያልቻልኩት በአገሪቱ ተከስቶ በነበረው የመንግሥት ለውጥ ምክንያት የአሰብ ወደብ ተዘግቶ ስለነበር ከአቅም በላይ በሆነ ምክንያት መሆኑን ገልጮ ለስር ፍ/ቤት ባቀረብኩት ክርክር ፍ/ቤቱ ይህ ሁኔታ ተከስቶ እንደነበር በውሣኔው ላይ ገልጿል፡፡=====//

የወደቡ መዘጋት ከታመነበት ዕቃዎቹን በውሉ ቀን ለማስመጣት ያልቻልኩት ከአቅም በላይ በሆነ ምክንያት በመሆኑ የጉዳት ካሳ ልጠየቅ አይገባም፡፡=====//

በፍ/ሕግ ቁ. 1797 መሠረትም ለሥር ከሣሹ አላሳወቀም ለተባለውም በመሠረቱ የሥር ከሣሽ ሁኔታውን አውቆ ከግንቦት 30/83 በኋላ ዕቃዎቹ እንዲመጡለት መጠየቁን አምኗል፡፡ በመሆኑም ሁኔታውን ለከሣሽ አላሳወቀም ልባል አይገባም፡፡ ይህ እንኳ ቢታለፍ ለጉዳት ካሳ ጥያቄ በሙሉ ኃላፊነት ሊኖር የሚችለው በፍ/ሕግ ቁ. 1798 መሠረት ከሣሽ በፍ/ሕ/ቁ. 1774 ድረስ ባሉት ድንጋጌዎች ማስጠንቀቂያ ሰጥቶኝ ቢሆን ነበር ይሁንና ይህንን አልፈፀመም፡፡=====//

ስለዚህ የሥር ተከሣሽ የውሉን ጊዜ አክብረህ ዕቃውን አላስረከበክምና ለውሉ መፍረስ ተጠያቂ ነህ ልባል አይገባም፡፡ ለውሉ መፍረስ ተጠያቂ ካልሆንኩ ደግሞ የጉዳት ካሳ እንድከፈል ልጠየቅ አይገባም፡፡=====//

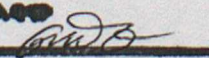
የሥር ከሣሽ የጠየቀውን የጉዳት ካሳ በህጉ መሠረት በማስጃ ያላስረዳ ስለሆነም የሥር ተከሣሽ የጉዳት ካሳውል ልክፍል አይገባም፡፡ ይኸውም ከውል የመነጫ ግዴታ ባለመከበሩ ለሚደርሰው የጉዳት ካሳ አላፊነትና መጠንን በተመለከተ የፍ/ሕግ ከቁጥር 1799-1805 የሚደነግግ ሲሆን እነዚህ እንቀጾች ስለውሉች /ግዴታዎች/ በጠቅላላው የሚናገሩ ናቸው፡፡=====//

ከሽያጭ ውል የመነጫ ግዴታ ባለመከበሩ ለሚደርስ የጉዳት ካሳ አላፊነትና መጠንን በተመለከተ ግን በተለይ የሚደነግጉት የፍ/ሕግ ከቁጥር 2360-2367 ድረስ ያሉት አንቀጾች ናቸው፡፡=====//

የሽያጭ ውልን የሚመከቱ የተለዩ አንቀጾች በፍ/ሕጉ ውስጥ ያሉ በመሆኑ ከላይ በተራ ቁጥር የተገለጹት ስለውሉች በጠቅላላው የሚደነግጉት የፍ/ሕግ ከቁ. 1799-1805 በሽያጭ ውል ላይ ተፈፃሚነት የላቸውም፡፡=====//

በዚህ መሠረት የከሣሹ የሥር ክሥ ውሉ ፈርሶ የደረሰ ጉዳት ይከፈለኝ የሚል በመሆኑና ውሉም የሽያጭ ውል በመሆኑን የጉዳት ካሳ መጠንን በተመለከተ አግባብነትና ተፈፃሚነት ያለው የፍ/ሕግ ቁ. 2362/1/ እንጂ ከሣሽ የጠቀሳቸው የፍ/ሕግ ቁ. 1790 እና 1799 አይደሉም፡፡=====//

በፍ/ሕግ ቁ. 2362/1/ ድንጋጌ መሠረት የጉዳት ኪሣራው መጠን የሚወሰነው ውሉ ፈራሽ በሆነበት ቀን ማግሥት በነበረው የዕቃ ዋጋና በውሉ በተጠቀሰው ዋጋ መካከል ያለውን የዋጋ ልዩነት በመከተል ነው፡፡=====//

ህጋዊ ጥያቄ ላይ ስር
የተከለከለ ማረፊያ
ላይ 

የሥር ከሣሹም ቅሬታውን በማጠናከር ጥር 3/1987 የተፃፈ የመልስ መልስ አቅርቧል።=====//

እንግዲህ በግራ ቀኙ መካከል የተካሄደው ክርክር ከፍ ሲል በዝርዝር የተገለፀው ሲሆን፣ በዚህ ጉዳይ የፍ/ቤቱን ውሣኔ የሚሹት አከራካሪ ጭብጦች፤

1ኛ. የሥር ከሣሹ /መልስ ሰጭ/ በተከሣሽ በይግባኝ ባዩ ላይ ክሥ ከማቅረቡ በፊት ማስጠንቀቂያ የመስጠት ግዴታ ነበረበት? አልነበረበትም?

2ኛ. የሥር ተከሣሹ ለከሣሹ ማለትም ለአሁኑ መልስ ሰጭ በውላቸው መሠረት ግምቱ ብር 88,600 የሆነ 1000 ላሚራ ለማስረከቡ በሥር ፍ/ቤት በምስክርቹ አስረድቷል? አላስረዳም? አስረድቷል የሚባል መሆን ይግባኝ ባይ ለመልስ ሰጭ ሊከፍል የሚገባው ገንዘቡ ምን ያህል ነው?

3ኛ. መልስ ሰጭ በሥር ፍ/ቤት ያቀረበው የብር 30,000 የካሣ ጥያቄ የታለፈው በአግባቡ ነው? አይደለም?

4ኛ. የሥር ፍ/ቤት በተፈረደው ገንዘብ መጠን 9% ወለድ እንዲከፈል የሰጠው ውሣኔ ተሻሽሎ ወለድ 15% እንዲሆን በማለት መልስ ሰጭ ያቀረበው ጥያቄ ተቀባይነት አለው? የለውም? የሚሉት ናቸው።

በኛ በኩል እነዚህን ጭብጦች አግባብ ካላቸው ህጉች ጋር በማገናኘብ አንድ በአንድ መርምረናል።=====//

አንደኛውን ጭብጥ በተመለከተ፤

ይግባኝ ባዩ የሥር ከሣሹ በውሉ መሠረት አልተፈፀመልኝም ብሎ ክሥ ከማቅረቡ በፊት ማስጠንቀቂያ ሊሠጠኝ ይገባ ነበር፣ በውሉ ላይ የውሉ መፈፀሚያ ጊዜ የተጠቀሰ ቢሆንም ውሉ ዘግይቶ የሚደረግን የውል መፈፀምን የማይፈቅድ አስገዳጅ አነጋገር ያላዘለ በመሆኑ ከሣሹ ማስጠንቀቂያ የመስጠት ግዴታ አለበት ሲል፤ መልስ ሰጭ በበኩሉ የውሉ መፈፀሚያ ጊዜ በውሉ ላይ ስለተገለፀ በፍ/ሕግ ቁ.1775/ለ/ ማስጠንቀቂያ የመስጠት ግዴታ የለብኝም ማስጠንቀቂያ አለመስጠት ወለድ የመጠየቅ መብት ያስቀራል እንጂ ክሥ የማቅረብ መብት አያሳጣኝም በማለት ተከራክሯል።=====//

በመሠረቱ ግራ ቀኙ የካቲት 12/1983 ያደረጉትን ውል እንዳየነው የውሉ መፈፀሚያ ጊዜ ማለትም ይግባኝ ባዩ ዕቃውን ለመልስ ሰጭ የሚያስረክበው የቅድሚያ ክፍያውን በተቀበለበት ቀን ጀምሮ እስከ ግንቦት 30/83 ድረስ መሆኑ ተገልጿል።=====//

በፍ/ሕግ ቁጥር 1775/ለ/ ባለዕዳው በውሉ ላይ በተመለከተው መሠረት የውሉን ግዴታ የሚፈጽምበት ጊዜ በውሉ ላይ ተመልክቶ እንደሆነና ይህ የተወሰነው የግዴታ መፈፀሚያ ዘመን ያለፈ እንደሆነ ማስጠንቀቂያ መስጠት አስፈላጊ እንደማይሆን ይደነግጋል።

ይግባኝ ባይ በውሉ መፈፀሚያ ጊዜ ውስጥ እንደውሉ ያለመፈፀሙን ሳይክድ በውላችን ላይ ውሉ ዘግይቶ እንዳይፈፀም በአስገዳጅነት ስላልተዋዋልን ዘግይቼም ከመፈፀም

ተገቢው ጥያቄ
የተሰጠውን መረጃ
አቅርቧል

//=====፡፡።፡፣፡፤፡፥፡፧፡፨፡፩፡፪፡፫፡፬፡፭፡፮፡፯፡፰፡፱፡፲፡፳፡፴፡፵፡፶፡፷፡፸፡፹፡፺፡፻፡፽፡፿፡

፡ወረታህሳስወረታህሳስ

//=====::የጊዜያዊ ተሳታፊዎች ወጪ ጥናት የሚለውን

//=====ጥላ ተላፊው ጥላ ሆኖ የሚሰጠው የጥላ ስራው ሆኖ

ሁለተኛው ትምህርት ዓመት

//=====::V5VU. 6.4UV8

//====::ወረ ወሃህዕ ኃርኝ ሌባ ኃሳኃ ወሀገቀፍ ቲህፌህ ሃፊህፊ ለገጠህ ጠላ

//=====::W4 36 W 2648 /V/SLLI

ቅ ሌሂ/ኃህ ንሓጋ ሓሰጋፍ ላህ ንሓ ስሪጽ ኋላህን ያቅብረላህ። ልሳሳህ ልሳሳህላህ

የከሣሽ ልጅ እየቆጠረ ሲረከብ እንደነበርና ምክሥሩ ግን ላሚራውን ያለመቁጠሩን ገልጾ የምስክርነት ቃሉን ሠጥቷል።=====//

3ኛው ምስክርም የሥር ከሣሽ ልጅ ሲሆን ላሚራው ሲራገፍ ተረካቢ እንደነበር ገልጾ በርክክቡ ወቅት ላሚራውን መቁጠር ጀምረው በኋላ መተዋቸውን በመኪናው ላይ የመጣው ብረት በሙሉ መውረዱን በርክክቡ ወቅት የሥር ከሣሽ በሥፍራው መኖሩን ገልጿል።=====//

4ኛው ምስክርም አንዲሁ ሚያዝያ 2/84 ይግባኝ ባይ ሥልክ ደውሎ ከጉምሩክ ላሚራው መጥቷል ዕቃ አዘጋጅ ብሎ ለመልስ ሰጭ እንዲነግረው ብሎ ስለላከው ይህንኑ ለሥር ከሣሽ ነገር ዕቃው መምጣቱንና ቦንዳው እየተፈታ እየተቆጠረ ሲያስገቡ እንደነበር የላሚራው መውረድ አንደተጠናቀቀ የሥር ተከሣሽ ከሣሽን ደረሰኝ ፈርምልኝ ስለው የቀረኝ ዕቃ ስለአለ አልፈርምም ብሎ ፈቃደኛ ሣይሆን መቅረቱን መስክሯል።=====//

እንግዲህ ይግባኝ ባይ ላሚራውን ለመልስ ሰጭ ለማስረከቡ በሥር ፍ/ቤት አቅርቦ ያሰማቸው መስክሮች ቃል ይህን የሚመስል ሲሆን የሥር ፍ/ቤት የምስክሮች ቃል አሳማኝ አይደለም በማለት ነው ውድቅ ያደረገው።=====//

ይህንን ግራ ቀኙ የካቲት 12 ቀን 1983 ባደረጉት ውል ላይ ይግባኝ ባይ ከውጭ አገር አስመጥቶ ለመልስ ሰጭ ለማስረከብ ግዴታ ከገባቸው ዕቃዎች ውስጥ በተራ ቁጥር 5 የተጠቀሰው ላሚራ ብዛቱ 1000 ሆኖ ጠቅላላ ዋጋው ብር 88,600 ሲሆን፤

4ቱም የሥር ተከሣሽ የአሁን ይግባኝ ባይ ምስክሮች የሰጡትን ቃል አጠቃለን ስንመለከተው በ1ኛው ምስክር አማካኝነት ከውጭ አገር የመጣው 1000 ላሚራ ጉምሩክ መጋዘን ከገባ በኋላ እንደገና ከጉምሩክ ተጭኖ መጥቶ በከሣሽ መኖሪያ ቤት መራገፋትና የከሣሽ ልጅ፣ ከሣሽም ሆነ ተከሣሽ እንዲሁም በውክልና ከውጭ ዕቃውን ያስመጣው 1ኛው ምስክር ዕቃውን ጭኖ ያመጣው ሹፌሩና ዕቃውን ሲያወርዱ የነበሩ ሠራተኞች ባለብት ከሣሽ 1000 ላሚራውን መረከቡን፣ ይሁንና መልስ ሰጭ /ከሣሽ/ ሌላ ያልመጣልኝ ዕቃ ስለሚቀረኝ ደረሰኝ አልፈርምም ብሎ ከይግባኝ ባይ ጋር ጭቅጭቅ መፍጠሩን በሚገባ መስክረዋል።=====//

ይሁንና መልስ ሰጭ ያህን የሚያስተባብል አንዳችም ማስረጃ ያላቀረበ መሆኑን የሥር ፍ/ቤት እየተረዳ ወይም ደግሞ ተከሣሹ በሌላ ውል ምክንያት ያስረከበው ላሚራ መሆኑን በማስረጃ አስደግፎ ያቀረበው ክርክር ሣይኖር የምስክሮቹ ቃል አሳማኝ አይደለም የሚል አግባብ ያልሆነ ምክንያት ሠጥቶ የሥር ተከሣሽ እንደውሎ 1000 ላሚራ ለማስረከቡ አላስረዳም ብሎ የምስክሮቹ ቃል ውድቅ ማድረጉና የሥር ተከሣሹን ለብር 88,600 ባለዕዳ አድርጎ የሰጠው ውሣኔ ሊሻር የሚገባው ሆኖ ተገኝቷል። ስለሆነም መልስ ሰጭው በውሉ መሠረት ግምቱ ብር 88,600 የሆነ 1000 ላሚራ መረከቡን በምስክሮች ቃል የተረጋገጠበት ሆኖ እያለ ላሚራውን ከተረከበ በኋላ ደረሰኝ አለመስጠቱን ሽፋን በማድረግ

ብቻ የተረከበውን ንብረት እንዳልተረከበ በማስመሠል የሚያቀርበው ክርክር ከክፉ ልቦና የመነጨና በሰው ሀብትና ድካም ለመበልፀግ ሲባል የቀረበ ክርክር በመሆኑ አልተቀበልነውም።=====//

ስለዚህ ይግባኝ ባይ ለመልስ ሰጭ ግምቱ ብር 88,600 የሆነ ላሚራ ለመልስ ሰጭ ለማስረከቡ ስለተረጋገጠ ክስ ለቀረበበት ብር 95,000 ውስጥ ይህን ብር 88,600 ይግባኝ ባይ ሊከፍል አይግባም ብለናል።=====//

ይሁንና ልዩነቱን ማለትም ብር 95,000-88,600 ብር 6,400 /ስድስት ሺህ አራት መቶ ብር/ ይግባኝ ባይ ለመልስ ሰጭ የማይከፍልበትን ምክንያት ስላላስረዳ ይህንኑ ብር 6,400 ብቻ ለመልስ ሰጭ ይክፈል ብለናል።=====//

3ኛውን ጭብጥ በተመለከተ፤

የሥር ከሣሽ የአሁን መልስ ሰጭ በስር ፍ/ቤት ያቀረብኩት የብር 30,000 የኪሣራ ጥያቄ ያለአግባብ ታልፎብኛል በማለት ያቀረበው ቅሬታና ክርክር የሥር ተከሣሹ ከውጭ ዕ ቃ አስመጣልህለሁ ብሎ ብር 95,000 በቅድሚያ ከወሰደ በኋላ በውላችን መሠረት ዕቃውን ማለትም ላሚራውን ስላላስመጣልኝ የድርጅቱ ሥራ ቀዝቅዞ ሠርተኞች አሠናብቻለሁ ደንበኞቼም እንዲመለሱ አድርጌአለሁ ይህም ስለመሆኑ በሥር ፍ/ቤት በምስክርነት አስረድቻለሁ ፍ/ቤቱ ግን ብር 30,000 ኪሣራ የደረሰበት ለመሆኑ አላስረዳም በማለት አልፎብኛል ኪሣራውን በርትዕም ቢሆን ሊወሰንልኝ ይገባ ነበር በሚል ነው።=====//

ይግባኝ ባይ /የሥር ተከሣሽ/ በበኩሉ በሥር ፍ/ቤት ውሣኔ እንደተገለፀው የሥር ከሣሽ ብር 30,000 ኪሣራ የደረሰበት መሆኑን አላስረዳም በመሰረቱ በመካከላችን የተደረገው ውል የሺያጭ ውል እንደመሆኑ ኪሣራ ደርሶበታል ቢባል አንኳ የጉዳት ኪሣራው መጠን የሚወሰነው በፍ/ሕግ ከቁ. 1799-1805 ባሉት ድንጋጌዎች መሠረት ሣይሆን በፍ/ሕ/ቁ. 2362/1/ መሠረት ነው በዚህ የህግ ድንጋጌ መሠረት ጉዳት የደረሰበት መሆኑን ከሣሽ አላስረዳም፣ ከደንበኞቹ የሚቀበለው ሥራ መጠን ስለሚያውቀው ከሣራው በርትዕ ሊወሰን አይገባም፤ ከዚህም በላይ ደግሞ በውሉ መሠረት በወቅቱ ላሚራውን ለማቅረብ ያልቻልኩት 1983 በተፈጠረ ሁኔታ የአሠብ ወደብ ሰለተዘጋ ከአቅም በላይ የሆነ ሁኔታ ሰለገጠመኝ ነውና ኪሣራ መክፈል የለብኝም ሲል ተከራክሯል።=====//

በመሠረቱ የሥር ከሣሽ የአሁን መልስ ሰጭ በሥር ፍ/ቤት ባቀረበው የክሥ ማመልከቻ ብር 30,000 ኪሣራ ይክፈለኝ ከማለት በቀር በዝርዝር ያቀረበው ነገር የለም አሁን በይግባኝ ደረጃም እንደሚከራከረው ኪሣራው በርትዕ ይወሰንልኝ ብሎ የቀረበው ጥያቄም የለም። ኪሣራ በርትዕ የሚወሰነው ለግምት አስቸጋሪ በሚሆንበት ጊዜ እንጂ መልስ ሰጭው ከውጭ አገር እንደመጣለት የነበረው ዕቃ በወቅቱ ቢደርስለት ኖሮ በንግድ ሥራው ላይ አውሎ ምን ያህል ገቢ ወይም ጥቅም እንደሚያስገኝለት ስለሚያውቅ ለግምት አስቸጋሪ ነው ሊባል አይችልም።=====//

ሠራተኛው ጽሑፍ
ተክክለኛ ጽሑፍ
ሠራተኛው ጽሑፍ

[illegible]

በተመለከተ የሥር ፍ/ቤት 9% ታስቦ እንዲከፍል በተሠሰጠው ውሣኔ መልስ ሰጪ ቅሬታ ስላላቀረበ በዚህ በተፈረደው በብር 6,400 ታስቦ ለመልስ ሰጭ እንዲከፍል፣ የዳኝነቱን በተመለከተ ይግባኝ ባይ በዚህ ፍ/ቤት ረቺ ስለሆነ ይግባኝ ባይ በዚህ መዝገብ የከፈለውን የዳኝነት ገንዘብ መልስ ሰጭ እንዲተካለት በሥር ፍ/ቤት ለተከፈለው የዳኝነት ገንዘብ ይግባኝ ባይ የብር 6,400 ዳኝነት ብቻ ለመልስ ሰጭው እንዲከፍል፣ ስለቀረው ወጭና ኪሣራ ግራ ቀኙ ይቻቻሉ ብለናል።=====//

ት ዕ ዛ ዝ

ውሣኔው መሻሻሉን እንዲያውቀው የዚህ ውሣኔ ግልባጭ ለሥር ፍ/ቤት ይድረሰው።=====//

ይህ ፍ/ቤት ሐምሌ 25/1986 በዋለው ችሎት የሰጠው የዕግድ ትዕዛዝ ተነስቷል። ለሚመለከተው ይተላለፍ።=====//

መዝገቡን ዘግተናል ለመ/ቤት ይመለስ።=====//

ይህ መዝገብ ከይ/መ/ቁ. 563/88 ጋር ተጣምሮ ስለተወሰነ የውሣኔው ግልባጭ ከይ/መ/ቁ. 563/88 ጋር ይያያዝ ብለናል።=====//

የማይነበብ የሦስት ዳኞች ፊርማ አለበት።

ረ.አ.አ. ጠቅላይ ፍርድ ቤት
ፋክስልን የሰጠ
ሰነድ 267/8
26-7-93

~~የአዲስ አበባ~~

148/90

ሐዳር 13 ቀን 1993

ዳር ረተለወርቅ ሙሉጊታ

ከሣሽ ወ/ር ገደይ ከገፋ — ጠበቃ ፍጹም አስፋው ቀረቡ::

ተከሣሽ አቶ ከሀሣይ ጋ/ጊዳርጊስ አለቀረቡም ከተባለ በኋላ ቀረቡ::

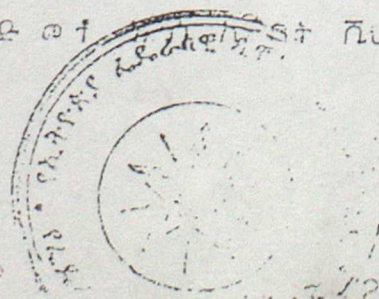
አወልካቸ ወ/ር አለማዝ ከፍሉ አለቀረቡም::

ወዘገቡ የተቀመረው ለምርጫ በግል ሲሆን ተጋርጦ የሚከተለው ውሳኔ ተሰጥቶአል::

ው ሳ ኔ

ከሰኞ ነሐሴ 13 ቀን 1990 ዓ.ም ጸፈው ባቀረቡት የክስ ጭልከቻ ከሣሽ ከወቀለ ለጣት ባንክ በተበደረት ገንዘብ ከተከሣሽ ጋር ሰኔ 14 ቀን 1987 ዓ.ም በተጻፈ የጣን ዘያፍና የጣን ተከላ ውል ስምምነት በብር 30,000/ሠላሣ ሺህ ብር የዳቦና የከክ ወጋገሪያ ጣን ሸጠውለት ሰኔ 15 ቀን 1987 ዓ.ም በቀጥር 0386 በተጻፈ ደረሰች ብር 28,000/ ሃያ ስምንት ሺህ ብር /ተቀበለዋል:: የሸጡትንም ጣን ውሉ በተደረገው በ5 ቀን ጊዜ ውስጥ አደዋ ከተጣ ደረሰ ሃይው ጣን ገጥመው እና ወሰራትን አረጋገጠው ሥራውን አስጀምረው ሲያስረክቡአቸው እና ቀሪውን 5,000/አምስት ሺህ ብር /ደገዋ ሊቀበሉ ከከሰኞ ጋር ተከሰሽ ተዋላዋል ይህንን ገዳጃ ከሰፈጸው ደገዋ ብር 10,000/አስር ሺህ/ገንዘብ ሊከፍሉ በውሉ ላይ ተከሰሽ ተሰማምተዋል:: ከሰኞ ይህን ጣን ብር 5000/አምስት ሺህ ብር/ለተራንስፖርት ከፍለው ከተከሰሽ ቤት አፋክ አበባ ወደ አድዋ ቢጋሰቱትም ተከሰሽ በውላቸው ወሠረት በተባለው ጊዜና ቦታ ጣን አላተከሉም ስራ ወጀመሩንም አላረጋገጡም ጣን ተከሉ ወሰራት ጀምሮ ሲሆን ኖሮ በቀን 10 ኩንጋል ቶቂት ዳቦና ከክ የሚገኘር ሲሆን የአጋንንት ኩንጋል ብር 1000/አንድ ሺህ ብር /በጋር 30,000 ብር የጓፀ. ወርሐ 15 ቀን ሲገዛ 1,155,000/አንድ ሚሊዮን አንድ መቶ ሺህ ብር /በላግህን ተከሰሽ የወከረች ገዳጃ አለባቸው::

በ.ደ.
ሰላ ትክክል ግለሰብ



ሰለዚህም ለዕቃ ማስገናኘት የተከፈለውን ብር 5000/አምስት ሺህ ብር/ የከፈለኩትን ተከታቢ ሊከፍሉኝ ይገባል በድምሩ ብር 1,195,000/ አንድ ሚሊዮን አንድ መቶ ዘመና አምስት ሺህ ብር/ ሰለሚሆን ተከታቢ ይሆንኑ ከሰ የቀረበበትን ገንዘብ እንዲከፍሉኝ በማለት ጠይቀዋል፡፡

በማስረጃነትም ሰኔ 14 ቀን 1987 ዓ.ም የተጻፈ የሚሾን ሽያጭ ውል ሰኔ 15 ቀን 1987 ዓ.ም የተጻፈ ተከታቢ ብር 28,000 /አያ ስዎንት ሺህ ብር/ፈርመው የተቀበሉትን ደረሰኝ — ለተከታቢ የተጻፈ የማስጠንቀቂያ ደብዳቤ እና የሽያጭ ውሉን መደረግ ሊያስረዳልኝ ይችላሉ የአሉኦቹን የሰው ያስክርቸ ቀጥረው አቅርበዋል፡፡

የተከታቢ ማዕልከቻ ለተከሣሽ ደርሶአቸው በ29/08/91 ዓ.ም በሰጡት መልስ ከተከታቢ ጋር የካቲት 5 ቀን 1987 ዓ.ም በመሠረትነው ውል መሠረት የዳቦና ኳክ መሣሪያ ሠርቼላቸው ሰኔ 14 ቀን 1987 ደግሞ በተፈራረደነው ውል መሠረት ማሽኑ ተሠርቶ ስተረከበው ወስደዋል በመሆኑም ከወሰዱት ከሶስት ዓመት በላይ ነው፡፡ ሰለዚህ ፣ ከሰለመወሰረት በፍ/ብ/ሕ/ቁ/ 2422/1/2/መሠረት ሦስት ዓመት ከሦስት ወር ከሃያ ዘመኝ ቀን የሆነው ሰለሆነ ከሱ በይጋጋ ሕግ ውድቅ ይሆናል መከሰስም አይችሉም ኪሣራና መቀጣ ይከፈላል የሚሉትንም ሕግ አይፈቀድላቸውም ማሽኑን ለመውሰድ ወደ አድዋማለት ነው /ብር 5000/አምስትሺህ ብር/ከፈለኩኝ ቢሉም ለመከፈላቸው ገን ያቀረቡት ማስረጃ የለም፡፡ ለጠይቀው አይችሉም፡፡ ማሽኑን አሳገጠመልኝም ለሚሉትም እኔ ተጠርቼ እያሉ አሳልኩም በፖስታ ማስጠንቀቂያ ከሰጥኩ ጸፈው አሳቀበልም አሳልኩም በመሆኑም በውሉ መሠረት ተከክለኛ ማለት ነው፡፡ ይህንንም በጋራ አሁን ያቀረብኩኝ ከሰ ያለ አገባብ ሰለሆነና የክሱ ገደብም የተገነከሰሁኝ ከበቂ ኪሣራ ጋር በነፃ እንዲያ ሠናበተኝ በማለት ፍ/ባተን ጠይቀዋል፡፡

በማስረጃነትም ተከታቢና ከሣሽ ሲዋዋሉም ሆነ ማሽኑን ያለረድሉት ሲረከቡ እንዲሁ ሰለጠቀሳላቸው ሁኔታ የሚያውቁ ያሏቸውን የሠው ያስክርቸ ጠቀበዋል፡፡

የተከታቢ መልስ ለተከታቢ ደርሶአቸው በ9/11/91 ዓ.ም. በተጻፈ የመልስ መልስ ከሰጡ አጠናክረው በማስረጃነትም ተከፈክረዋል፡፡

የተከታቢና የተከሣሽ ጠቅላይ ኮሚሽኑ ለሰጡት በተገለጸው መልስ የቀረበ ሲሆን ፍ/ባተን በቀድሞው በተገኘው የርዳና ሚኒስትር ያደረገውን የመደመሪያ ደረጃ



Handwritten signature and date at the bottom left corner.

ወቅቱም ወርቆርአለ፡፡ ይኸው የተከሰሰ የደርጋ መከራከሪያ ተቀባይነትን ያገኛል
ወይስ አያገኝም የሚለውን ነገር በመያዝ ፍ/ቤተ ጉዳዩን ወርቆርታለ፡፡

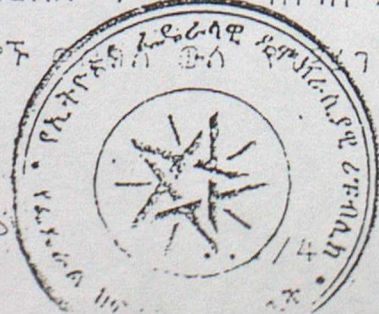
ተከሰሰ የከሰሰ ክስ በፍ/ብ/ሕ/ቀ/2422/1/42/ መሠረት በደርጋ
ቀሪ ነው በማለት የሚከራከሩ ሲሆን በዚህ የሕግ ድንጋጌ መሠረት፡፡

“ አንድ ሰው የተለየ ለይነት ያሳገሙ ዕቃዎች ባስፈለጉት ጊዜ በምርጫ ክስን ይዞ
ዕቃ አቀራቢ ብቻ ለመውሰድ ገዳታ የሚገባበት ውሳኔ ከሦስት ዓመት የበለጠ ጊዜ
ሊጸና ለይቸለም በሚል የተቀመጠ ሲሆን ይህም ድንጋጌ ተፈጻሚ የሚሆነው የተለየ
ዐይነት ያሳገሙ ዕቃዎች ለምሳሌ የተዘጋጁ ልብሶችን ወይም የዚህን መሠል ዕቃዎችን
በተመለከተ ሲሆን በዕቃ አቀራቢው እና ተረካቢው ይህንን ዕቃ በተመለከተ ቀጠሮ
የሆነ የአቅርቦት እና የመረከብ ስራ የሚሠሩ ሲሆን ነው ወደተያዘው ጉዳይ ስንመጣ
ገን ገራ ቀኙ ያቋቋሙት የሽያጭ ውሳኔ አንድ ማሸንገ የሚመለከት ሲሆን ይህም ማሸንገ
የተለየ ጭነት ዕቃ ችሎታው የተገለጸቱትን ስለሌላ እና በገራ ቀጥታውክል ያለው
ሽያጭ ውሳኔ ለሌሉ ተጠባባይ ማሸናፊ በቀጣይነት ተፈጻሚ እንደሚሆን ያልተሰማው ስለሆነ
እና ገንጽነታቸው ቀጣይ ስላልሆነ ተጠቃሾች የሕግ ድንጋጌ በከሰሰ በኩል በቀረበው
ክስ ተፈጻሚ የሚሆን ሆኖ ፍ/ቤተ አሳገኘው፡፡

በዚህ ሌሊት የከሰሰ ጥያቄ ተከሰሰ በውሉ መሠረት የገባውን ገዳታ በአለመፈጸሙ
ከሣራ ይክፈላል በማለት የቀረበሲሆን በፍ/ብ/ሕ/ቀ/ 1845 መሠረት ደገፎ ውሳኔ
ባለመፈጸም የተነሳ ስለሚደርስ ጉዳት የመጠየቅ መብት በዐሥር ዓመት ይርጋ ቀሪ
ይሆናል ስለሚል የከሰሰ በስም መታየት ያለበት ውሳኔ አስመልክቶ በተቀመጠው የደርጋ
ጊዜ መሆን ስላለበት ተከሰሰ ባቀረበው የደርጋ ወሳኝ የከሰሰ ክስ ተቀባይነትን
አያገኝም ማለት ስለማይቻል በዚህ ምክንያት ፍ/ቤተ በተከሰሰ በኩል የቀረበውን
የደርጋ መከራከሪያ ሳይቀበለው ቀርቶአል፡፡

በመቀጠለም ፍ/ቤተ በገራ ቀኙ መካከል በፍ/ረ ጉዳይ ላይ የተደረገውን
ክርክር ወርቆርታለ፡፡ ከሰሰ በገራ ቀኙ መካከል የሚሸንገ በያዘው ተከሰሰ ተፈ
ጸዋለሰ ተከሰሰ ገን በውሉ መሠረት ገዳታው ለሰተገባም ስለዚህም ገዳታውን ባለው
ወጣት ምክንያት የደረሰበትን ከሣራ ተከሣሽ ይክፈላል በማለት የጠየቀ ሲሆን ተከ
ሰሰ ደገፎ በገራ ቀኙ መካከል ውሳኔ የሚሸንገ መሆኑን ባይቀበል በውሉ በተመለከተ

ሰለ ተከሰሰ ገዳታው



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ገዳታ መሠረት ፈጽሟለሁ በግለት ተከራክረዋል፡፡ፍ/ቤተሙ የሚከተሉትን ነጥቦች በጥበጥነት በመያዝ ጉዳዩን አገባብነት ከሳጡ የሕግ ድንጋጌዎች አኳያ እና ገራ ቀጥ ከቋቋሙት ውሳኔ አኳያ መርምሮታል ጥበቦችዎ፡፡

1. ተከሳሽ ለከሳሽ በውል የሸጡት ማሽን እገልገሉት የሚሰጥ ነው ወይስ እይደለኛ?
2. ውሉስ ከሳሽ በጠየቁት መሠረት ቀሪ ሊሆን ይገባል እይገባኛ?
3. ውሉ ቀሪ ሊሆን እይገባውም ከተባለስ ከሳሽ ይከፈለኝ በማለት የጠየቁትን የኪሣራ ገንዘብ ተከሳሽ ሊከፍል ይገባል እይገባኛ? ይከፈል ከተባለስ ምን ያህል መክፈል አለበት? የሚሉት ናቸው::

በጠቅላላ ገንዘብ ቁጥር 1 ላይ የተቀመጠውን ግንጥ ፍ/ቤተ መርምር አለ፡፡

ከሲቭ ባሕር ማዕረግ ላይ ተከላከለ የሚችል ማህንድስና የተሰጠ አገልግሎት
የሚደረግ ነው በማለት የገለጽ ሲሆን ተከላከለ ደገፍ ማህንድስና አገልግሎት ይሰጣል በማለት
ተከራክረዋል። በዚህ ሁኔታ የተሸጠው ማህንድስና የተሰጠ ነው በማለት የጠየቁት ከሲቭ ማህንድስና
የሚያራምዱ ሰላማዊነት የሚያስረዳት ሽብር ያለባቸው ሲሆን ከሲቭ ገን በከላከለው እና በዕለት
ዕለታቸው ጋር ማህንድስና አይደለም የሚያራምዱ ማህንድስና ነው ተከላከለ ያስረከቡትን ማህንድስና ውጭ
ይሆን ሁኔታ አማስረዳት ገን ያቀረቡት ዋና ዋና ዓይነት ማስረጃ የለም። የቀረበውን ክስ
ተከላከለ ያስተባባሩ ሲሆን ማህንድስና ሲያረዳት ማስረዳት ያለባቸው ከሲቭ ሲሆኑ ይሆን
ሁኔታ በዋና ዋና ዓይነት ዕለታዊ/ባለ ባለቤትነት ከሲቭ የሚያራምዱ ማህንድስና ነው ተከላከለ
ያስረከቡት በሚል ያቀረቡትን/ባለ አሳተፋቸውም።

በመቀጠል በሁለተኛ ተራ ቀጥሮ የተቀመጠውን ጭነት ፍ/ቤተ መርዶሮአል ከሰሸ
ውሎ ቀሪ ሊሆን ይገባዋል በማለት ዳፕነት የሚጠይቁት ተከሰሽ የማይሠራ ማሽን አሰረከበጭኛል
በጫል ሲሆን ነገር ገን በመጀመሪያው ጭነት ላይ እንደተመለከተው ከሰሸ ማሽኑ አለመሰራተን
በማሰራጃ አሰደገረው ያሳቀረቡ ሰለሀኑ እና ፍ/ቤተን ማሽኑ እድሰራዎ የሚል መደዎደሚያ
ላይ ባለመድረሱ ውሎ ቀሪ ሊሆን ሥገባዋል በጫል በከሰሽ በኩል የቀረበው አቤተገ በዚሁ
ዎክንያት ተቀባይነት ያለው ሆኖ ፍ/ቤተን ላገጥው::

[illegible]

እስከ አሳተካደ ድረስ ደገዎ ከከሰሽ ጋር ያቋቋሙት ይህ ውሉ በፍ/ብ/ሕ/ቁ/ 1731/ህ/ መሠረት በገራ ቀኙ መካከል እንደ ሕግ ሆኖ ያገለገላል፡፡ በገራ ቀኙ ላይዎ ገዳታ የሚጥል ይሆናል፡፡

ከሰሽ በክል ማመልከቻቸው ላይ እንደጠቀሱት ተከሰሽ የሽጠውን ማሸን ውሉ ከተደረገ ቀን ጀምሮ በ5 ቀናት ውስጥ አድዋ ድረስ ሂደው ተከለውና በራ አስ ጀምረው መሰራተን አረጋገጠው ሊያስረክቡኝ በተዋዋልነው መሠረት በሽማግሌ ከመ ጠየቀዎ በኋላ ማስጠንቀቂያ በፖስታ ቤት በኩል ተሰጥሎ ለመቀበል ፈቃደኛ ሳይ ሆን ቀርቶአል በዚህም መሠረት ተከሰሽ በውሉ ላይ በተቀመጠለት ገዳታ ስላሰረ ጸጦ ኪሣራውን ሊከፍል ይገባል ብለዋል፡፡

እንገዲህ ለዚህ ጭብጥ አሳሳት ለመስጠት ውሉን መመልከት አገባብ ይሆናል፡፡ ገራቀኙ በ14/10/87 በአደረጉት የጠያቂ ውሉ ውስጥ የሚከተለው ነገር ተቀምጧል፡፡ “ አድዋ ከተማ የአለክትሪክ ሥራዎችን ከመቻቸ በኋላ በሰላክ ወይም በመልዕክት ለአቶ ከሀሣድ ሀበተ ጊዢ ጊዛ እንደተነገራቸው ስፍራው ድረስ በመሄድ ይህንኑ የአለክትሪክ ሥራዎችን ማሸኑን ገጥመው የማሸኑን ሥራ ሁኔታ ያከር .ለማሳረከብ ለዚህም 5 ቀን የሚያስፈጽመው መሆኑን.....” ውሉ ይጠቀሳል በዚህ የውሉ ቃል መሠረት ይኸው ማሸን ተኖሮ አድዋ ከተወሰደ እና አስፈላጊው ዘገፎት ከተጠናቀቀ በኋላ ከሰሽ ተከሰሽን እንደሚጠሩና ተከሰሽም ማሸኑን እንደሚገጥሙ የሚያመለክት ሲሆን በውሉ ላይ የተገለጸው 5 ቀናትም ተከሰሽ መልዕክት እንደደረሰባቸው ሥፍራው ከደረሱ በኋላ ሥራቸውን አጠናቀው የሚያስረክቡበት ሰንጊ ውሉ ከተደረገ ጀምሮ በ5 ቀናት ውስጥ ተከሰሽ አድዋ ከተማ ተገኘተው ገዳታቸውን ለገደጠው የሚያስገድዳቸው እይ ደለዎ፡፡

በዚህ ውሉ መሠረት ተከሰሽ ገዳታቸውን አሳተጠው በሞለት ከሰሽ በከሰሽ ገዳታ ላይ ቢገልጹም በፍ/ቤት ገንዘብ ገን ተከሰሽ ገዳታቸውን አሳተጠው የሚባሉ ከሰሽ በውሉ ገዳታ መሠረት በሰላክ ወይም በመልዕክት ገዳታቸውን እንዲጠሩ ለተከሰሽ ነገረዋቸው ሲሆን ኖሮ ነበር፡፡ ይህንኑ ተከሰሽ በውሉ መሠረት እንዲፈጽም በማገል ለክ ነበር ቢለዎ ይህንኑ በማገልገል ለማድረግ ተከሰሽ ገን የቀረበ የማስረጃ



Handwritten signatures and scribbles at the bottom left of the page.

የለም ከዚህ ላይ ደግሞ ለተከሰባቸው መልእክተ በፖሊስ ቤት በኩል የተሰጠ መሆኑን የሚያሳይ ማስረጃ ያቀረቡ ሲሆን ፖሊስ ተቀባይ በማወቅ ተመላሽ ተደርገዋል፡፡ ይህም የሚያሳየው ተከሰባቸው የፖሊስ መላዕክት አላማገኘታቸውን ሲሆን መላዕክት ደርሶአቸዋል ሊያስጠሉ አይችሉም፡፡

ከላይ በተዘረዘረው ሁኔታ መልእክተ ለተከሰባቸው ሳይደርስ ተከሰባቸው በውሉ መሠረት ገዳታቸውን አላተወጡም ለሚሉት ስለማይቻል ይህ ሳይረጋገጥ ደግሞ ከሰላም ደረሰበት ለሚሉት ከሀገሩ ተጠያቂ መሆን ስለማይገባቸው ፍ/ቤት ተከሰባቸው ይሄንኑ የከሀገሩ ገንዘብ ሊከፈሉ አይገባቸውም ቢል ወስኖአል፡፡

በዚህ መዝገብ በተከሰባቸው በኩል የቀረበውን ክስ ከላይ እንደተገለጸው ፍ/ቤት ያልተቀበለው ስለሆነ ተከሰባቸው በዚህ ክስ ምክንያት ደረሰበት ለሚሉት ወጭ ዝርዝር የማቅረብ መብታቸውን ጠብቆ መዘገቡን ዘግቶታል፡፡

ተጨማሪ ትዕዛዝ

በገሬ ቀኙ መካከል በአለው የፍ/ብ/ክርክር ምክንያት በወረዳ 20 ቀበሌ 43 ክልል በሚገኘው የቤተ ቀጥር 535 በሆነው መኖሪያ ቤት ላይ የተሰጠውን የዕገደ/ትዕዛዝ ፍ/ቤት አንብቶታል ዕገዳም ለመሰላተ እንዲያውቁት እገጥሞ ለተሰላረሰው አካላት የዚህ ትዕዛዝ ገልባጭ ይደረሰው፡፡
(ፎታ አካላት የዚህ ትዕዛዝ ገልባጭ ይደረሰው፡፡)

በፍ/ቤት
በፍ/ቤት ደ/ሥነ ምግባር
2-4-93

የዳኛ ፊርማ
ረታለወርቅ መሉጌታ



በፍ/ቤት ደ/ሥነ ምግባር
02/04/93
በፍ/ቤት ደ/ሥነ ምግባር

Amharic

የፍ/ብሔር ይግ/መ/ቁ/ 3927/92

19/3/1994 ዓ/ም

ዳኞች፡... ሐገሥ ወልደ

ዳኝ መላኩ

ጌታቸው ምስረቱ

ስለ ይግባኝ ባይ ፡..... እጂኝ ኢትዮጵያ አክሊዮን ማኅበር ጠበቃ የሴፍ ገ/እግዚአብሔር
ቀረበ፡//

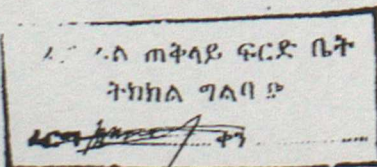
መልስ ሰጭ ፡..... ዓለም ጠቅላላ ፡ንስትራክሽን ኃላፊነቱ ፡ተወሰነ የግል ማኅበር
በሌለበት፡//

መዝገቡ ተመርምሮ ውሳኔ ተሰጥቷል፡//

ው ሣ ኔ

ይግባኝ ባይ ነሐሴ 13/1991 ዓ/ም በጠበቃው በኩል ጽፎ ባቀረበው 4 ገጽ
ማመልከቻ የፌዴራል ከፍተኛ ፍ/ቤት በፍ.መ.ቁ.142/90 ባይ ሰኔ 15/1991 ዓ/ም በሰጠ
ው ውሳኔ ቅር ተሰኝቶ ይግባኝ አቅርቧል፡፡በከፍተኛው ፍ/ቤት ከሣሽ የነበረ ሲሆን
በመልስ ሰጭ ባይ ያቀረበው ክስ መልስ ሰጭው ከእሱ ለተረከባቸው የነዳጅ ዘይት
ምርት ውጤቶች ዋጋ ብር 608,311.80 /ስድስት መቶ ስምንት ሺህ ሶስት መቶ
አስስራ አንድ ብር ከሰማኒያ ሣንቲም/ ሊከፍለው ፈቃደኛ ሆኖ ባለመገኘቱ ይህንኑ
ገንዘብ መልስ ሰጭው እንዲከፍል ከተጠየቀበት ቀን አንስቶ ክሱ እስከ ቀረበበት ድረስ
በገንዘቡ ባይ የተሰበውን ወለድ ብር 172,928.02/አንድ መቶ ሰባ ሁለት ሺህ ዘጠኝ
መቶ ሃያ ስምንት ብር ከዚህ ሁለት ሣንቲም/ ከዋናው ገንዘብ ጋር በድምሩ ብር
781,239.82 /ሰባት መቶ ሰማኒያ አንድ ሺህ ሁለት መቶ ሰላሣ ዘጠኝ ብር ከሰማኒያ
ሁለት ሣንቲም/ እንዲከፈለው ነው፡፡

ክሱ የቀረበለት ፍ/ቤት መልስ ሰጭው በሌለበት ውሳኔውን የሰጠ ሲሆን
በውሳኔው የይግባኝ ባይ ክስ በማስረጃ የተደገፈ መሆኑንና ካቀረቡትም ማስረጃዎች
ተከሣሽ ገንዘቡን የመክፈል ግዴታ ያለበት መሆኑን የገለጸበትን መመልከቱን ገልጾ
ያልከፈለውን ዋና ገንዘብ ብር 608,311.80/ስድስት መቶ ስምንት ሺህ ሶስት መቶ
አስራ አንድ ብር ከሰማኒያ ሣንቲም/ ክሱ ከተመሰረተበት ጊዜ ጀምሮ ተከፍሎ አለቀ



69,

*payment of
price 1*

በእነዚህ ምክንያቶች መሠረት የከፍተኛው ፍ/ቤት ጉዳዩን ማየት ሲገባው የወለድ ስምምነት ስለሌለ ይግባኝ ባይ መልስ ሰጭን ወለድ አስልቶ የጠየቀው አላግባብ ነው በሚል የሰጠው ውሳኔ በዚህ ፍ/ቤት ተቀባይነት አላገኘም ። በሌላ በኩል ይግባኝ ባይ የወለድ ክፍያን በተመለከተ ገንዘቡ መከፈል ከነበረበት ጊዜ ጀምሮ ይከፈላል በማለት ጠየቀ እንጂ እንደ ጥያቄው አቀራረብ የወለዱን ስሌት በክሱ አላስረዳም ወይም አላሰየም። የከፍተኛው ፍ/ቤት የተጠየቀው ወለድ ክፍያ በስንት ኘርሰንት /ወይም / እንደታሰበ እና ገንዘቡ ከመቼ ጀምሮ እንደታሰበ አረጋግጦ ሊወሰን ያልቻለው የወለድ ክፍያ ስምምነት የለም፡ በሚል ምክንያት እንደሆነ ለመገንዘብ ተችሏል ። ከዚህ በላይ እንደተገለጸው መልስ ሰጭው ገንዘቡን መከፈል ከነበረበት ጊዜ አንስቶ ክሱ እስከተመሰረተበት ጊዜ ወለድ ጨምሮ መከፈል አለበት። መከፈል ከነበረበት የከፍተኛው ፍ/ቤት በመጠኑ ላይ ውሳኔ ሊሰጥበት የሚገባ ሆኖ ተገኝቷል። በእነዚህ ምክንያቶች መሠረት የከፍተኛው ፍ/ቤት የወለድ ስምምነት የለም በሚል ምክንያት ይግባኝ ባይ መልስ ሰጭው ካልከፈለው በክሱ ከተጠቀሰው ገንዘብ ብር 608.311.80/ስድስት መቶ ስመንት ሺህ ሶስት መቶ አሥራ አንድ ብር ከሰማኒያ ሣንቲም/ ላይ ገንዘቡ መከፈል ካለበት ክሱ እስከተመሠረተበት የወለድ ክፍያ ጥያቄ ማቅረብ አይችልም በሚል የሰጠውን ፍርድ በፍ.ሥ.ሥ.ሕ.ቁጥር 348/1/መሰረት ሽረን ይከፈላል በማለት መከፈል ይገባዋል የሚለውን ወለድ አረጋግጦ ውሳኔ ይስጥበት ብለን ጉዳዩን በፍ.ሥ.ሥ.ሕ. ቁጥር 343 መሰረት መልስንላታል። መዝገቡ ተዘግቷል። ወደ መዝገብ ቤት ይመለስ።//

ፌዴራል ጠቅላይ ፍ. ድ. ቤት የማይነበብ የሶስት ዳኞች ፊርማ አለበት
ትክክል ግልጽ
ፊርማ ቀን 1/4/92

Amman

የፍ/ይ/መ/ቁ. 1219

20/10/1993 ዓ.ም.

ዳኞች፡- ፍሰሃ ወርቅነህ

መቅደስ ተስፋዬ

ጌታቸው አካሣ

ይግባኝ ባይ፡- አቶ ታዬ በላይ አልቀረቡም፡፡

መልስ ሰጪ፡- የኢትዮጵያ አስመጪና ላኪ ኮርፖሬሽን አልቀረበም፡፡

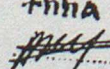
መዝገቡ ተመርምሮ የሚከተለው ተወስንዋል፡፡

ው ሣ ኒ

ይግባኝ የቀረበው በክልል 14 መስተዳድር የዞን ፍ/ቤት በፍ/ብ/መ/ቁ. 1049/84 ሐምሌ 18/1986 ዓ.ም. በወሰነው ውሣኔ ላይ ነው፡፡ መልስ ሰጪ በአዲስ አበባ አስተዳደር አካባቢ ከፍተኛ ፍ/ቤት ይግባኝ ባዩን በመክሰሱ ነው፤ የክሱ ፍሬ ነገር የሚከተለው ነው፡፡=====//

ተከሣሽ ባቀረበው የግዢ መጠየቂያ መሠረት ተከሣሽ ከውጭ አገር የገበታ ጫፍ ጥሬ ዕቃ አስመጥቶ እንዲሸጥላቸው ተስማምተዋል በስምምነቱ መሠረትም በትዕዛዝ ቁጥር 086/78 እና በትዛዝ ቁጥር 035/79 የመጣውን ዕቃ ተከሣሽ ተረክቦታል፤ ተከሣሽ በግዢ የተረከቡት ዕቃ ጠቅላላ ዋጋ ብር 74,325.31 ሲሆን ከዚህ ውስጥ ብር 48,692.36 ከፍለው ብር 25,632.95 ግን አልከፈለም፤ ከሣሽ የሚፈለግባቸውን ጠቅላላ ገንዘብ ድርጅቱ ካሳወቃቸው ከግንቦት 9/1982 ዓ.ም. ጀምሮ በወቅቱ ባለመክፈላቸው እስከ ሐምሌ 3/1983 ዓ.ም. ድረስ ብር 2,378.87 ህጋዊ ወለድ በማስከተሉ፣ ተከሣሽ በጠቅላላው ብር 28,011.82 ይፈለግባቸዋል፤ ስለዚህ ተከሣሽ ይህንን ገንዘብና ገንዘቡ ተጠቃሉ እስከሚከፈል ህጋዊ ወለድ ክሱ ካስከተለው ወጪና ኪሣራ ጋር ለከሣሽ እንዲከፍሉ ይወሰንባቸው በማለት ክሱ ቀርቦዋል፡፡=====//

ተከሣሽ ለክሱ ባቀረበው የመከላከያ መልስ፣ መጋቢት 26/78 ዓ.ም. እና መጋቢት 2/79 በተጻፉት ውሉች አንቀጽ 3.3 መሠረት ገዢው ዕቃዎቹን አጠናቆ በተረከበ በ45 ቀናት ውስጥ ሻጭ ትክክለኛውን ዋጋ ለገዢ ለማስታወቅ ውል ገብቷል፤ ገዢው ዕቃዎቹን የተረከበው አንዱን ህዳር 28/1980 ዓ.ም. ሲሆን ሁለተኛውን ደግሞ መጋቢት 24/80 ዓ.ም. ነው፤ በውሉ አንቀጽ 3.3 መሠረት ሻጩ የግምቱ ዋጋ የተለወጠ መሆኑን ለገዢው አላስታወቀም፤ በመሆኑም ተከሣሹ የግምቱ ዋጋ ትክክለኛ እንደሆነ በመውሰድ ትርፍና ኪሣራውን በዚህ ዋጋ ላይ በመመሥረት ምርቱን ሽጧል በማለት ተከሣሽ ተከራክሮዋል፡፡

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክለኛ ግልጽ
ረርግ 

ይፌ

ማህተም
የግዢ

ከሣሽ በመልስ መልሱ፣ የውል አንቀጽ 3.3 የይርጋ አንቀጽ አይደለም፤ የዕቃው ርክክብ ከተፈፀመ ከ45 ቀን በኋላ የዋጋ ልዩነትን አያስጠይቅም አይደለም፤ ተከሣሽ በትዕዛዝ ቁጥር 086/78 የመጣላቸውን ዕቃ የተረከቡት እ.ኤ.አ ታህሣስ 8/1987 ሲሆን የዕቃው ትክክለኛ ዋጋ ማስታወቂያ የተሰጣቸው እ.ኤ.አ ታህሣስ 11/1987 ነው በማለት ተከራክርዋል፡፡=====//

የሥር ፍርድ ቤት በክሱ የጠየቀውን የብር 2,378.87 የወለድ ጥያቄ ባለመቀበል ክስ ከቀረበበት ገንዘብ ብር 25,632.95 ወለድ ክስ ከቀረበበት ጊዜ አንስቶ ተከፍሎ አለቀድረስ ህጋዊው እየታሰበ፣ የጻፏቸውን በዚሁ ገንዘብ ታሪፍ ልክ እና ለሌሎች ወጪዎች ብር 300 በማክል ተከሣሽ ለከሣሽ እንዲከፍል ይግባኝ የቀረበበትን ውሣኔ ወሰነ፡፡=====//

ይግባኝ ባይ፣ በሥር ፍርድ ቤት ካቀረበው ክርክር በተጨማሪ የሥር ከሣሹ የዕቃውን ትክክለኛ ዋጋ በውሉ አንቀጽ 3.3 መሠረት በወቅቱ ለገዢው አሳውቃለሁ ባለው ማስረጃ አለማቅረቡን በመግለጽ የሥር ፍርድቤት ውሣኔ እንዲሻርና በዚህ ጉዳይ ምክንያት ያወጣውና ዘበቃ አበል እንዲከፈለው ይግባኝን በዚህ መዝገብ አቅርቦዋል፤ መልስ ሰጪ የዕቃውን ትክክለኛ ዋጋ በወቅቱ ለገዢው አሳውቁአለሁ የሚለውን ክርክር ያስነሣ ሌላውን በሥር ፍ/ቤት ያነሣውን ክርክር በማንሣት ይግባኝ የቀረበበት ውሣኔ ይፅና ኪሣራ ይቆረጥልን በማለት ለይግባኝ መልስ አቅርቦዋል፡፡=====//

ይህ ፍርድ ቤት መዝገቡን ከህጉ ጋር በማገናዘብ መርምረዋል፤ ይህን ጉዳይ ለመወሰን መልስ ማግኘት የሚገባው ጭብጥ ግራቀኙ በተዋዋልዋቸው ውሎች አንቀጽ 3.3 መሠረት መልስ ሰጪ የዕቃውን ትክክለኛ ዋጋ ይግባኝ ባይ ዕቃውን በተረከበ በ45 ቀናት ካላሳየው በክሱ የጠየቀው ገንዘብ ሊከፈለው ይገባል ወይስ አይገባም? የሚለው ነው፤ ይግባኝ ባይ ዕቃውን በተረከበ በ45 ቀናት መልስ ሰጪ የዕቃውን ትክክለኛ ዋጋ ለይግባኝ ባይ አለማሳወቁን አምኖልኩ፤ የመልስ ሰጪ ክርክር የዕቃውን ትክክለኛ ዋጋ በውሉቹ መሠረት በጊዜው ባላስታወቅም በውሉቹ አንቀጽ 3.3 መሠረት የዕቃውን ትክክለኛ ዋጋ ከመክፈል አልከለከለም ባይ ነው፤ ዕቃው ለሽያጭ የሚቀርብ ሸቀጥ መሆኑ ግራቀኙን አላከራከረም ዕቃው ለሽያጭ የሚቀርብ ሸቀጥ ከሆነ ዘንድ የሚሸጥበት ትክክለኛ ዋጋ በአጭር ጊዜ ውስጥ ታውቆ ለሽያጭ ማቅረብ የሚገባው መሆኑ ግልጽ ነው፤ ግራቀኙም በውሉቸው አንቀጽ 3.3 የዕቃው ትክክለኛ ዋጋ የዕቃው ርክክብ በተፈጸመ በ45 ቀናት አንዲታወቅ የጊዜ ገደብ ያስቀመጡት የዕቃው የመሸጫ ዋጋ በአጭር ጊዜ ታውቆ ዕቃውን ለሽያጭ ለማቅረብ እንደሆነ ግልጽ ነው ስለዚህም ይግባኝ ባይ ከተጠቀሰው የ45 ቀናት ጊዜ በላይ ትክክለኛውን ዋጋ ለማወቅ መልስ ሰጪን ለመጠበቅ አይገደድም ለመጠበቅ ካልተገደደ ደግሞ አስቀድሞ በጊዜያዊነት የነገረውን የዕቃውን ዋጋ መሠረት በማድረግ ዕቃውን መሸጡ ተገቢ በመሆኑ መልስ ሰጪ በክሱ የጠየቀው ገንዘብ ሊከፈለው አይገባም ብለናል ይግባኝ የቀረበበት ውሣኔ ተሽርዋል በሥር ፍርድ ቤትና በዚህ ፍ/ቤት ለደረሰው የሙግት ወጪና ኪሣራ መልስ ሰጪ የጠበቃ አበል ብር 1,500 (አንድ ሺህ አምስት መቶ ብር) ሌላውን ኪሣራና ወጪ በሚመለከት ብር 200 (ሁለት መቶ ብር) ለይግባኝ ባይ ይክፈል ብለናል፤ መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ፡፡=====//

የማይነበብ የሦስት ጻፎች ፊርማ አለበት፡፡

251/252

ሊደራረብ ጠቅላይ ፍርድ ቤት
ትክክል ገልጻል
ፊርማ

21/10/1994 ዓ.ም.

ዳኞች፡- ሐጉስ ወልዱ

ዳኚ መላኩ

ጌታቸው ምህረቱ

ይግባኝ ባይ፡- ብሔራዊ መሐንዲሶችና ሥራ ተቋራጭ ድርጅት

ፋሲል ታደሰ ጠበቃ ቀርቧል።

ሰለመልስ ሰጭ፡- የእርሻ መሣሪያዎችና ቴክኒክ አገልግሎት ድርጅት

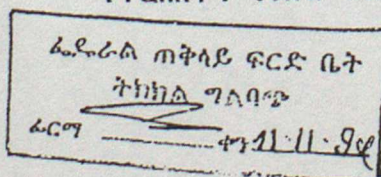
ሰለሞን ጓንጉል ኑፈጅ ቀረበ።

መዝገቡ ተመርምሮ ውሳኔ ተሰጥቷል።

ው ሣ ኔ ፣

መዝገቡን መርምረን እንደተረዳነው ጉዳዩ የገንዘብ ክፍያን የሚመለከት ሲሆን ክርክሩ የተጀመረው በፌዴራል ከፍተኛው ፍ/ቤት ነው። በፍ/ቤቱ ከሆሽ መልስ ሰጭ ተከሣሽ ይግባኝ ባይ በመሆን ተከራክረዋል ክሱ ሰኔ 29/1992 ዓ.ም. በተዘጋጀ 4 ገጽ ማመልከቻ የቀረበው ሁለቱ ወገኖች ጳጉሜ 2/1986 ዓ.ም. በፈጸሙት ውል መሠረት ተከሣሹ ለገዛቸው የካተር ፒለር መሣሪያዎች ዋጋ መክፈል የሚገባውን ገንዘብ አጠናቆ ባለመክፈሉ ብር 1,362<514.77/አንድ ሚሊዮን ሦስት መቶ ስድሣ ሁለት ሺህ አምስት መቶ አሥራ አራት ብር ከሰባ ሰባት ሣንቲም) ተከፍሎ እስከአለቀ ድረስ በውሉ መሠረት ከሚታሰብ ወለድ ጋር እንዲሁም ከወጭና ኪሣራ ጭምር ለማስከፈል ነው።

ተከሣሹም ጥር 24/1993 ዓ.ም. የተጻፈ 7 ገጽ መልስ አቅርቧል። በመልሱም ከሣሹ የዱቤ ሽያጭ ውሉን መሠረት አድርጉ ከዚህ ክስ በፊት በመሠረተው የክፍያ ጥያቄና በፍ.መ.ቁ.29/91 ውሳኔ የተሰጠበት ጉዳይ በዚህ መዝገብ ማቅረብ ተቀባይነት የሌለው ስለመሆኑ፣ በመጀመሪያው ክስ ሊያቀርብ ይገባው የነበረውን የክፍያ ጥያቄ በዚህ ክስ ማቅረብ የማይገባው መሆኑን በክሱ የተጠየቀው የወለድ ክፍያ የፍትሐብሄሐር ሕጉ ስለወለደ ክፍያ የደነገገውን የሚቃረን በመሆኑ ውድቅ መደረግ እንዳለበት በማስረዳት ክሱን ተከላክሏል። ክርክሩ የቀረበለት ፍ/ቤትም ጥቅምት 9/1994 ዓ.ም. በፍ.መ.ቁ.5/93 ውሳኔ የሰጠ ሲሆን በውሳኔውም ከሣሹ በዚህ መዝገብ አስከፍቶ ያቀረበው ክስ የበፊተኛው ክስ በቀረበበት ጊዜ ያልበሰለ ክፍያን(ዕዳን) የሚመለከት መሆኑን በፍ.ሕ.ቁ.2384 መሠረት ክስ የቀረበበትን ገንዘብ መጠየቅ እንደሚቻል እና የወለዱንም የክፍያ ጥያቄ በፍትሐብሄሐር ሕጉ ቁጥር 1731 መሠረት የሕግ ድጋፍ ያለው ስለመሆኑ ትንታኔ በማስቀመጥ ክስ የቀረበበትን ገንዘብ ተከሣሹ ለከሣሹ እንዲከፍለው ፈርዷል።



ተከሣኹ ሀዳር 20/1994 ዓ.ም. በተጻፈ 6 ገጽ ማመልከቻ ውሳኔውን በመቃወም ይግባኝ አቅርቧል። በይግባኝ ማመልከቻው ላይ የፍ.ሕ.ቁ.2384 ባለገንዘቡ ማስጠንቀቂያ ሣይሰጥ ተፈጻሚነት ሊኖረው የማይችል ስለመሆኑ ማስጠንቀቂያው እንኳ ተሰጥቶ ቢሆን ከሣኹ ውሉ እንዲፈርስ የመጠየቅ እንጂ ከአንድ የክስ ምክንያት የሚመነጭ የክፍያ ጥያቄን እየከፋፈለ መጠየቅና በቀድሞው ክስ ሊያቀርበው የሚገባውን የበሰለ ክፍያ በኋለኛው ክስ ለማቅረብ የፍትሐዊነት ሕግ እንደማይፈቅድለት ክስ የቀረበበት ገንዘብ በየወቅቱ የሚከፈል የነበረ፣ በመሆኑ በፍ.ሕ.ቁ. 2024 መሠረት ከሁለት ዓመት በኋላ ሊጠይቅ የማይገባ መሆኑን እና ከ12%(ከአሥራ ሁለት በመቶ) በላይ በውል ወለድ መጠየቅ የማይቻል ለመሆኑ በሕጉ የተመለከተውን ውሳኔ የተላለፈ ስለመሆኑ በምክንያትነት በማስቀመጥ ውሳኔ እንዲሻር አመልክቷል። ለይግባኝ ቅሬታው 5 ገጽ መልስ የቀረበ ሲሆን በመልሱ በፍ.ሕ.ቁ.2384 መሠረት ባልተከፈለው ዕዳ ላይ የበሰለውን ክፍያ በወቅቱ በፍ.መ.ቁ. 29/91 መጠየቁን በፍ.መ.ቁ.5/93 የተጠየቀው በበፊተኛው ክስ ዳኝነት ያልተጠየቀበት መሆኑን፣ በዚህ መዝገብ ለተካሄደው ክርክር መነሻ በሆነው ክስ ለተጠየቀው ክፍያ በቅድሚያ ማስጠንቀቂያ የተሰጠበት ስለመሆኑ እና በየወሩ ማስጠንቀቂያ ለመስጠት ባለገንዘቡ ሕግ ግዴታ እንዳልጣለበት ከሥነ-ሥርዓት ሕጉ ይልቅ የፍ.ሕ.ቁ. የበላይነት፣ ስለሚኖረው የፍ.ሕ.ቁ.2384ን መሠረት አድርጎ የቀረበው ክስ የፍ.ሥ.ሥ.ሕ.ቁ.216 የደነገገውን ምክንያት በማድረግ ውድቅ ሊደረግ እንደማይገባው የወለድ ክፍያውም ውሉን መሠረት አድርጎ ውሳኔ የተሰጠበት በመሆኑ ሊሻር እንደማይችል ዘርዘር በማቅረብ ውሳኔው እንዲፀናለት ተከራክሯል።

ይግባኙን ለማጠናከር በ28/8/1994 ዓ.ም. የተዘጋጀ የመልስ መልስ የቀረበ ሲሆን በመልስ መልሱ የጽሑፍ ክርክር ተደምድሟል።

ይህም ፍ/ቤት ክርክሩን ከመዝገቡና ከሕግ ጋር አገናዝቦ ጉዳዩን እንደመረመረው በከፍተኛው ፍ/ቤት የቀረበው ክስ በፍ.ሥ.ሥ.ሕ.ቁ.5 መሠረት ሊዘጋ የሚገባው ነበርን? መልስ ሰጭ ከግንቦት 1990 ዓ.ም. እስከ መስከረም 1991 ዓ.ም. ያሉትን ክፍያ በፍ.መ.ቁ.29/91 ላይ አለመጠየቁ በፍ.መ.ቁ.5/93 በቀረበው ክስ ክፍያውን ከመጠየቅ የፍ.ሥ.ሥ.ሕ.ቁ.216 ይከለክለዋል? ይግባኝ ባይ ባዕዳው ላይ 24% ወለድ ሊከፍል ይገባል? አይገባም? የሚሉት ጭብጦች በዋናነት የሚያዙ ሆነው አግኝቷቸዋል። መልስ ሰጭ በፍ.መ.ቁ.29/91 በቀረበው ክስ በፍ.መ.ቁ.5/93 ክስ የቀረበበትን ገንዘብ ተገቢውን የዳኝነት ገንዘብ በመክፈል አቅርቦ ውሳኔ ያልተሰጠ ለመሆኑ መዝገቡ ስለሚያስረዳ ዕዳውን በሙሉ በፍ.ሕ.ቁ.29/91 በቀረበው ክስ ተጠይቆ ውሳኔ እንደተሰጠበት አድርጎ በማቀረብ ይግባኝ ባዩ በፍ.ሥ.ሥ.ሕ.ቁ.5 መሠረት ለይግባኙ ምክንያት የሆነውን ክስ ለማዘጋት ያቀረበው ክርክርና ቅሬታ አግባብነት የሌለው ነው። 2ኛውን ጭብጥ በተመለከተም፡- ሁለቱ ተከራካሪ ወገኖች ጳጉሚ 2/1986 ዓ.ም. ባደረጉት የዱቤ የካተር ፒላር መሣሪያዎች ሽያጭ

ደብዳቤ ቁጥር 11/11/94

ውል ገዥው (ይግባኝ ባዩ) ለመልስ ሰጭው (ለሽያጭ) የመሣሪያዎቹን ዋጋ አጠናቆ መክፈል ያለበት ውሉ በተደረገ በ60 ወራት ውስጥ ሰለመሆኑ የውሉ ሰነድ የሚገልጽ ሲሆን አከራከሪ አለመሆኑን መዝገቡ ያስረዳል። ከዚህም መረዳት የሚቻለው መልስ ሰጭ በውሉ መሠረት ክፍያውን የውሉ ጊዜ ከአበቃ በኋላም ክፍያውን የመጠየቅ መብት ያለው መሆኑን ነው። ክፍያውን በበፊተኛው ክስ ማቅረብ ሲገባው ቀንሶ የተወውን ክፍያ ከበፊተኛው ክስ በኋላ በቀረበ ክስ ስላቀረበ በፍ.ሥ.ሥ.ሕ.ቁ.216 መሠረት ማቅረብ አይገባውም ብሎ መከራከር የሚቻለው መልስ ሰጭው የክፍያውን የመጨረሻ ቀን አሳልፎ በሚያቀርበው ክስ መጠየቅ የነበረበትን የበሰለ ክፍያ ሳይጠይቅ ቀርቶ ወይም አውቆ ትቶ በ2ኛ ጊዜ በሚያቀርበው ክስ ሊጠይቅ ነበር።

በተያዘው ጉዳይ ግን በፍ.ሕ.ቁ.29/91 የቀረበው ክስ የመሣሪያዎቹ የሽያጭ ዋጋ ተከፍሎ እንዲያልቅ ስምምነት ከተደረገበት ጊዜ በፊት የቀረበ በመሆኑ በዝያ መዝገብ ክስ ያልቀረበበት ክፍያ በፍ.ሕ.ቁ.5/93 በቀረበው ክስ ሊጠየቅ አይገባም ለማለት የሚያስኬድ ነው።

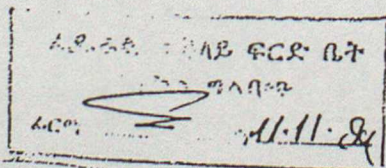
በመጨረሻ የታየው የወለድ ክፍያ ክርክሩን ነው። ይግባኝ ባይ የወለዱ ስምምነቱም ሆነ የወለድ ክፍያ ውሳኔ ሕግን የተከተለ አይደለም በማለት የሚከራከር ሲሆን መልስ ሰጭው በበኩሉ የወለድ ክፍያ የተወሰነው የሽያጭ ውሉን መሠረት አድርጎ በመሆኑ የከፍተኛው ፍ/ቤት ውሳኔ ሊነቀፍ አይገባም በሚል ምላሽ ይሰጣል።

በበኩላችን ክርክሩን አግባብ ካለው የፍትሐብሄር ሕጉ ድንጋጌ አኳያ እንደተመለከትነው በተጠቀሰው ሕግ ቁጥር 2361 ገዥው የገዛውን ዕቃ ዋጋ ከመክፈል በሚዘገይበት ጊዜ በሕግ በተወሰነው የወለድ መጠን መሠረት ወለድ መክፈል እንደሚኖርበት በአስገዳጅ ቃል (Mandatory provision) አስቀምጧል። ድንጋጌው በአስገዳጅ ሁኔታ ከተደነገገ ደግሞ በውል ሊጣስ የማይችል መሆኑን መገንዘብ ይቻላል።

በሌላም በኩል የፍ.ሕ.ቁ.2479 የወለድ ልክን በሚመለከት የደነገገ ሲሆን የዚሁ ድንጋጌ ንዑስ ቁጥር 1 ተዋዋዮቹ በወለድ የሚከፈለውን ገንዘብ በዓመት በመቶ ከዓሥራ ሁለት (ከ12%) በላይ እንዲሆን ለመዋዋል አይችሉም በማለት ደንግጓል። ንዑስ ቁጥር ሦስት ላይ ደግሞ ብድሩ በወለድ እንዲሆን ውል በሚኖርበት ጊዜ እና በወለድ የሚከፈለው ገንዘብ ከፍተኛ እንዲሆን ወይም በወለድ የሚከፈለው ገንዘብ ከአሥራ ሁለት (ከ12%) በላይ በዓመት እንዲከፈል በጽሑፍ የተደረገ ውል ሲኖር ተበዳሪው ባለገንዘቡ በዓመት በመቶ ዘጠኝ (9%) ወለድ መክፈል እንዳለበት በአስገዳጅ መልክ ተደንግጓል።

የፍ.ሕ.ቁ.2479 የገንዘብ ዕዳን የሚመለከት ድንጋጌ በመሆኑ ለሚያከራከር ጉዳይ አግባብነትና ተፈጻሚነት ይኖረዋል።

የተያዘው ጉዳይ የገንዘብ ዕዳ ክፍያን የሚመለከት በመሆኑ ለጉዳዩ የፍ.ሕ.ቁ.2479 አግባብነት አለው ከተባለ ደግሞ ይግባኝ ባይና መልስ ሰጭው የ24%(የሃያ አራት በመቶ)



የወለድ ክፍያ በዕዳው (በገንዘቡ ክፍያ) ላይ እንዲከፈል ቢዋዋሉም የወለድ መጠኑ በዚሁ ሕግ በተመለከተው መሠረት ተቀባይነት አይኖረውም። ሕጉ ከ12% በላይ ወለድ እንዳይከፈል የከለከለው የወለድ የመጨረሻ ጣሪያ በፍ.ሕጉ መሠረት 12% መሆን እንዳለበት በመወሰን ከዚያ በላይ የሚጠየቀው ወለድ አራጣ ይሆን በሚል ሐሳብ እንደሆነ መረዳት አያዳግትም። ከአሥራ ሁለት በመቶ (12%) በላይ የወለድ ክፍያ ስምምነት መደረግ የሌለበት ስለመሆኑ በሕጉ የተገለጸ ሲሆን ይህን መጠን በማለፍ ስምምነት ከተደረገ ደግሞ የወለድ መጠኑ ስምምነት ተፈጻሚ ባለመሆኑ የሚኖረው አማራጭ በፍ.ሕ.ቁ. 2479(2) ወይም በፍ.ሕ.ቁ.1750 መሠረት ሕጋዊ ወለድ እንዲከፍል ማስደረግ ነው።

ከተጠቀሱት ሕጎች(ድንጋጌዎች) ይዘት መረዳት የሚቻለው በሽያጭ ውሉ የተደረገው የወለድ ሥምምነት (የ24% የወለድ ክፍያ ስምምነት) የፍ.ሕ.ቁ.2479 እና የፍ.ሕ.ቁ.2361 የደነገጉትን የሚጥስ መሆኑን ነው የወለድ ስምምነቱ በሕጉ የተቀመጠውን የወለድ መጠን ከተቃረነ ደግሞ ተፈጻሚነት በተጠቀሱት ሕጎች መሠረት አይኖረውም። ካልኖረው ደግሞ ይግባኝ ባይ በፍ.ሕ.ቁ.2479,2361 እና 1750 መሠረት ሊከፈል የሚገባው 9% በመቶ ወለድ ይሆናል። የከፍተኛው ፍ/ቤት ሁለቱ ተከራካሪ ወገኖቹ በውሉ 24% ከመቶ ወለድ እንዲከፍሉ ስለተስማሙ በፍ.ሕ.ቁጥር 1731 መሠረት ውሉ በተዋዋሉ መካከል ሕግ በመሆኑ የወለድ ክፍያውን በሚመለከትም ተፈጻሚነት እንደሚኖረው የወሰነውን በተመለከተም በፍ.ሕ.ቁ.1731 መሠረት ውሉ ስቋቋሚቸው ሰዎች ላይ ሕግ ናቸው ማለት የሚቻለው ውሉ ሕግን ሳይቃረን ሲቋቋሙ ብቻ ነው። በዚህ ጉዳይ ለተነሣው ወለድ ክፍያ ክርክር መሠረት የሆነው የ24% ወለድ ክፍያ ስምምነት ከዚህ በላይ የተጠቀሱትን ድንጋጌዎች የሚቃረን በመሆኑ በተከራካሪዎቹ መካከል የወለድ ስምምነቱ በተጠቀሰው ሕግ መሠረት ሕግ ነው ለማለት በእኛ በኩል የማይቻል ሆኖ አግኝተነዋል።

ስለዚህ በዝርዝር የተቀመጡትን ምክንያቶች መሠረት አድርገን ይግባኙን እና ለይግባኙ የተሰጠውን መልስ(ክርክር) ከመዝገቡ ጋር እንደመረመርነው ይግባኝ ባይ በዕዳው ላይ 24%(ሃያ አራት በመቶ) ወለድ እንዲከፈል የተወሰነበትን በመሻር በምትኩ 9% /ዘጠኝ በመቶ/ ወለድ ይከፈል በማለት እና ከዚህ ወጭ የቀረበውን የይግባኝ ቅሬታ ባለመቀበል የከፍተኛውን ፍ/ቤት ውሳኔ በፍ.ሥ.ሥ.ሕ.ቁ.348(1) መሠረት አሻሽልን ፈርደናል። ወጭና ኪሣራን በሚመለከት ሁለቱ ወገኖች የየራሳቸውን ይቻሉ በማለት መዝገቡን ዘግተን ወደ መዝገብ ቤት እንዲመለስ አዘናል።

የማይደረግ የሦስት ዳኞች ፊርማ አለበት።

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