ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.572/1997

Date	Order with signature of Judge

Date of hearing: 27.11.2007

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

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

JUDGEMENT

KHALID ALI Z. QAZI.J.- **Plaintiff has filed this suit against the defendant for accounts and recovery of Rs.101,225,535/- with markup at the rate of 14% per year from the date of suit till recovery plus cost of the bardana found short at the time of final account.**

2. Brief facts of the plaintiff's case are that initially the plaintiff in the suit was Rice Export Corporation of Pakistan which was merged with Trading Corporation of Pakistan (Private) Limited whose name was substituted by filing amended title of the plaintiff. On 15.1.1997 the suit was filed against defendant, a Sole Proprietorship Firm carrying on business. Subsequently the plaint was amended pursuant to the Court order dated 10.12.2003 in H.C.A No.152/2003 whereby claim of Rs.5,404,344/- was added being the value of 11,980 - B Twill / Pt Will bags 45,281 Hessain Bags, 243,828 & 57,223 Heavy Cess Bags and Polypropylene bags (Total 358,312 Bags) found short, making the total plaintiff's claim in the suit to Rs.101,225,535/- and the amended plaint was accordingly filed on 22.10.2003.

3. It was further contended that plaintiff invited tender for handling rice crop 1991-92 at their godown at Bin Qasim Landhi and TPX Godown.

4. The plaintiff urged that Defendant Firm submitted tender for handling of rice at Qasim Rice Godown and Plaintiff accepted the tender of the Defendant.

5. It was further contended that the Plaintiffs entered into a written contract with the Defendant on 21st November 1991 bearing No. RECP-5/M%M/91-92/3 (Ex.P/2) and appointed the Defendant Contractors/Handling Agents for handling the rice crop 1991-92 at Qasim Rice Godown of the plaintiff as well as for the handling of any other rice stock which the Plaintiff may entrust the Defendant during the currency of the said contract. The terms and conditions of the rates for rendering service to the Plaintiffs were duly provided for in the contract. That the terms and conditions contained in the said Agreement/Contract and tender document may be read as part of the Plaint.

6. It was contended in the plaint that as per terms of the contract Defendant have to exercise all care in respect of stocks including its bye-products etc, entrusted to them and are liable for and make good any loss or damage therein howsoever caused or arising.

7. It is inter alia, contended by the plaintiff that in pursuance of the said contract the Defendants were entrusted with large quantities of rice of various qualities, gunny bags and dunnages in connection with the performance of the contract for handling rice as per terms of the aforesaid contract.

8. The plaintiff has urged that as per Clause 4(a) of the tender document the period of contract was for two years from the date of acceptance of tenders, and time of contract period was extended from time to time till 30-9-1995.

9. It was stated in plaint that the services rendered and work performed by the Defendant throughout the handling of rice crop 1991-92 was found un-satisfactory which fact is evident from the letters addressed by the Plaintiff to the Defendant from time to time. Copies of three letters were filed as annexure B, C & D alongwith the plaint. (Exh.P/3, P/4 & P/9).

10. It was further stated that the Plaintiff appointed an independent Surveyor in whose presence Plaintiff and Defendant carried out physical verification of the stocks and submitted the report. Copy of the report dated 27.8.1992 was filed alongwith plaint as annexure 'E' (Ex.P/11).

11. It was urged contended that vide letter dated 31.10.1996 (Ex.P/5) the Plaintiff called upon the Defendant to deposit Rs.95,821,191/- being the cost of shortage of 11543 M.Ton of rice.

12. It was stated by the plaintiff that Defendant vide his letter dated 16.11.1996 (Exh.P/6) admitted the shortage of 11,543 M.Ton of rice. Photocopy of defendant's letter dated 16.11.1996 was filed alongwith plaint as annexure 'G'.

13. It is urged by the plaintiff that the Defendant as handling agents under the terms and conditions of contract are liable to render account for the stocks entrusted to them under the terms and conditions of the contract in question and are liable to pay to the Plaintiff a sum of Rs.95,821,191/- being the value of the shortage and cost of the rice, which was entrusted to the Defendant and remained unaccounted for. The Plaintiff held security of the Defendant in contract against the claim in suit. It was further contended that the defendants are also liable to pay Rs.5,404,344/- being the value of 358,312 Gunny Bags / BARDANA found short. Therefore, the total claims comes to Rs.101,225,535/- only.

14. The defendant filed written statement and counter claim against the plaintiff for recovery of Rs.106,42,443/- on 5.10.2001. The contents of para 1 to 5 of plaint were admitted and further stated that Rs.35,00,000.00/- (Rupees thirty five lacs only) as cash security was given to the plaintiff as per their requirement.

15. The defendant contended that under the agreement the defendants were required to submit their running bill for the job completed and 2.5% of the amount on each running bill was to be deducted by the plaintiff and retained by them as "Retention Money", which was payable by the plaintiffs to the defendants along with security amount after completion of the contract. The copies of the concise statement, statement of each year and vouchers issued by the plaintiffs were filed alongwith written statement as annexures D/1 to D/6 respectively. It was contended that the total amount of retention money, which is still lying with the plaintiff is Rs.16, 91,436.00.

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

17. It was contended by the defendant that the matter was brought into the notice of plaintiffs which was considered by the Board of Directors of the plaintiffs in their meeting held on 19/4/1995. The Board of Directors of the plaintiffs through the working papers and detail deliberations agreed in principle to allow rebate 3% on loss in handling and its storage etc. The Board of Directors of the

plaintiffs also directed the plaintiffs to seek their opinion of the well known international reputed firm SGS Pakistan (Private) Limited surveyor. Photocopy of the extract from the meeting of the Board of Directors held on 19.4.1995 was filed alongwith the written statement as annexure D-7.

18. It is urged by the learned counsel for the defendant that the plaintiffs thereafter as per direction of the Board of Directors approached the said firm M/S SGS Pakistan (Private) Ltd., an international surveyor, and obtained their opinion on the subject of loss in weight of rice in R.E.C.P. godown. The said surveyor gave their report discussing the various stages of multiple handling process and transportation before shipment and during long storage and recommended loss of 3.5% to 6%. Copy of the said report of M/S SGS Pakistan (Private) Ltd. dated 30/5/1995 filed as annexure D/8 alongwith the written statement.

19. The defendant stated that during the period of contract the answering defendants received 2,38,447 metric tons of rice in R.E.C.P. godown and successfully handled the same according to the terms of the contract along with the Rice Crop for the year 1990-91 which was already stored there in the R.E.C.P. godown. Out of the total huge quantity of 5,24,547 metric tons for the Crop 90-91 plus 2,38,447 metric tons for the Crop 91-92 which equals 7,62,994 metric tons, a handling loss alleged to have been found to be 22,354 metric tons which comes within expected limits as approved by the international surveyors and Board of Directors of R.E.C.P.

20. The defendant further urged that the contract was performed according to the entire satisfaction of the plaintiffs. it was further contended that the directions as contained in annexures B, C & D of the plaint are not correct and the letters have been issued just to make baseless ground for withholding the defendants' security as well as retention amount.

21. It was further stated that the defendants have no notice of the appointment of the surveyor and the survey was conducted by them and the findings of the surveyor are not binding upon the defendants. It was further urged that it was verification report, which was prepared by the plaintiff's own surveyor.

22. The contents of para-11 were denied. It was denied that the defendants are liable do deposit Rs. 9,58,21,191.00 being cost of the shortage of 11,543 metric tons of rice or any part thereof. The said letter dated 31/10/1996 has been appropriately replied, by letter dated 16/011/1996 and it was pointed out that the alleged said shortage comes within the expected range of 3.5& to 6%, which has been approved by the plaintiff's Board of Directors and defendants are not liable.

23. It was pleaded that the defendants are not liable to any amount or the plaintiffs are entitled to retain or adjust the security amount against the alleged losses. It is further contended

that the defendants by their letter dated 2/7/1994, stated that they have successfully completed 2 contracts of the plaintiffs for the Crop 1991-92 which were handled simultaneously and also demanded their security amount of two contracts together with the Retention Amount.

24. The defendant contended that the defendants also by their another letter dated 12/9/1995 demanded their deposit total amounting to Rs. 1,84,27,861.00 so as to close the matter.

25. It was submitted that the plaintiffs also by their letter dated 15/10/1995 admitted the security amount and the Retention Money of the defendants and informed that the amount is adjusted/recovered against the losses. It was further urged that in view of the survey report of M/S SGS Pakistan (Private) Ltd. and the resolution passed by the Board of Directors of the plaintiffs, no amount is payable by the defendants to the plaintiffs. The defendant claims that the plaintiffs are liable to pay the following amount to the defendants:

Security amount	**Rs. 35, 00,000.00**
Retention Money	**Rs. 16, 91,436.00**
Profits at the rate of 15% w.e.f. 01/1/1995 till 30/9/2001	**Rs. 54, 51,007.00**
	TotalRs.1, 06, 42,443.00

26. The defendant urged that the plaintiffs have no right to add any shortage and claim the same. The defendant further denied that any amount is payable by the defendants to the plaintiffs. It was further submitted that the plaintiffs have taken over the control in the year 1996 and since then they have been handling themselves, hence no liability can be put upon the defendants thereafter.

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

28. Out of the pleading of the parties following issues were framed by this Court on 19.04.2004.

i. What quantity of rice and bags entrusted to the defendant by the plaintiff for handling purpose at the time of contract?

ii. Whether there was any shortage of rice and bags, if so to what percentage of quantity as to rice and numbers as to bags?

iii. Whether shortage in rice, if any, comes within the expected range of 3.5% to 6% if so its effect?

iv. Whether the defendants are entitled to claim relaxation benefit under the contract between the parties as to rice bags?

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

vi. Whether the defendant is liable to pay plaintiff's claim of shortage of rice and bags? If so what amount?

vii. Whether the plaintiff have illegally retained the security amount and retention money, if so its effect?

viii. Whether the plaintiffs are liable to pay any profit to the defendant on retention money, if so to what amount?

ix. Whether the defendant has cause of action and counter claim is maintainable?

x. Whether the survey report dated 14.1.999 is illegal, if so its effect?

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

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

30. Plaintiff examined one witness Muhammad Atiq Khan, who produced his affidavit-in-evidence as Ex.P/1 alongwith documents sand in cross-examination produced documents thereafter, closed its side.

31. On the other hand defendant filed affidavit-in-evidence of Mr.Kamaran Farid same was exhibited as Ex.D/1 alongwith documents. After cross-examination the said witness, closed its side.

32. The learned counsel for the parties have submitted written arguments.

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

<u>ISSUE No.1</u>

Learned counsel for the defendant submitted that the quantity of rice entrusted to the defendant after the handing over to the warehouse / godown is not denied. However, important point for consideration of this Court is that at the time of handing over to godown, the account of the

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

13. A C C O U N T S

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

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

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

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

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

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

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

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

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

(x) All accounts maintained by the contractors under the terms and conditions of the Contract shall be made available, as and when required for check and audit by a representative of the Corporation and / or by the Audit Officer of the Government of Pakistan. For this purpose the

Contractors shall provide all facilities and assistance to the representative of the Corporation and / or the Audit Officer of the Government of Pakistan. The contractors shall keep all records intact in case local audit is not conducted during the currency of the contract. The contractors shall preserve the records for a minimum period of four years from the date of expiry of the contract.

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

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

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

(xiv) The contractors shall maintain:-

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

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

(iii) **Consolidates stock Register.**

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

(v) Disposal Register showing full details of stocks;

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

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

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

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

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

It appears that total quantity of rice entrusted to the defendant for handling purposes under the contract in question was admittedly 238,447 M/tons, rice as accepted by the defendant vides its letter dated 16.11.1996 (Exh.P/6) while the total quantity of gunny bags / bardana were 358,312.

ISSUE NO.2.

As regard the issue No.2 from the record it appears that shortage of rice was 11,543 M/tons which was specifically mentioned by the plaintiff in its letter dated 31.10.1996 (Ex.P/5), which shortage was accepted by the defendant vide its letter 16.11.1996 Ex.P/6. The DW in his cross-examination admitted which read as under:-

" It is correct that according to the plaintiff the shortage of rice as mentioned in Ex.P/5 was 11543 M/tons It is correct that our letter dated 16.11.1996

(Ex.P/6), we have not denied the figure of shortage, but we claimed the exemption of the same."

As such the same stand proved and as per Article 113 of the Qanoon-e-Shahadat, 1984 no further proof is required, while the shortage of Bags was total 358,312 bags. As is evident from Enquiry Report dated 24.5.1999 (Ex.P/13). The quantity of bags and their value has been specifically mentioned in para 14-A in the amended plaint filed in the above suit and in affidavit-in-evidence of PW. The defendant could not shake / advert to the evidence of PW with regards to shortage of quantity and value of bags / Bardana. Thus the shortage and value of Bags in question is legally deemed to be admitted by the defendant. learned counsel for the plaintiff has placed reliance on the following case laws;

(i) MST.FAROOQ BIBI ..VS.. ABDUL KHALIQ & OTHERS reported in 1999 CLC 1358 (a) relevant page [1361]A Supreme Court (AJ & K) wherein it has been held that;

It is a settled principal of law that a piece of evidence or statement of witness which goes against the interest of particular party and that party does not question the correctness of that assertion or the deposition of the witness it shall be deemed to have been admitted."

(ii) CENTRAL BANK OF INDIA ..VS.. SYED MUHAMMAD ABDUL JALIL SHAH & others reported in 1999 CLC 671 (f) relevant page [691]E wherein it was held that;

If a fact is asserted in Examination in Chief and is not impeached by way of cross-examination, that assertion is deemed to have been admitted by defaulting party"

(iii) MUHAMMAD AKHTAR ..VS.. MST. MANNA 7 3 OTHERS reported in 2001 SCMR 1700(C) wherein it was held that;

Where a fact asserted by one party remains unchallenged, the same amount to admission on the part of the other party."

ISSUE No.3 & 4.

I will deal these issues together as both are interconnected. On the basis of shortage of 11,543 M/tons rice as compared to admitted total quantity of 238,447 M/tons Rice entrusted to the defendant for handling purposes for the crop 1991-92 under the Contract in question comesto 4.84%. It is stated that even this percentage of loss / shortage is not permissible / allowable as there it is no provision/s in the Contract (Exh-P/2) and / or its supplements annexure I to V between the

parties. Resolution of Board of Directors of the Plaintiff of no consequences as it was subject to approval of Govt. of Pakistan, Ministry of Commerce, which approval was not accorded. In the result, the defendant is liable for the admitted shortage of rice to the plaintiff. The defendant could avoid this admitted loss / shortage of rice by taking care as mentioned / quoted / pointed out in para 5 herein above but he failed to do so though it was responsibility of the defendant to protect and take care of the stock of rice and bags entrusted to it by the plaintiff, which the defendant has been neglected as Bailiee as such the defendant is liable for the shortage in question in terms of clause 13(xiii) of annexure III supplemented to the Contract EX.P/2. The defendant as bailee was liable to discharge of his duty imposed upon him under Section 151 of Contract Act, 1872. Nothing has been stated / deposed by the DW in this regard in evidence. The defendant as bailee was bound to take as much care of the stocks of rice in question as a man of ordinary prudence would, under similar circumstances, take of his own goods. It was duty of the defendant to take all reasonable precaution to obviate risks, which may be reasonable apprehended or foreseeable, his duty would be to take proper measures for the protection of goods when such risks were imminent or had actually occurred. The defendant has failed to discharge his onus as cast upon him as bailee under Section 151 R/w Section 152 CPC of the Contract Act, 1872, as such as per section 176 ibid is responsible to the plaintiff for the shortage of rice and bags in question and he cannot legally avoid his liability thereto on any excuse. Learned counsel has placed reliance on the following case laws.

(i) M/s.MASTER SONS Vs.M/s. EBRAHIM ENTERPRISES AND ANOTHER reported in 1988 CLC 1381 (a) relevant page 1386 A

(ii) Q.B.E INSURANCE LTD. VS. THE TRUSTEES OF THE PORT OF KARACHI THROUGH CHAIRMAN AND OTHERS reported in 1992 CLC page 904(f).

Issue No.5

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

Issue No.6.

As regard this issue plaintiff stated that the defendant in the above facts and circumstances and the submissions made relating to the issues No.2, 3 & 4 above is liable to pay plaintiff's claim as claimed.

Issues No.7 & 8

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

Issue No.9.

As regard this issue, it appears that defendant has no cause of action for counter claim, which is for refund of security money and retention money held / retained by the plaintiff as provided under clause 15 of the agreement annexure III supplemented to the Contract in question. In my opinion the counterclaim of the defendant is liable to be dismissed with costs.

Issue No.10.

As regards this issue it appears there is no survey report dated 24.1.1999. there is an enquiry report dated 24.5.1999 which cannot legally be described as illegal and in effective in absence to the contrary. It appears that enquiry report relates to Gunny Bags / Bardana.

Issue No.11.

For the foregoing facts, evidence, reasons and discussion, I therefore, decree the suit of the plaintiff against the defendant in the sum of Rs. Rs.101,225,535/- with mark up at the rate of 14% per year from 15.1.1997, the date of filing of suit till recovery of decretal amount and dismiss the counter claim of the defendant.

JUDGE

Karachi
Dated: