ORDER SHEET

THE HIGH COURT OF SINDH AT KARACHI

Suit No. 825 of 2014

DATE ORDER WITH SIGNATURE OF JUDGE

Plaintiff:	**Kashif Riaz & others Through Mr. Abdur Rehman, Advocate.**
Defendant No.1:	**Fed. Of Pakistan, the Secretary Revenue Division Through Mr. Muhammad Bilal Bhatti, Advocate.**
Defendant Nos.2 & 3:	**OGRA & SSGC Through M/s. Asim Iqbal and Farmanullah Khan, Advocates.**
Fed. Of Pakistan:	**Through Mr. Irfan A. Memon, DAG.**

For Hearing of CMA No 13863/2018.

Date of hearing: **20.01.2020**

Date of Order: **20.01.2020.**

O R D E R

Muhammad Junaid Ghaffar J. This application has been filed on behalf of plaintiffs No.7(a) and (f), whereby the plaintiffs have prayed for directions to the Nazir of this Court to release accrued profit to them on the amount invested with the Nazir of this Court pursuant to order dated 30.05.2014. Learned Counsel for the plaintiffs submits that the disputed amount of sales tax was deposited by the plaintiffs with the Nazir of this Court on the basis of order dated 30.05.2014, which in turn was passed on the basis of orders in C.P. No.D-3266 of 2014, whereas, though the petition was dismissed on 20.10.2015 as well as this Suit on 30.03.2016 and the principal amount available with the Nazir of this Court has been released to the defendants; however, the plaintiffs are entitled for the amount of profit earned on such investment as it is has

accrued on the plaintiffs money. He has further argued that since the amount of sales tax stands paid; the defendants cannot claim the said amount of interest as they have not initiated any proceedings for default surcharge as contemplated in Section 34 of the Sales Tax Act, 1990. In the circumstances, he has prayed for grant of the listed application.

2. Learned DAG appearing on behalf of defendant No.1 submits that it is Government money which was withheld by the plaintiffs and they have delayed the payment of Government Revenue, whereas, the petition on merits stands dismissed; hence, profit accrued, if any, on such amount is to be paid to the Government and not to the plaintiffs. He has further argued that this is not a case under Section 34 ibid as contended. According to him, if the Court had not restrained the department, then the amount would have been recovered timely by the department. He has prayed for dismissal of the listed application.

3. Learned Counsel for defendants No.3 submits that they are only acting as withholding agent of defendant No.1, whereas, the judgment rendered by the learned Division Bench stands approved by the Hon'ble Supreme Court and this Court may pass appropriate orders as deemed fit.

4. I have heard all learned Counsel and perused the record. It is not in dispute that through instant Suit, plaintiffs had impugned the power to determine the value of supply and as consequence thereof, the levy of sales tax accordingly required to be paid through their monthly Gas bills issued by defendant No.3 acting as withholding agent of defendant No.1. The identical controversy was

pending before a learned Division Bench of this Court in C.P. No.D-3266 of 2014, which stands dismissed vide judgment dated 06.10.2015 and pursuant to such judgment, the Suit of the plaintiffs stands dismissed vide order dated 30.03.2016, which reads as under:-

> "30.03.2016
>
> Mr. Asad Khan, Advocate holding brief for
> Mr. Khalid Javed Khan, Advocate for Plaintiff.
> Mr. Farmanullah Khan, Advocate for Defendant No.2.
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> Counsel holding brief for Mr. Khalid Javed Khan submits that the controversy as raised has already been decided by a Division Bench of this Court vide judgment dated 6.10.2015 passed in C.P. No.D-3266/2016 in the case of (Shakeel Ahmed and others Vs. Federation of Pakistan and others) and other connected petitions and therefore, submits that this Suit may also be decided in view of the order passed in the above petitions.
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> In the circumstances, instant Suit is dismissed along with all pending applications in view of the aforesaid order."

5. On the date when the above order of dismissal of the Suit was passed, admittedly no request was made on behalf of the Plaintiffs in respect of any deposit and the profit so accrued. Thereafter, listed application has been filed and Counsel earlier representing the plaintiffs was heard at length on 05.12.2018 and he was confronted as to the grant of this application, but he sought time and subsequently, present Counsel has been engaged. This has been done despite the fact that this matter was already partly heard; however, notwithstanding this, the present Counsel was granted indulgence and was permitted to make arguments afresh; but with profound respect, I am not convinced with the arguments so raised by the learned Counsel for the plaintiffs, inasmuch as it is not in dispute that Government Tax/Revenue was withheld for a considerable period of time and was deposited

with the Nazir of this Court with further directions to invest the same in any Government profit bearing instrument. Ultimately, the plaintiffs have lost their case on merits, which now stands upheld till the level of Hon'ble Supreme Court. Nonetheless, the Plaintiffs even otherwise have not agitated the issue any further and have accepted such dismissal of the Suit. It is but natural that in such disputes when the matter pertains to levy of any tax / Revenue, ordinarily it is directed to be deposited with the Nazir of this Court or be secured through any other Guarantee or instrument. Once the Suit is dismissed the Principal amount naturally has to go to the losing party, which in the instant case is Federal Board of Revenue/concerned Commissioners through defendant No.3. Now the argument that the amount of profit must go to the Plaintiffs is not tenable merely for the fact that no proceedings were ever initiated for levy of default surcharge under Section 34 of the Sales Tax Act, 1990 and non-issuance of notice to that effect. Learned DAG's argument in this context is correct as it is the discretion of the Court, which first directed the plaintiffs to deposit the disputed amount with the Court and further directed the Nazir to invest the same. The intention of the Court is always to secure the amount as far as possible so that the successful party is put to least disadvantageous position due to the act of the Court in passing of a restraining order. It may be the case that defendants are not compensated to the fullest extent; however, at the same time, it can never be the case of a party which loses the case and asks for a benefit in such a manner for which one is not entitled. What the Plaintiffs are asking is getting enriched at the cost of the money which from inception belonged to the Government. It may also be

noted that all Plaintiffs in the listed application are CNG or Petroleum filling stations and it has never been their case that after depositing the amount in question they have not recovered the same from the general body of consumers and they have absorbed the levy of any such tax.

6. The Hon'ble Supreme Court of India in the case reported as ***GTC Industries Ltd. v. Union of India (1998) 3 SCC 376*** has observed that while vacating stay it is court's duty to account for the period of delay and to settle equities and went on to observe that:

> 16. Section 11AA of the Central Excises and Salt Act, 1944 was added on 26th of May, 1995 by the Finance Act, 1995. This Section provides, inter alia, for interest on delayed payment of duty. Where a person chargeable with duty determined Under Sub-section (2) of Section 11A fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, interest at such rate not below 10% and not exceeding 30% per annum as is for the time being fixed by the board on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty. Prior to the insertion of Section 11AA, there was no specific provision in the Central Excises and Salt Act, 1944 under which the department could recover interest on delayed payment of duty. But this Court had, in suitable cases, directed payment of interest. Two such decisions have been brought to our notice. In the case of KashyapZip Ind. v. Union of India and Ors. 1993 (64) ELT 161(SC), the recovery of disputed duty had been stayed by an interim order of the High Court in the writ petition. ***While dismissing the writ petition and revoking the Stay order, the High Court directed the Appellant to pay interest at 17.5% per annum from the date of the order of Stay till recovery. This Court reduced the rate of interest to 12% per annum and on the facts and circumstances directed that this amount should be recovered from 1st of January, 1985 till payment, this being the year in which the matter was Finally decided by this Court as a result of which the writ petition came to be dismissed by the High Court.***

In fact, the Court in its own wisdom can even ask the losing party to pay interest or mark-up to the other party so as to neutralize the effect of any adverse interim order passed by the Court.

7. In another case again the Indian Supreme Court in the case reported as ***Jaipur Municipal Corporation v. C.L. Mishra (2005) 8 SCC 423*** has observed that interim order merges in final order, it cannot have independent existence, and cannot survive beyond this. Thus, no benefit of interim order can be taken.

8. In another case reported as ***Ram Krishna Verma v. State of U.P. (1992) 2 SCC 620***, again the same Court relying upon earlier decision in *Grindlays Bank Ltd. v. Income Tax Officer, Calcutta (1980) 2 SCC 191*, held that no one can suffer from the act of the court and in case an interim order has been passed and Petitioner takes advantage thereof and ultimately petition is found to be without merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized.

9. In the case reported as ***Mahadeo Savlaram Shelke v. Pune Municipal Corporation (1995) 3 SCC 33*** it has been observed by the Indian Supreme Court that the court under inherent jurisdiction 'ex debito justitiae' has a duty to mitigate the damage suffered by the Defendants by the act of the court. Such action is necessary to put a check on abuse of process of court.

10. In ***Amarjeet Singh v. Devi Ratan and Ors. (2010) 1 SCC 417*** the Indian Supreme Court while relying upon on an earlier decision has been pleased to hold that that no person can suffer from the act of court and unfair advantage of interim order must be neutralized. It has been held that:

> In Ram Krishna Verma v. State of U.P., this Court examined the similar issue while placing reliance upon its earlier judgment in Grindlays Bank Ltd. v. ITO: (1980) 2 SCC 191, and held that no person can suffer from the act of the

> Court and in case an interim order has been passed and the Petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any underserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

11. Again the Indian Supreme Court has considered the maxim of 'actus curiae neminem gravabit' in ***Karnataka Rare Earth and Anr. v. Senior Geologist, Department of Mines & Geology and Anr: (2004) 2 SCC 783***, and it was emphasized that parties should be placed in the same position they would have been but for courts order and has observed that:

> 10. ....the doctrine of actus curiae neminem gravabit and held that the doctrine was not confined in its application only to such acts of the Court which were erroneous; the doctrine is applicable to all such acts as to which it can be held that the Court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the Court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an improvement which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the Court would not have been passed. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost.
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> 11. In the facts of this case, in spite of the judgment of the High Court, if the Appellants would not have persuaded this Court to pass the interim orders, they would not have been entitled to operate the mining leases and to raise and remove and disposed of the minerals extracted. But for the interim orders passed by this Court, there is no difference between the Appellants and any person raising, without any lawful authority, any mineral from any land, attracting applicability of Sub-section (5) of Section 21. As the Appellants have lost from the Court they cannot be allowed to retain the benefit earned by them under the interim orders of the Court. The High Court has rightly held the Appellants liable to be placed in the same position in which they would have been if this Court would not have protected them by issuing interim orders. All that the State Government is demanding from the Appellants is the price of the minor minerals. Rent, royalty or tax has already been recovered by the State Government and, therefore, there is no demand under that Head. No penal proceedings, much less any criminal proceedings, have been initiated against the Appellants. It is absolutely incorrect to contend that the Appellants are being asked to pay any penalty or are being subjected to any penal action. It is not the case of the Appellants that they are being asked to pay a price more than what they have realised from the exports or

> that the price appointed by the Respondent State is in any manner arbitrary or unreasonable.....

12. In the case reported as ***Dilshad Hussain v Islamic Republic of Pakistan*** (**2005 SCMR 530**) the issue before our own Supreme Court was in respect of profit earned on the contribution made in respect of Workers Welfare Fund that as to whether the entire profit would be given to the Fund / benefit of the workers or part of it will also go to the Government as notified in some circular. The workers challenged this circular before the Lahore High Court and the petition was dismissed. An Intra Court Appeal was also dismissed against which the matter went before the Hon'ble Supreme Court and the Appeal was allowed. The stance of the workers was that despite contribution by the employer; since the ultimate amount of contribution is for the benefit of the workers from the Fund, the entire amount of profit so earned must go to the workers and not only to the extent of contribution by them and the order to pay the balance of the interest to the Government was illegal. The relevant finding of the Hon'ble Supreme Court is as under;

> 9. Undoubtedly out of the allocated funds, a worker is not entitled more than Rs.3,000 or Rs.6,000, whatsoever the case may be, and if any amount is left due, it will be transferred to the fund constituted under section 3 of the Workers' Welfare Fund Ordinance, 1971, but this amount of Rs.3,000 or Rs.6,004 has nothing to do, as far as the interest is concerned, which accrues upon the amount of the allocated fund, if it has been utilized by the company in its business and has paid interest thereon, as envisaged under paragraph 2, reproduced hereinabove.
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> 10. It is pertinent to mention here that High Court of Sindh, in its earlier judgment pronounced in C.P. No.D-682 of 1991, while taking into consideration the above provisions of para.5, has opined that "the worker is entitled for the interest which has accrued on the investment of allocated funds" but in the subsequent judgment, learned Division Bench did not agree with this conclusion in the case of National Tanker Company (Pvt.) Ltd. (ibid) as petition filed by the company was dismissed on 3rd March, 1998. However, this judgment was challenged before this Court in Civil

Appeal No.1231 of 1998 and vide judgment dated 18th February, 1998, authored by Mr. Justice Munir A. Sheikh (as he then was) it has been concluded that:--

> "(5) The High Court was justified in law in not granting relief of the refund of the said amount at present on account of non compliance of the provisions as to constitution of the Board of Trustees and intimation of their names to the Government and other formalities as mentioned in the judgment under appeal but the fact remains that the amount, profits accrued on the amount, is to be paid to the workers of the company after compliance with the provisions of law."

Therefore, in view of above judgment of the Court, we are persuaded to hold that the amount of profit accrued on the allocated fund has to be paid to the workers of the company, after compliance with the provisions of law.

Thus, for the foregoing reasons, appeal is allowed with no order as to costs.

13. In view of hereinabove facts and circumstances of the case, I am of the view that the request made on behalf of the Plaintiffs is not justified and reasonable and the Court cannot accede to such a prayer. Accordingly, the listed application was ***dismissed*** through short order on 20.01.2020 in the following terms and these are the reasons thereof: -

> "For the reasons to be recorded later on, this application is dismissed. Nazir is directed to release the amount available with him with up to date profit to defendant No.3, to be paid/credited to the concerned Commissioner / Department."

Judge

*Faizan PA/**