

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
IInd Appeal No. 14 of 2022

Dated: Order with signature of Judge(s)

1. For orders on Office Objection
2. For Hearing of CMA No. 418 of 2023
3. For Hearing of Main Case.

Date of Hearing : 28 April 2023

Appellant : M/s Al-Waqar Corporation through Mr. Adnan Ahmed, Advocate

Respondent No.1 : M/s Rice Export Corporation of Pakistan Limited

MOHAMMAD ABDUR RAHMAN, J. - This Second Appeal has been maintained by the Appellant under Section 100 of the Code of Civil Procedure, 1908 impugning the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, upholding the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996, whereby Civil Suit No.1480 of 1996 was decreed in favour of the Respondent No.1.

2. The Respondent No.1 had instituted Civil Suit No. 334 of 1986 before this Court for the recovery of Rs.450,475.65 from the Appellant with mark-up at the rate of 14% per annum from the date of the Suit till "payment". Civil Suit No.334 of 1986 was, pursuant to the revision of the pecuniary jurisdiction of this Court, transferred to the Court of VIth Senior Civil Judge Karachi (East) where it was renumbered as Civil Suit No.1480 of 1996.

3. In Civil Suit No. 1480 of 2006, the Respondent No.1 contend that they had entered into a contract on 16 January 1979 with the Appellant for the execution of certain works which were to be completed by the Appellant on the dates as noted hereunder:

<i>S.No.</i>	<i>Name of work</i>	<i>Stipulated period for completion</i>
1.	Underground water and pump house	135 days Ending on 30.06.1979
2.	Workshop Complex	180 days Ending on 13.08.1979
3.	Mill Administration Building	135 days Ending on 30.06.1979

4. The Respondent No.1 contended that during the course of the implementation of the Contract the following breaches of the contract were made by the Appellant:

- (i) the Appellant initially failed to submit a performance bond in accordance with the tender that had been issued by the Respondent. The Performance Bond that was supplied were returned to the Appellant by the Respondent on 6 February 1979 and which were resubmitted by the Appellant to the Respondent on 19 February 1979 duly corrected and which were accepted by the Respondent on 24 February 1979 leading to a delay in the execution of the obligations on the part of the Appellant under the contract;
- (ii) The works were also not completed by the Appellant within the time specified for each work, as indicated in the table hereinabove, on account of a shortage of labour, material, equipment's and general slackness on the part of the Appellant, which despite being pointed out to the Appellant by the Engineer, appointed under the Contract to supervise

such works, were not rectified by the Appellant leading to delays in the completion of the works;

- (iii) On 14 January 1982 the Engineer issued a "Substantial Completion Certificate" identifying therein the list of incomplete/outstanding works which remained to be completed by the Appellant within the specified period under the Contract and which included the installation of an electric panel board and of light fixtures in the workshop complex. While the remaining works in the workshop complex were completed on 31 July 1981, the Appellant failed to provide the electric shades that were to be installed therein, intimating the Engineer on 25 January 1982 that the electric shades that they had quoted in their tender were not available and alternative equipment and light fixtures were available at a higher rate; and which not being in conformity with the Contract were duly rejected by the Respondent;
- (iv) Certain completion drawings that had to be provided by the Appellant to the Respondent were submitted on 15 December 1981 and found not to be in conformity with the works carried out and returned to the Appellant.
- (v) In respect of the distribution of the electricity load through a distribution box in the Workshop Complex, these were also found to be inadequate and the Appellant was again requested to rectify panels located in the Distribution Board by the Engineer on 31 January 1982 and again on 9 March 1982.

The Appellant refused to execute the remaining work on account of which the respondent had suffered losses as under:

S.NO.	Name of Work	Original Rate of M/s. Al Waqar Crop	Lowest bid Price of M/s.T	Excess Expenditures
1.	Balance/Outstanding work of workshop complex	Rs.217,624.35	Rs.464,083.00	Rs.246,458.65
2.	Balance/Outstanding work of underground water Reservoir Pump House	Rs.97,285.00	Rs.273, 302.00	Rs.180,017.00
		Rs.310,909.35	Rs.737,385.00	Rs.426,475.00
Addl. Engineer Transfer				Rs. <u>24,000.00</u>
				Rs. 450,475.65

5. The Appellant in his written statement has contended that:
- (a) The work was not completed in due time due to commission and omission of the Respondent;
 - (b) Completion certificates were issued in respect of the Mill Administration Building on 6 July 1981, for the underground reservoir and pump house on 3 January 1982 and for the workshop complex on 14 January 1982;
 - (c) All works had been completed except the electric panel process and light fixtures as the necessary decision in respect of these items were not taken and intimated by the respondent to the appellant; and
 - (d) The performance bond were released by the Respondent to the Appellant unconditionally indicating that there was no loss suffered by the Appellant.
6. The following issues were framed by the court for determination:

- “ ...
- (1) Whether the defendant has sought declaration against the Plaintiff in Suit No. 67/1984 that the plaintiffs herein are not entitled to carry out/execute the balance of electrical items (i.e. Panel Board of light fixtures etc.) at the risk and costs of the defendant and an issue frame in that respect? If so, its effect?
 - (2) Whether the necessary decision were taken and communicated to the defendant regarding items of Electric Panel Board and light fixtures upto handing over of the works or end of maintenance period?
 - (3) Whether the subject works were delayed by the Defendant as alleged by the plaintiff in para No. 3 of the plaint?
 - (4) Whether the effect of the letters of the defendant dated 04-07-1981 (D-5 and D-6) on completion certificates ?
 - (5) Whether the award of the left-over work to another contractor was proper and legal and his rates reasonable?
 - (6) Whether the defendants are liable to pay the alleged claim amount of Rs. 4,50,475.65?
 - (7) Whether any cause of action arose to the Plaintiff in respect of the suit amount?
 - (8) What should the decree be?

7. The Suit was first dismissed by a Judgement dated 9 April 2005 under Order XVII Rule 3 of the Code of Civil Procedure, 1908 on account of the failure of the Respondent to adduce evidence. The Respondent No.1 preferred an appeal before IIIrd Additional District Judge Karachi (East), bearing Civil Appeal No.96 of 2005 and whereby on 31 January 2007 the IIIrd Additional District Judge Karachi (East), was pleased to set aside the Judgement dated 9 April 2005 and remanded the case to the Court of VIth Senior Civil Judge Karachi (East) with directions to that court to permit the Respondent to adduce evidence on 8 February 2007.

8. Thereafter the sequence of events is as follows:

- (i) the Respondent on 8 February 2007 appeared but no one appeared on behalf of the Appellant and the matter was adjourned to 24 February 2007 and on which date the Respondent adduced evidence inasmuch as the

examination in chief of the Appellant was recorded. The matter was then relisted on 17 March 2007 giving the Appellant an opportunity to cross examine the Respondent;

- (ii) On 17 March 2007 due to a strike called by the Karachi Bar Association the matter was once again adjourned to 7 April 2007 for an opportunity to be given to the Appellant to cross examine the Respondent;
- (iii) Thereafter on 7 April 2007, 7 May 2007, 26 May 2007, 7 July 2007, 28 July 2007, 18 August 2007, 8 September 2007, 23 November 2007, 6 December 2007, 17 January 2008, 23 February 2008 and 15 March 2008 the Appellant did not appear before the VIth Senior Civil Judge Karachi (East) and who concluded the deposition of the Respondent and listed the matter on 22 March 2008 giving the Appellant a right to adduce evidence;
- (iv) Regrettably on 22 March 2008, 25 March 2008 and 27 March 2008 the Appellant failed to appear before the VIth Senior Civil Judge Karachi (East) and due to the negligent attitude on part of the Appellant, the VIth Senior Civil Judge Karachi (East) concluded the recording of evidence and passed the Judgement dated 27 March 2008 and Decree dated 31 March 2008 in favour of the Respondent.

9. The Appellant preferred Civil Appeal No.77 of 2008 impugning the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 and which was granted by the IIIrd Additional District and Session Judge Karachi (East) on 10 December 2009 and whereby the Judgement

dated 27 March 2008, and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 was set aside with a direction to the VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 to give a final opportunity to the Appellant to cross examine the Respondent and thereafter to adduce evidence.

10. Against the Judgement dated 10 December 2009 passed by the IIIrd Additional District and Session Judge Karachi (East) in Civil Appeal No.77 of 2008 the Respondent preferred a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 before this Court bearing IInd Appeal No. 9 of 2010 and which was on 9 December 2019 allowed and whereby the Judgement dated 10 December 2009 passed by the IIIrd Additional District and Session Judge Karachi (East) in Civil Appeal No.77 of 2008 was set aside and the matter remanded back to the IIIrd Additional District and Session Judge Karachi (East) with directions to decide the same afresh after calling for the Record & Proceedings from the VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996.

11. After IInd Appeal No. 9 of 2010 was granted by this court and Civil Appeal No.77 of 2008 was remanded to the IIIrd Additional District and Session Judge Karachi (East) with the direction that the IIIrd Additional District and Session Judge Karachi (East) was to hear Civil Appeal No.77 of 2008 afresh, it was listed on 14 September 2020 when it was dismissed for non-prosecution. An application was thereafter moved under Order IX Rule 9 of the Code of Civil Procedure, 1908 for recalling the order dated 14 September 2020 and which was allowed on 4 August 2021 subject to payment of a cost and where after Civil Appeal No.77 of 2008 was heard by the IIIrd Additional District and Session Judge Karachi (East) who was pleased to dismiss the same holding that:

- (i) the Appellants had failed to attach a copy of Suit No. 687 of 1984 to their Written Statement and as the same had not been adduced by the Appellants in evidence the fact, as alleged by the Appellant that they had maintained and Suit for Declaration as against the Plaintiff bearing Suit No. 67 of 1984 praying therein that they were not obliged to “carry out/execute” the balance of electrical items (i.e. Panel Board of light fixtures etc.), remained unproved;
- (ii) that the Respondent had adduced evidence to show that decisions were taken and communicated to the Appellant regarding the responsibility of the Appellant to install the Electric Panel Board and Light Fixtures and which, on account of the Appellants having failed to cross examine the Respondent, stood proved by the Respondent;
- (iii) that the Respondent had adduced evidence to show that the Appellant had delayed in performing its obligations on time and which, on account of the Appellants having failed to cross examine the Respondent, stood proved by the Respondent;
- (iv) that the letters of completion that had been issued by the Respondent had been issued subject to the Appellant providing “as built” drawings to the Respondent and should be treated as “conditional” and as such the letters dated 4 July 1981 issued by the Appellant could not be treated as a final endorsement to the fact that they had completed the works assigned to them under the Contract;

- (v) that as the Appellants had refused to perform their obligations under the Contract, the Respondent was left with no other option but to engage a new contractor to complete the works and which resulted in losses being suffered by the Appellant to the amount of Rs. 450,475.65.

12. That being aggrieved and dissatisfied with the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, upholding the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996 the Appellants have preferred this Second Appeal. Mr. Adnan Ahmed appearing on behalf of the Appellants has alleged that the Respondent should have been granted permission to adduce evidence so that the matter could be decided on merit. The Appellants contend that even if the matter is examined on the basis of the documents on record the IXth Additional District & Sessions Judge (MCAC) Karachi (East) in the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by in Civil Appeal No. 77 of 2008 and the VIth Senior Civil Judge Karachi (East) in the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed in Civil Suit No.1480 of 1996 have misinterpreted the evidence adduced and the on that basis alone the II Appeal should be granted. The Counsel for the Appellant did not rely on any case law in support of his contentions.

13. I have heard the Counsel for the Appellant and have perused the record. The following points fall to be determined in this Second Appeal.:

- (i) Whether the trial Court had correctly barred the appellant from cross examining the respondent and adducing evidence?

- (ii) Whether the Appellant had breached his obligations to the Respondent under the contract?
- (iii) Whether the Respondent is entitled for damages of Rs.450,475/- along with markup from the date of filing the suit till realization?

A. WHETHER THE TRIAL COURT HAD CORRECTLY BARRED THE APPELLANT FROM CROSS EXAMINING THE RESPONDENT AND ADDUCING EVIDENCE?

14. It has come on record that the Appellant had first impugned the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 by filing Civil Appeal No.77 of 2008 and which was granted by the IIIrd Additional District and Session Judge Karachi (East) on 10 December 2009 and whereby the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 was set aside with a direction to the VIth Senior Civil Judge Karachi East in Civil Suit No.1480 of 1996 to give a final opportunity to the Appellant to cross examine the Respondent and thereafter to adduce evidence.

15. Against the Judgement dated 10 December 2009 passed by the IIIrd Additional District and Session Judge Karachi (East) in Civil Appeal No.77 of 2008, the Respondent preferred a Second Appeal under Section 100 of the Code of Civil Procedure, 1908 before this Court bearing IInd Appeal No. 9 of 2010 and which was on 9 December 2019 allowed and whereby the Judgement dated 10 December 2009 passed by the IIIrd Additional District and Session Judge Karachi (East) in Civil Appeal No.77 of 2008 was set aside and the matter remanded back to the IIIrd Additional District and Session Judge Karachi (East) with directions to decide the same afresh after calling for the Record & Proceedings of Civil

Suit No.1480 of 1996 from the VIth Senior Civil Judge Karachi (East). The right of the Appellant to adduce evidence having been successfully assailed by the Respondent in IInd Appeal No. 9 of 2010 and against which no appeal was apparently preferred by the Appellant to the Supreme Court of Pakistan would to my mind, once and for all, decide the issue as to whether or not the Appellant can adduce evidence in Civil Suit No.1480 of 1996. The issue having been decided by this Court in IInd Appeal No. 9 of 2010, I bound by law not to sit in appeal over the Judgment dated 9 December 2019 passed in IInd Appeal No. 9 of 2010. I am therefore of the opinion that this issue as to whether the Appellant should have a right to adduce evidence in Civil Suit No.1480 of 1996 has already been decided in IInd Appeal No. 9 of 2010 and that the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008 cannot be assailed on this ground in this appeal.

B. WHETHER THE APPELLANT HAD BREACHED HIS OBLIGATIONS TO THE RESPONDENT UNDER THE CONTRACT?

16. The Respondent has adduced evidence in support of its contentions as to the existence and terms of the Contract for works that had to be performed by the Appellant. It has also come on record that there were numerous delays caused by the Appellant in regard to the performance of its obligation under the contract which were that:

- (i) the Appellants initially failed to submit a performance bond in accordance with the tender that had been issued by the Respondent. The Performance Bond that was supplied were as such returned to the Appellant by the Respondent on 6 February 1979 and which were resubmitted by the Appellant

to the Respondent on 19 February 1979 duly corrected and which were accepted by the Respondent on 24 February 1979 leading to a delay in the execution of the obligations on the part of the Appellant under the contract;

- (ii) the Appellant did not complete the works within the time specified for each of such work on account of a shortage of labour, material, equipment's and general slackness on the part of the Appellant, and which were not rectified by the Appellant leading to delays in completion of works;
- (iii) the certificate issued by the Engineer "Substantial Completion Certificate" identified therein a list of incomplete/outstanding works which remained to be completed by the Appellant within the specified period under the Contract and which included the installation of an electric panel board and of light fixtures in the workshop complex which works remained outstanding and were never performed by the Appellant.
- (iv) Certain completion drawings that had to be provided by the Appellant to the Respondent were submitted on 15 December 1981 and found not to be in conformity with the works carried out and returned to the Appellant.
- (v) In respect of the distribution of load through a distribution box in the Workshop Complex were also found to be inadequate and the Appellant who was again requested to rectify panels located in the Distribution Board by the Engineer on 31 January 1982 and again on 9 March 1982.

17. Finally, the Respondent had adduced evidence that on account of the Appellants refusal to execute the remaining work the respondent had suffered losses as under:

S.NO.	Name of Work	Original Rate of M/s. Al Waqar Crop	Lowest bid Price of M/s.T	Excess Expenditures
1.	Balance/Outstanding work of workshop complex	Rs.217,624.35	Rs.464,083.00	Rs.246,458.65
2.	Balance/Outstanding work of underground water Reservoir Pump House	Rs.97,285.00	Rs.273,302.00	Rs.180,017.00
Addl. Engineer Transfer		Rs.310,909.35	Rs.737,385.00	Rs.426,475.00 Rs. <u>24,000.00</u> Rs. 450,475.65

18. Each of the contentions of the Respondent remained unrebutted by the Appellant as they failed to adduce evidence in Civil Suit No.1480 of 1996. In addition the various pleas that were raised by the Appellant in their defence that:

- (a) they had instituted Suit No. 67 of 1984 seeking a declaration that they were not obliged to complete the balance works;
- (b) the work was not completed in due time due to commission and omission of the respondent;
- (c) the completion certificate that was issued by the Respondent in respect of Mill Administration Building on 6 July 1981, for underground reservoir and pump house on 3 January 1982 and for workshop complex on 14 January 1982 amounted to a tacit acceptance on the part of the Respondent that there was no default on the part of the Appellants on their obligations under the Contract;
- (d) all the works had been completed except the electric panel process and light fixtures as the necessary decision in

respect of these items were not taken and intimated by the respondent to the appellant.

- (e) the performance bond were released by the Respondent to the Appellant unconditionally indicating that there was no loss suffered by the Appellant.

Each remained unproved as the Appellants failed to adduce any evidence to rebut the contentions of the Respondents or to assert their contentions. In the judgment reported as **Nasir Ali vs. Muhammad Asghar**¹ the Supreme Court of Pakistan has held that:²

“ ... According to the article 117 of the Qanun e Shahdat Order, 1984, if any person desires a court to give Judgement as to any legal right or liability, depending on the existence of facts which he asserts, he must prove that those facts exist and burden of proof lies on him. The terminology and turn of phrased “burden of proof” entails the burden of substantiating a case. The meaning of “onus probandi” is that if no evidence is produced by the party on whom the burden is cast, then such issue must be found against him.”

It is clear that faced with the fact that the Appellant had failed either to cross examine the Respondent or to adduce evidence of its own in support of its own contentions would result in the Appellant failing to discharge the burden of proof that was cast upon it under Article 117 of the Qanun e Shahdat Order, 1984. Consequentially, I am of the opinion that both the IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, and the VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996 had correctly held that the Respondents have adduced evidence to show the existence of a contract as between the Appellant and the Respondent and the breach of such contract by the Appellant and which evidence went rebutted on account of the Appellant having failed to either cross examine the Respondent or to adduce evidence of its own and which would result in the contention of the Respondent as having being proved by it. I am therefore inclined to hold

¹ 2022 SCMR 1054

² *Ibid* at pg. 1060

that on the evidence adduced the Appellant had breached its obligations to the Respondent under the contract and uphold the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, and the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996 on this issue.

C. WHETHER THE RESPONDENTS ARE ENTITLED FOR DAMAGES OF RS.450,475/- ALONG WITH MARKUP FROM THE DATE OF FILING THE SUIT TILL REALIZATION?

19. After having clarified that the Appellant had breached the contract, the burden of proving the damages suffered by the Respondent also vests on it. In the judgment of the Supreme Court of Pakistan reported as *Azizullah Shaikh vs. Standard Chartered Bank Limited*³ it was held that:⁴

“ ... In view whereof, the learned counsel for the petitioners is right in submitting that the petitioners have been able to prove breach of contract but that is not enough to award claimed damages to the petitioners. Undoubtedly, the petitioners filed the suit claiming damages while relying on the provisions of section 73 of the Contract Act. Under section 73 of the Contract Act, the party claiming damages has to firstly plead and then prove by sufficient, trustworthy, independent and cogent evidence that the concluded agreement existed between the parties, the other party committed breach of contract, such breach entitles the first party to damages and the foremost factor is quantum of damages.”

The Respondent has stated that, on account of the Appellant having failed to perform its obligations under the contract, they had been compelled to engage another company to complete the work and which made them incur an additional cost of Rs.450,475 (Rupees Four Hundred and Fifty Thousand Four Hundred and Seventy Five). Having given a complete breakdown of the statement and which had been adduced unrebutted, on

³ 2009 SCMR 276

⁴ *Ibid* at pg. 279

account of the Appellant having failed to either cross examine the Respondent or to adduce evidence of its own, would result in the contentions of the Respondent as towards the loss suffered by them as having being proved by it. I am therefore inclined to hold that on the evidence adduced, the Appellant is liable to pay to the Respondent a sum of Rs.450,475 (Rupees Four Hundred and Fifty Thousand Four Hundred and Seventy Five) with mark up at the rate of 14% per anum per anum as held in the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996, and as upheld by the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, upholding the whereby Civil Suit No.1480 of 1996.

20. For the foregoing reasons I find there to be no illegality or infirmity in either the Judgement dated 18 October 2021 and Decree dated 23 October 2021 passed by IXth Additional District & Sessions Judge (MCAC) Karachi (East) in Civil Appeal No. 77 of 2008, or in the Judgement dated 27 March 2008 and Decree dated 31 March 2008 passed by VIth Senior Civil Judge Karachi (East) in Civil Suit No.1480 of 1996 which are upheld and for which reason I had dismissed this Second Appeal on 28 April 2023 and these are the reasons for that order.

JUDGE