IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.997 of 2007

Mst. Bano Hasham and Others v. New Jubilee Insurance Company Ltd.

Plaintiff	:	Mst. Bano Hasham Allibhai and Others through Usman Tufail Shaikh. Advocate
Defendant	:	New Jubilee Insurance Company Ltd. Through Khawaja Aizar Ahsan, Shaheer Roshan Shaikh & Sami ur Rehman, Advocates
Dates of Hearing	**:**	23.08.2023, 25.08.2023, 08.09.2023, 20.09.2023, and 27.09.2023
Date of Decision	**:**	13.10.2023

J U D G M E N T

Jawad Akbar Sarwana, J.: This dispute between the parties had its genesis 53 years ago. The first round of litigation began 45 years ago, in 1978 and ended on 20.12.2005, at the appellate stage, in favour of the now deceased Plaintiff, Hasham Allibhai, as an Intervenor (Defendant No.10)/Plaintiff/Respondent, acquiring 92,800 shares of Defendant Company and bonus shares arising from the said initial shareholding as well as dividends accrued thereon. The current suit is the second round of litigation, which began in June 2007. In the second round (current litigation), Plaintiff has alleged that Defendant Company deprived him of the markup and profit earned on the unpaid dividends retained by the Company from 1970 up to the date of filing of the Suit in July 2007 hence this Suit. The Plaintiff has prayed for the following reliefs:

(i) Pass judgment and decree against the Defendant in a sum of Rs.334,689,495/- being the equalizer / interest on the dividend income retained by the Defendant

as Plaintiff's trustee and utilized by the Defendant for its own financial needs;

(ii) Award further interest on the suit amount at the rate of 14% per annum from the date of filing this suit till its disposal; and,

(iii) Any further and better relief that this Hon'ble Court may deem just and necessary.

(iv) Costs of the suit.

2. On 12.08.2010, Hasham Allibhai passed away. On 31.05.2011, the Plaintiff's legal heirs filed CMA No.7438/2011, attaching a copy of the amended title of the Plaint (available on page 25A of Part-III of the Suit file). Pursuant to the Court's Order dated 19.08.2013, Plaintiff's legal heirs, the surviving widow, Mst. Banoo Hasham and the deceased three sons, Shahid H. Allibhai, Zaki Alias Tariq H. Allibhai, and Arshad H. Allibhai, were brought on record. However, the Office (O.S.-II) did not place the Amended Title of the Plaint in its proper place in the suit file. For convenience, reference in this Judgment to the Plaintiff and/or to his legal heirs shall be made by reference to the Plaintiff, simpliciter, or in the alternative Hasham Allibhai.

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3. The brief facts of the case are that Plaintiff, in the early seventies, through his friend, Late Aziz Fancy, purchased 92,800 shares of Defendant Company. Of these 92,800 shares, 22,000 were purchased from Jubilee Insurance Kenya, a company incorporated in Kenya, and 70,800 shares from EWI International, a company incorporated in Switzerland. The 22,000 shares were purchased directly from the Kenyan Company and 70,800 shares were purchased through Plaintiff's above-mentioned friend, Late Aziz Fancy. Both these sets of shares were kept with Aziz Fancy as he was to facilitate their transfer in Plaintiff's name in the records of the Defendant Company. While the shares in question were still lying in trust with Aziz Fancy, he suddenly died in the year 1973. Thereafter, the shares fell into the hands of one Naushad Fancy, the nephew of Late Aziz Fancy. Through his bankers,

Naushad Fancy lodged these shares for transfer, but the Defendant Company refused to transfer the same.

4. In 1978, Naushad Fancy instituted in this Court Suit No.572/1978 seeking declaration and mandatory injunction in respect of the transfer of the 92,800 shares in his name (hereinafter referred to as the “disputed shares”) against the Defendant Company and others. On 26.07.1978, this Court passed ex-parte ad-interim Order on CMA No.2762/1978 whereby the Defendant Company was restrained from paying/disbursing/passing on dividend and interest thereon and any accrual thereafter on the disputed shares (Ex. No. “D/10”). When Plaintiff came to know of Suit No.572/1978 in the year 1984, he filed an application to become a party in the said suit as Defendant No.10, which application was allowed.

5. During the pendency of Naushad Fancy’s Suit 572/1978, Plaintiff instituted Suit No.472/1993 seeking delivery and possession of the disputed shares from the Defendant Company. The Plaintiff prayed as follows in Suit No.472/1993:

(i) A decree against all the defendants for delivery of possession of the said 92,800 shares and bonus shares declared in respect of the same;

(ii) In the alternative decree directing Defendant No.1 to cancel scrips or certificates of said shares and to issue duplicate of the same in the name of Plaintiff;

(iii) Mandatory injunction directing the Defendant No.1 to effect transfer and registration of the said 92,800 shares in the name of the Plaintiffs;;

(iv) A decree against Defendant No.1 to render complete account of bonus vouchers and dividends declared in respect of the 92,800 shares since 1970 and to delivery/pay the same to Plaintiff;

(v) A decree for delivery by Defendant No.1 of 21,33,965 Bonus Shares issued in tespect of the said 92,800 shared since 1970;

(vi) A decree for payment by Defendant No.1 of Rs,1,19,54,208/- on account of dividends accrued on 92,800 shares;

(vii) In the alternative a decree for Rs.8,09,83,923 against Defendant Nos.1 &3 jointly and severally, with interest/markup at 22% per annum from date of suit till payment;

(viii) Costs of the suit;

(ix) Give and grant such other or further relief or reliefs as may be deemed fit and proper in the facts and circumstances of the case."

6. As the title/ownership in the disputed shares were the subject matter in both Suit No.572/1978 and Suit No.472/1993, this Court, on 06.12.1995, stayed proceedings in Suit 472/1993. Ultimately, the two Suits were decided together vide Judgment and Decree dated 07.08.2003 (Ex. Nos."P/2" and "P/3"). The Court declared that Plaintiff was entitled to the transfer in his favor of the said disputed shares, i.e. 92,800 shares of New Jubilee Insurance Co. Ltd., together with all accruing benefits, dividends, etc., disbursed by Defendant No.1 for the entire period since 1970.

7. Plaintiff Hasham Allibhai accepted the Judgment and Decree. He did not prefer any appeal against the said Judgment and Decree dated 07.08.2003. He appeared to accept the Judgment and Decree dated 07.08.2003 when he did not file any appeal.

8. On the other hand, Naushad Shamsuddin Fancy, preferred High Court Appeal No.183/2003 against the said Judgment and Decree dated 07.08.2003 against Plaintiff (Respondent No.1), the Defendant Company (Respondent No.2) and others. Other members of the Fancy family also filed appeals. Unlike the Plaintiff who did not file any appeal,

all the members of the Fancy family were unhappy with the Judgment and Decree passed by the trial court and filed appeals.

9. On 19.12.2005, the Appellant and Respondent Nos.1, 5 and 6 in person and their Advocates signed and filed CMA No.1912/2005 under Order 23 Rule 3 CPC read with Section 151 CPC. Respondent No.2 (the Defendant Company) did not sign the said CMA No.1912/2005. The relevant paragraphs of CMA No.1912/2005 (Ex. No."D/8" on pages 517 to 529 of the evidence file) concerning references to Defendant (Respondent No.2) are reproduced herein below:

> "3. (a) The Respondent No.2 be directed to transfer all the aforesaid shares above with bonus shares/dividends and ash dividends specified in paragraph 5(b) to the parties in the proportion specified herein above against their respective names mentioned at paragraph 2(a) to (d) above within 60 days of the date of orders on this application. Such transfer of shares should be inclusive of all bonus shares and dividends upto date.
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> 3 (b) Nothing stated herein shall preclude the parties from claiming interest on the accrued and outstanding cash dividends from New Jubilee Insurance Company Ltd. if they are entitled to the same under law. Any action for recovery of interest shall be at their respective cost and expenses.
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> . . .
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> 5. (c) Respondent No.2 New Jubiless Insurance Company Ltd. be directed to comply with the paragraphs 2, 3, 4 and 5 of this compromise application under intimation to this Hon'ble Court."

10. As mentioned earlier, Defendant (Respondent No.2) was not a signatory to CMA No.1912/2005. Defendant (Respondent No.2) did not accept the compromise agreement and filed a Statement dated 19.11.2005 through their counsel, Mr. Badar Vellani in HCA

No.183/2003 (Ex. No.“D/9”). Clauses 2(e) and 4 of the said Statement read as follows:

> “2. While the Respondent No.2 is ready to abide by any directions given by this Hon’ble Court in regard to the registration of the disputed shares in the names of the Appellant and the concerned Respondents, it is most respectfully submitted that in order for the Respondent No.2 to comply with such directions certain procedures and requirements of various applicable laws including the Companies Ordinance, 1984, the Foreign Exchange Regulation Act, 1947 and the Articles of Association of the Respondent No.2 would have to be complied with. In this connection, it is respectfully further submitted that:
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> (a) . . .
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> (b) . . .
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> (c) . . .
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> (d) . . .
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> (e) It is submitted that under the Articles of Association of the Respondent No.2 no interest may be claimed from the Respondent No.2 Company in respect of any unclaimed dividends and in the circumstances of the present case there is no basis for the payment of any such interest. It is also submitted that there is no basis for any interest being claimed from the Respondent No.2 in respect of dividends already paid out. It is respectfully submitted that the Respondent No.2 cannot and does not accept or agree with the provisions of paragraph 3(b) of the proposed compromise application.
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> (f) . . .
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> (g) . . .
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> 3. . . .
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> 4. It is submitted that the Respondent No.2 is not a party to and will not become a party to the proposed compromise application nor is the Respondent No.2 in any position to accept the obligations which the Appellent and Respondent Nos. 1, 5 and 6 are attempting to thrust on the Respondent No.2. Further the Respondent No.2 denies that it is liable to pay any interest on any amount of dividend whether already

> paid or remaining to be paid with respect to the disputed shares or any part thereof. It is further submitted that the Respondent No.2 cannot accept any responsibility or liability in regard to the distribution of its shares and entitlements to bonus and dividend in respect of such shares amongst its shareholder or their heirs or the other parties to the appeals.
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> Karachi dated this 20th day of December 2005
>
> Advocate for the Respondent No.2."

11. On 20.12.2005, the Court took up CMA No.1912/2005 with Counsels for Appellant and Respondents present. Respondent No.2 Counsel, Mr. Badar Vellani, Advocate, was also present in Court on the said date of hearing. The learned Division Bench passed the Final Order on 20.12.2005 (Ex. No. "D/7"). A selection of relevant clauses from the Final Order of 20.12.2005 are reproduced below.

> " Defendant No.1 in Suit No.572/1978 and Defendant No.3 in the Suit No.472/1993 held the original shares of New Jubiless Insurance Company in trust for the beneficiaries. The trustee company , in para 3 of the Written Statement had acknowledged the holding of such shares in trust subject to the decision of this Court. It is also admitted position that New Jubilee Insurance Company, is holding all the bonus shares and dividends declared on the original shares.
>
> . . .Likewise New Jubilee Insurance Company shall also hand over to the Nazir of this Court, all the bonus shares and dividends held by it. Let such exercise be carried out...
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> . . .
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> Mr. Badaruddin Vellani learned counsel appearing for respondent No.2 (New Jubilee Insurance Company) has filed a Statement to the effect that respondent No.2 is committed to honour the terms of the compromise. It is however, submitted that in order to avoid any controversy as to the availability/non-availability of any party to the compromise to sign transfer deeds or like documents.

> Mr. Badar, further request that to facilitate New Jubilee Insurance Company to implement the negotiated settlement Nazir may be authorized to sign all the transfer deeds and/or any other transfer documents, acknowledgement and discharge for and on behalf of the respective parties to the extent and in the manner agreed in the compromise application. None of the parties have any objection to such request, order accordingly.
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> In order to facilitate the implementation of the compromise by consent, learned Commissioner Mr, Justice (Rtd) G.H. Malik is authorized to convey the compromise executed by and between the parties to Nos.2 and 3 namely, New Jubilee Insurance Company Ltd. and M/s East West International Trade Establishment respectively. Learned Commissioner may direct them to transmit, convey, and surrender the original shares, bonus shares, dividend held by them respectively to the Nazir of this Court and to direct them to comply with the directions of this Court.
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> . . .
>
> In view of the settlement arrived at between the parties and as recorded in the application under Order 23 Rule 3 CPC filed in High Court Appeals Nos.183 and 184 of 2003, H.C.A. No. 174, 175, 179. . .of 2003 [all] stand disposed off in terms of the compromise and decrees prepared accordingly.
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> Sd.= Mushir Alam
> Judge
>
> Sd= S. Zawar Hussain Jafri
> Judge"

12. Although the Final Order dated 20.12.2005 directed the office to prepare decrees in terms of the compromise, none were prepared. Nevertheless, the Commissioner and Nazir, acting upon the terms of the compromise agreement, paid out the dividend to the Plaintiff in terms of the compromise and did not make any payment of the profit accrued on unpaid dividends retained by the Defendant Company as the same was agreed by the parties to the suit to be agitated as a separate cause of action, in future, hence the present suit.

13. Defendant Company filed its Written Statement on 26.03.2008. Defendant claimed that Plaintiff became a shareholder of the Defendant Company with effect from 07.06.2007 when certain shares were registered in his name pursuant to the Order of this Court dated 20.12.2005 passed in the aforementioned High Court Appeal. The Defendant contended that it was not a party to the Compromise application and had recorded its objections to the compromise vide the Statement filed in Court. Defendant further contended that Defendant retained the bonus shares and dividends in compliance with the Order dated 26.07.1978 restraining Defendant from making any payments. The Defendant Company submitted that it withheld the payments as trustees for the persons who eventually would become the registered holders of the shares in dispute between the parties. Therefore, the Defendant Company was not liable for any payment due and payable during this period on account of the Court's Order. Defendant Company further submitted that Article 117 of the Articles of Association of the Defendant Company prohibited payment of interest on dividends. Defendant claimed that at all material times, Plaintiff knew that Defendant was not liable to and would not pay any interest on the unclaimed dividend, and this fact was accepted by Plaintiff when he consented to the order dated 20.12.2005. Defendant denied that it was obligated, required, or directed to invest the amount of unclaimed dividends which had accumulated in respect of Plaintiff's shares in the Defendant Company.

14. On 26.04.2008, the Defendant Company, filed an application under Order 7 Rule 11 CPC (CMA No.4052/2008), which remained pending in Court until 14.09.2015. On the said date, Defendant Counsel submitted that he did not press the said application as he intended to propose issues which may cover the grounds taken in the application under Order 7 Rule 11 CPC.

15. With the consent of the learned Counsels for the parties, the Court settled the following issues on 09.11.2015:

(i) Whether this suit is maintainable?

(ii) Is the Defendant liable to pay any interest on the dividends relating to the disputed shares?

(iii) Whether the Defendant Company owed any fiduciary duty, or was required to exercise, any duty of care towards the Plaintiff as a trustee with regards to investing the amount of unclaimed dividends relating to the disputed shares?

(iv) Whether the bonus shares and dividend accrued in respect of the Plaintiff's 92800 shares during the period from 1970 to 31.12.2005 can be termed as unclaimed bonus shares and dividend, if not, its effect.

(v) What should the decree be?

16. On 06.10.2016, the Court appointed a Commissioner for Recording of Evidence. On 20.06.2017, Bano Hasham Allibhai, wife of Plaintiff (84 years old), appeared as a witness of the Plaintiff. She filed her affidavit-in-evidence and was cross-examined on 20.06.2017 and 21.06.2017. Plaintiff's witness exhibited the following documents:

i. Ex. No."P/1". Affidavit in Evidence;

ii. Ex. No."P/2". Amended Plaint in Suit No. 997 of 2007;

iii. Ex. Nos."P/3" and "P/4". Judgment and Decree in Suit No. 572/1978 and Suit No.472/1993;

iv. Ex. No."P/5". Statement filed by Defendant in Suit No. 572 / 1978 & Suit 472/1993; and

v. Ex. No."P/6". Compromise Application along with order dated: 23.12.2005, passed in HCA Nos. 183 & 184/2003.

17. Nawaid Jamal, Executive Vice President and attorney of the Defendant Company, filed his affidavit-in-evidence on 18.11.2017 and was cross-examined on 04.08.2018, 01.09.2018 and 10.09.2018. He exhibited the following documents:

i. Affidavit in Evidence exhibited as Ex."D/1"

ii. Power of Attorney exhibited (subject to original) as Ex.“D/2”

iii. Written Statement exhibited as Ex.“D/3”

iv. Memorandum and Articles of Association dated 16.05.1953 exhibited as Ex.“D/4”

v. Articles of Association dated 21.06.1986 exhibited as Ex.“D/5”

vi. Articles of Association dated 27.04.2007 exhibited as Ex.“D/6”

vii. Copy of the Order dated 20.12.2005 exhibited as Ex.“D/7”

viii. Copy of the Judgment passed in Suit No.572/78 & 472/93 exhibited as Ex.“D/8”

ix. Copy of the Statement filed in HCA No.183/03 exhibited as Ex.“D/9”

x. Copy of the Order dated 26.07.1978 passed in Suit No.572/78 exhibited as Ex.”D/10”

xi. Copy of an Article of Association (undated) exhibited as Annexure “X”.

18. The Commissioner’s Report dated 17.10.2018 was taken on record on 26.10.2018 and the suit became ripe for final arguments.

19. During arguments, learned counsel for Plaintiff submitted that Plaintiff’s evidence was unshaken, as the witness had proved that during the pendency of the first round of litigation, which lasted about four decades, the Defendant Company had fully enjoyed the cash dividend, as per the Statement of Dividend accrued on the shares, produced by Plaintiff’s Witness marked as Ex. No. “P/5” which was neither denied by Defendant in its Written Statement nor during Pliantiff’s cross-examination. The Statement was unrebutted. He contended that once the amount mentioned in the statement became established, the Company was liable to pay interest on the profit on dividends retained by Defendant Company as a trustee, part of its fiduciary duty to Plaintiff, and on the basis of unjust enrichment.

20. The Defendant's Counsel opposed the Plaintiff's claim. He argued that Plaintiff's claim was hit by Order 2 Rule 2 CPC, and the entire suit was liable to be dismissed, which was not maintainable. He contended that no case for interest on dividends could be made out as the same was contrary to the provisions of the Company law, the charter documents of Defendant Company and no case for either a trust, fiduciary duty or unjust enrichment was made out by Plaintiff. He submitted that the suit should be dismissed and cited several authorities in support of his contentions.

21. I have heard the learned Counsels for parties, read the evidence available on the record, considered the applicable law, and my findings on the above issues, along with reasons, are as follows:

REASONS

Issue No.(i)

22. This issue as to the maintainability of the suit was vigorously argued by the Plaintiff's Counsel and was premised on the ground that the dispute between parties in the titled suit has its genesis in Suit No. 572 of 1978, which was filed by Mr. Naushad Fancy, *inter alia*, against Defendant. The claim in the suit was in relation to shares of the Defendant company, with Mr. Naushad Fancy claiming title to 92,800 disputed shares.

23. The present Plaintiff, Mr. Hasham Allibhai, was impleaded as a party in Suit No. 572 of 1978 in 1984.[1] Thereafter, Plaintiff filed a counter-suit, i.e. Suit No. 472 of 1993. Through Suit No.472 of 1993, Plaintiff alleged that the disputed shares (92,800) and dividends issued thereon belonged to him. The Plaintiff did not seek any interest on dividend in the said Suit. Paragraph 8 of the plaint in Suit No. 472 of 1993 specified the claim in respect of dividends on the disputed shares. It stated that the amount of dividends was Rs.11,954,208. The figure

[1] As per Paragraph No.5 of Judgment dated 07.08.2003 passed in Suit No. 572 of 1978

provided by Mr. Hasham Allibhai in Suit No.472 of 1993 in Paragraph 8 of the plaint in Prayer (vi) also sought:

> *"(vi) A decree for payment by Defendant No.1 of Rs. 1,19,54,208 on account of dividends accrue on 92800 shares;"*

24. As evidenced by the contents of the plaint, no relief was sought by Plaintiff against Defendant company in respect of any profit accumulating on unpaid dividends. Accordingly, the learned Single Judge did not grant any relief in relation to interest on unpaid dividends. By Judgment dated 07.08.2003, the learned Single Judge decreed Suit No.472 of 1993 in favour of Plaintiff in the following terms:

> *"71. In view of my findings of the above Issues, I hold that defendant No. 10 is entitled to the transfer of the said disputed shares in his favour together with all accrued benefits, dividends, etc. disbursed by defendant no.1 for the entire period. Accordingly, Suit No. 572/78 is dismissed and Suit No.472/1993 is decreed in favour of the Plaintiff with cost*."

25. Mr. Naushad Fancy filed HCA No. 183 of 2003 against Judgment dated 07.08.2003, whereas Plaintiff did not file any appeal. Thereafter, an application under Order XXIII Rule 3 was filed to give effect to a compromise entered between Mr. Naushad Fancy (Appellant), Mr. Hasham Allibhai (Respondent No.1), Mr. Ismat Fancy (Respondent No.5), and Mr. Shaukat Fancy (Respondent No.6). On 20.12.2005, parties accepted the compromise recorded by the Appellate Court in terms thereof. Whereas the Judgment and Decree of the trial Court awarded all the 92,800 shares to Plaintiff, as per Paragraph 2 of the compromise application, the disputed shares were divided between the parties in the following proportion:

Hasham Allibhai	50%[2]
Naushad Fancy	20%
Ismat Fancy	20%

[2] As per this application, Plaintiff's interest in the shares was reduced from 92,800 to 46,400 shares.

Shaukat Fancy 10%

26. Additionally, Paragraph 3 (a) of the Compromise Application then further required Defendant Company to transfer the dividends and bonus shares to the parties in the above-mentioned specified proportion and Paragraph 3 (b) of the Compromise Application stated that parties may file a claim for recovery of profit on unpaid dividends earned by the Defendant Company.

27. The Compromise Application was not signed by the Defendant Company, instead the latter filed a statement wherein in Paragraph 2 (e), Defendant Company specifically stated that the Articles of Association bar the company from paying any interest on dividends. Defendant Counsel contended that the compromise application disclosed two separate admissions on the part of Plaintiff: (1) that no claim for interest with reference to dividends was ever made by parties in the earlier round of litigation, and (2) this Court granted no interest in respect of dividends in the first round; hence none could be agitated at the appellate stage.

28. Defendant Counsel argued that this was also admitted in the cross-examination of Plaintiff's witness on 20.06.2017:

> '*It is correct to suggest that there is no mention of the transfer of any interest of the dividends in the order dated 20-12-2005.*'

29. He further cited Paragraph 15 of the Plaint in Suit No.997 of 2007, which stated that the cause of action arose as follows:

> "*The cause of action accrued to the Plaintiff on 20.12.2005 when the controversy as to the ownership of the shares came to an end in High Court Appeal No. 183 of 2003…*'

30. Defendant's Counsel's main contention as to maintainability rested on the provisions of Order II Rule 2 CPC which is reproduced herein below.

> ***"2. Suit to include the whole claim.***
>
> *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.*
>
> *(2) Relinquishment of part of claim. Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such relief, he shall not afterwards sue for any relief so omitted.*

31. Defendant's Counsel argued that Plaintiff, through the titled suit, had sought interest on dividends for the exact duration of the earlier proceedings, i.e. the time taken for the determination of the ownership of the disputed shares by this Court. He contended that the evidence file of the titled suit disclosed that the documentary and oral evidence relied upon by both parties was only in relation to the previous litigation. The parties had introduced no fresh documentary or oral evidence. He submitted that the present suit is an extricable part of the earlier litigation. It is a part of the same continuous transaction. The same evidence would have sustained both, Suit No. 472 of 1993 and the titled suit. He submitted that Plaintiff was under a duty to claim all reliefs in relation to the dividends during the first round of litigation. The Plaintiff had abandoned the relief for interest on dividends when he neither pleaded nor prayed for the same in Suit No.472/1993. Therefore, the claim made in the present suit was hit by Order II Rule 2. He argued that Plaintiff's action was nothing but a belated attempt to seek relief which

was expressly left out or relinquished during the earlier litigation. He submitted that Plaintiff's failure to sue in respect of interest on unpaid dividends through Suit No. 472 of 1993 had resulted in such claim now being barred under Order II Rule 2.[3]

32. Plaintiff's Counsel argued that the cause of action was not available in the prior suits as the said suit was instituted to the extent of declaration of ownership of the disputed shares. The dividends, bonus shares, etc., announced by the Company were in respect of undisclosed members of the Defendant Company in whose names the shares of the company were yet to be registered. As such, the names of neither Plaintiff's predecessor nor Plaintiff were registered with the unpaid shares until the passing of the Appellate Compromise Order dated 20.12,2005. After the shares were allocated to the new members as per the compromise agreement, the parties acquired a title in the disputed shares by way of a Court Order as per the Articles of Association of the Defendant Company and the unpaid dividends stood confirmed allocated to the new members hence a fresh cause of action accrued to the Plaintiff. The Plaintiff cited two judgments in support of these contentions. Firstly, he relied on *Muhammad Rashid Ahmed v. Muhammad Siddique*, 2002 SCMR 300 at page 302, Para No. 5:

> ". . .It is well settled law that the suit under Order II Rule 2 CPC would be barred only if in a previous suit a relief which was available in relation to cause of action stated in the said suit but was not claimed. It is an admitted fact that the previous suit was not filed on the basis of the same cause of action, therefore, there was no question of application of Order II Rule 2 CPC. The Learned Council has not placed on record the copy of the plaint of the previous suit. . . . "

[3] Defendant's Counsel relied on the case of *National Bank of Pakistan v. Hashim Khan*[3] wherein the plaintiff first filed a suit for recovery against the bank. After withdrawing the suit, the plaintiff, through a fresh suit, claimed amount by way of damages and compensation with interest. Upon an examination of facts and the caselaw under Order II Rule 2, the Balochistan High Court held:

> *"Since originally neither compensation or interest was claimed, nor while making settlement any such demand was put-forth, therefore, subsequent suit for compensation regarding blockade of money or interest pertaining to original amount is patently ill-founded*."

33. Secondly, he further relied on another case: Muhammad *Tahir v. Abdul Latif and 5 Others*, 1990 SCMR 751. Here, three suits were instituted. The first suit was dismissed, and the second suit was allowed, whereas the third suit was instituted by the same Plaintiff who had filed the two earlier suits. In paragraph 15 on page 757, the Supreme Court observed as follows:

> "In the third suit instituted by the appellant, certain new facts had come into existence. One fact was that. . .Secondly,. . .These two facts clearly could not be and were not the subject matter of the civil suit instituted on. . .Therefore, the institution of the third suit while the first was pending, on fresh grounds that became available during the pendency of that suit and continues of the second even after the dismissal of the first suit under Order IX Rule 8 CPC could not on any ground be objected.
>
> The causes of action were different, the occasions when the causes of action arose were different and the High Court recognized this difference by saying that the plaintiff ought to have amended the plaint and incorporated the subsequent causes of action and the relief in the first suit. That was at best an option open to the plaintiff. He could not, however, be penalized for not availing of it and adopting the other course of restricting in the third suit the controversy to the causes of action which had arisen after the institution of the first suit."

34. Plaintiff Counsel further submitted that Defendant Company's Counsel, Mr. Badar Vellani, had consented to Paragraph 3(b) of the Compromise Agreement. Mr. Vellani's concession was binding on the Defendant Company as he did not make his acceptance to the compromise agreement on behalf of the Defendant Company subject to the parties' relinquishment of the claim for interest on dividends. Plaintiff's Counsel relied on the express consent given to Plaintiff to pursue his claim against the Defendant Company as per the Defendant Company's Counsel. Plaintiff's Counsel argued that when he put the question to Defendant Company's witness if the company was a party to the compromise agreement through their Counsel, the witness did not expressly deny Plaintiff's assertions.

> "Q5. In para No. 5 of the affidavit-in-evidence you have stated that the defendant is not party whereas per the order passed on 20-12-2005 your counsel has consented to the application for compromise moved in the HC in Appeal No. 183, 184/2003?
>
> Ans: The defendant is not the part to the compromise application under C.M.A. No. 1912/2005."

In light of the evasive reply of Defendant Company's Witness, Plaintiff Counsel argued that it stood admitted that Defendant Company accepted the terms of the compromise application through Defendant Company's Counsel.

35. Plaintiff's Counsel next argued that through the Order dated 20.12.2005, Plaintiff had obtained leave of the court under Order II Rule 2(3) to sue the Defendant Company in respect of interest on dividends. He contended that on account of paragraph 3(b) of the compromise agreement, the Final Order was impliedly with leave of the Court for the parties to the compromise application, including the Plaintiff, to file a claim for interest on dividends in future. In reply, the Defendant's Counsel argued that the said order was completely silent concerning any leave being granted to sue in respect of any relief omitted through the earlier litigation. No reliance could be placed upon such order to state that leave was granted by this Court to sue in respect of interest on dividends. The Order dated 20.12.2005 was silent in respect of any leave being granted as that was not the subject matter before the learned Division Bench. While passing the Appellate Order dated 20.12.2005, the learned Division Bench was hearing an application under Order XXIII Rule 3 bearing CMA No. 1912 of 2005 at the appellate stage of proceedings; neither could leave have been sought nor was granted. In Paragraph 3 (b) of the said application (CMA No. 1912 of 2005), no leave from the Court was sought in respect of suing for the relief of interest on dividends. Rather than seeking leave, the parties, in fact, attempted to reserve their right to sue for interest on dividends. This type of relief, the Plaintiff's Counsel argued, was still barred under Order II Rule 2(3).

36. Finally, Defendant's Counsel argued that the Order dated 20.12.2005 stated that the appeals between the parties "*stand disposed off in terms of the compromise*". The learned Division Bench did not simpliciter allow CMA No.1912 of 2005 but disposed it of in light of the specific directions passed in the said order. Counsel contended that the "disposal" of CMA No.1912 of 2005, in contrast to such application being simply "allowed" was important when viewed from the perspective of the application itself and the statement filed by Defendant. As the Order dated 20.12.2005 was completely silent regarding any leave being sought or granted under Order II Rule 2(3), no contention of the counsel for Defendant was recorded in this respect.

37. Defendant Counsel's submissions would have carried weight except for certain crucial points identified and discussed herein below, which have led me to decide Issue No.1 on the maintainability of the suit in the affirmative. First, the settlement arrived between the parties and, as recorded in the compromise application, stood disposed of in terms of the compromise in the presence of Counsel for the Defendant Company, who was in attendance on the final day of hearing. This meant that the Defendant Company was a party to the compromise agreement. Second, the objections of the Defendant Company, as mentioned in the Statement filed by the Defendant's Counsel, were not recorded in the Appellate Order dated 20.12.2005. The Defendant's Counsel did not object to the recitals of the appellate Order. Third, the Defendant Company's Counsel neither filed any review application nor any other application to modify the order and positively record the Defendant Company's objections regarding Plaintiff's claim for interest based on unpaid dividends. The compromise application was to be given effect through the Order dated 20.12.2005 with the Appellate Court order that "decrees be prepared accordingly". The Court directed the office to prepare a decree in terms of the compromise agreement. As per the said Final Order, the Defendant company undertook to transfer all bonus shares and dividends held by it as per the agreed specification to the Nazir of this Court for onward transfer to the Appellant and Respondent shareholders which exercise was completed

through the Commissioner and Nazir's Office. The Defendant Company did not disburse the interest on the unpaid dividends to the Commissioner/Nazir as it was agreed between the parties that it would be agitated later by the parties in accordance with law. The compromise agreement became an appellate decree (although not produced by either party). A fresh cause of action accrued to the Plaintiff as per the above terms. For all the above reasons, the provisions of neither Order II Rule 2 nor Order II Rule 2(3) were applicable to the case.

38. Additionally, the onus was on the Defendant Company to oppose the compromise in case it had any objections to the compromise as recorded by the Court. This was because Defendant Company was impleaded in the appeal as Respondent No.2 Company; its Counsel had entered an appearance in the appeal. Mr Badar Vellani, Advocate for Respondent No.2 Company, filed a Statement and was present during the hearing and passing of the Order dated 20.12.2005 on the compromise application. In the circumstances, Defendant and its Counsel had to ensure at all times that when the settlement between the parties was recorded in the compromise application, there was no recital in the final order of 20.12.2005, which could be relied upon or interpreted in favor of the Plaintiff to agitate any claim against Defendant Company in future. In order words, any and all the contents of the compromise application being opposed by Defendant Company should have been made part of the Compromise Order dated 20.12.2005 as recorded by the Court. The objections to the compromise that the Defendant Company would not enforce any claim for interest on dividend should have been made an express condition of the compromise, expressly recorded in the final order, culminating in the appellate judgment and decree. In the absence of such express condition precedent referencing that none of the terms of the compromise agreement was acceptable to the Defendant Company until any and all future claims for interest on dividends by the parties was abandoned was not made part of the Final Order of 20.12.2005. Thus, Defendant's submission placing reliance on a statement which never made it to the recitals in the Final Order does not carry weight.

In the case of *Malik Din and Another v. Muhammad Aslam*, PLD 1969 SC 136 at page 145, paragraph 3, the Supreme Court of Pakistan observed as follows regarding the implication of recitals mentioned in Court Order in a separate proceeding involving the same parties and/or subject matter:

> "Judgments, whether inter parties or not, are conclusive evidence for and against all persons whether parties, privies, or strangers of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. But where the judgment is inter parties, even recitals in such a judgment are admissible. A previous judgment is admissible also to prove a statement or admission or an acknowledgement made by a party or the predecessor-in-interest of a party, in his pleadings in a previous litigation. Similarly, a judgment narrating the substance of the pleadings of the parties to a litigation is admissible to establish the allegations made by them on that occasion.
>
> The next contention of the learned counsel is that in any event, the recital could not be used against Malik Din, without confronting him with it, as required by section 145 of the Evidence Act. This argument is again misconceived, as such confrontation is necessary only for the purposes of contradiction. In the present case, however, the purpose for which the recital was sought to be utilised was to induce the Court to draw the inference that the present case sought to be made out through the plaintiff. Imam Din, was an after thought, for, on the previous occasion, no such case was made out. No confrontation was, therefore, necessary."

39. Based on the *Malik Din* case (supra), the Court's express observations and matters not raised and omitted from mention by the Division Bench in its Final Order are relevant and important too in assessing the applicability of the provisions of Order II Rule 2 to the case in hand, particularly in the preservation of Plaintiff's right to pursue interest on dividends against the Defendant Company. In the Final Order passed in the HCAs which were to be decreed in terms of the compromise application, the Court continues to refer to the compromise

application, which contained the crucial paragraph 3(b) referring to preserving Plaintiff's right to claim interest on dividends. The Defendant Company's Counsel's assurances to the Division Bench that the Company would ensure compliance to the compromise application is mentioned several times in the Final Order dated 20.12.2005. In contrast there is no express mention of Defendant Company rejecting Plaintiff's claim for interest as agitated by Plaintiff in paragraph 3(b) of the Compromise Application in the Final Order. The Defendant Company's rejection to any future claim, as set out in the Statement, is not mentioned anywhere in the Order. The Defendant Company appears to have accepted Plaintiff's proposal to agitate this claim in future and to address it as and when it would be lodged. There is no condition mentioned in the Final Order that Plaintiff shall lose his right to agitate his claim subject to implementing the compromise application if he does not give up his claim in future for interest on dividends. In order words, Plaintiff should have been put on notice that unless and until he abandoned this claim for interest on dividend, the compromise agreement could not be enforced against the Defendant Company. But the Defendant Company simply submitted a statement that Plaintiff has no right to claim interest on the dividend. Defendant Company did not submit that no claim will lie on behalf of Plaintiff against Defendant after Defendant accepts the compromise application. Hence, no objection is available from Defendant's Counsel with regard to future claim for interest on dividend in the final Order to which Defendant Company is also a party as such claim which is presumed to have been accepted by Defendant Company notwithstanding that appellate decree were to be prepared by the Office in terms of the compromise application. It is pertinent to mention here that the ground of Order II Rule 2 is also not pleaded in the Defendant Company's Written Statement. The main defence in the Written Statement of the Defendant Company is that no interest on dividend is payable as a matter of company law and secondly that Defendant Company is not a party to the compromise application.

40. The above-mentioned inference of "acceptance" of Plaintiff agitating his claim for dividend in future by Defendant Company may

also be understood in the backdrop/context of the dispute between the Fancy family and the Defendant Company. It appears that the Defendant Company knew that, ultimately, it had to deal with the Fancy family as shareholders and eventually directors in the Defendant Company. The dispute had been pending in Court for over two decades and a compromise was imminent. Thus, most likely, the Defendant Company and the Fancy (as future shareholders) may well have accepted Plaintiff's claim for interest on dividends to facilitate a settlement with the caveat that they (the Defendant Company and its shareholders, the Fancys) would deal with Plaintiff's claim as and when it would be agitated as a matter of law. A fresh cause of action has accrued with the preservation of the right of the parties to pursue their claim against the Defendant Company for profit earned on the unpaid dividends retained by the Defendant Company as inferred from the Appellate Court's Final Order dated 20.12.2005. This may be gathered from the Written Statement filed by the Defendant Company wherein the only defence taken by the Defendant Company is that no interest is permissible as per Company law. The Defendant Company has not raised any defence of Order II Rule 2 CPC in their Written Statement. In 2007, Defendant Company appeared to have accepted the position that if and when any of the parties would file an action against the Defendant Company, the latter would defend such claim on merits and the challenge as to maintainability on the grounds of Order II Rule 2 CPC had been waived by Defendant Company on account of its concession as recorded in the Division Bench Order dated 20.12.2005. Once the members of the Fancy family became shareholders of the Defendant Company, as a group, none claimed interest on dividends. They were members of the Defendant Company and acted in concert to safeguard the family interest in the Defendant Company. Therefore, Plaintiff alone filed his claim for recovery of the profit earned on the unpaid dividend retained by the Defendant Company from 1970 to mid-June 2007.

41. Another aspect of the matter is that the Defendant's Counsel did not object in the Final Order of 20.12.2005 that parties

extinguishment of any claim for profit earned on the unpaid dividends retained by the Defendant Company was a condition precedent to the transfer of shares and payment of dividends by the Defendant Company to the parties to the compromise agreement. The said Final Order was/is clearly silent on the defence taken by the Defendant Company that the compromise was not acceptable to it. The Defendant Company's Counsel fully participated in the Final Order dated 20.12.2005, which was going to culminate in an appellate decree. Defendant Counsel's participation in the consent Order of 20.12.2005 bound Defendant Company to accept the claim by any of the members of the Fancy family, including inter alia, Plaintiff's claim for interest on dividend in future as a fresh cause of action. Defendant Counsel's action not to outrightly reject the terms of compromise application if Plaintiff is allowed to recover any interest on dividend in future is not recorded in the Final Order also amounted to a concession on behalf of Defendant Company.

42. Order 3 Rule 4 CPC states as follows:

> "24. Appointment of pleader. (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.
>
> (2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.
>
> (3) For the purposes of subrule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

> (4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.
>
> (5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating:
>
> (a) the names of the parties to the suit,
>
> (b) the name of the party for whom he appears, and
>
> (c) the name of the person by whom he is authorized to appear:
>
> Provided that nothing in this subrule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.]."

43. In the case of *Haseeb Express (Pvt.) Ltd. v. Azerbaijan Hava Yollari State concern Azerbaijan Airlines*, 1998 CLC 1390, a learned Single Judge of this Court observed:

> "It is well established law that a counsel has authority to take all actions necessary for the proper conduct of his clients cause. This includes the power to withdraw interlocutory applications and even a Suit. The counsel also has implied authority of his client to enter into compromise and settle disputes unless such authority has been expressly excluded in the Vakalatnama."

44. Defendant Company, pursuant to Order 3 Rule 4 through its Counsel, accepted the terms of the compromise as recorded in the Division Bench Order dated 20.12.2005.

45. Finally, the Defendant Company accepted the trial Court's Judgment and Decree of 07.08.2003 as modified by the Appellate Court's Order of 20.12.2005. The Appellate Court disposed of the case in terms of the compromise asking the office to prepare a fresh decree. Paragraph 3(b) of the Compromise Agreement was preserved in the

fresh decree to be prepared by the office (the Plaintiff's right to file a fresh suit for interest on unpaid dividends). The Defendant Company did not file any Appeal, Review, or Revision against the Appellate Court's Final Order dated 20.12.2005. They accepted the Final Order as passed.

46. In view of the above findings and law, I decide Issue No.(i) in favour of Plaintiff and hold that this suit, as filed, is maintainable against the Defendant Company.

Issue Nos.(ii) and (iii)

47. Issue nos.(ii) and (iii) overlap each other and therefore are considered together. Issue no.(ii) is whether the Defendant Company is liable to pay Plaintiff any interest/profit on the unpaid dividends related to the disputed shares. Whereas Issue No.(iii) concerns whether the Defendant Company owed any fiduciary duty [to Plaintiff] or, as a trustee, was required to exercise any duty of care towards Plaintiff and ought to have invested for the benefit of Plaintiff the sum of unclaimed dividends arising out of the disputed shares declared by the Company from 1970 onwards. This Court will first examine the Plaintiff's entitlement to interest/profit accrued on the unpaid dividends retained by the Defendant Company under the Articles of Association read in the light of the Company laws of Pakistan. Secondly, and in the alternative, the Court will determine if a case can be made out for Plaintiff's claim for interest/profit earned on unpaid dividends and used by Defendant Company since 1970 on the basis of whether Defendant Company was obliged either by way obligations in the nature of trust, or by way of any fiduciary duty or as an alleged trustee or under some other form of legal relationship and responsibility, to invest the unpaid dividends arising out of the disputed shares in some profitable scheme for the future benefit/interest of Plaintiff. Suffice to say that the Plaintiff and other competing family members had also been asserting title/ownership in the disputed shares since 1970s which the Defendant Company was well aware of.

Company laws and articles of association

48. As the present dispute runs across 40 years, the starting point of examination of the above-mentioned two issues would be to examine the three different company laws applicable to the Company from 1953 to 2007 and the specific provisions that govern the rights of members. The three laws include, inter alia, the Companies Act 1913, the Companies Ordinance 1984, and the Companies Act 2017. It is common ground, across all three laws that came into force, including the law that is currently in force, that the Articles of Association bind the company and the members inter se:

Companies Act, 1913

> 21. Effect of memorandum and articles:
>
> (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

Companies Ordinance, 1984

> 31. Effect of memorandum and articles.-
>
> (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe and be bound by all the provisions of the memorandum and of the articles, subject to the provisions of this Ordinance.

Companies Act, 2017

> 17. Effect of memorandum and articles.—
>
> (1) The memorandum and articles shall, when registered, bind the company and the members

> thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe and be bound by all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

49. Given the above, it is admitted that the Articles of Association always regulate the relationship between a Company and its member as its shareholder. In the present case, this means that as a starting point, the relationship between the Plaintiff and Defendant Company is governed by the Articles of Association.

50. During evidence, the witnesses produced three (3) versions of the Articles of Association of the Defendant Company, which are date stamped 1953, 1986 and 2007. The oldest Articles of Association marked as Exhibit "X" was brought on record by the Defendant Company pursuant to the Court's Order dated 04.04.2021, that "in case the relevant Article 99 of the Articles of Association is interpreted in view of the documents already exhibited and present on [the] record. . .the said Memorandum and Articles of Association [will] be brought on record." Counsel for Plaintiff contended that only Article 99 may be interpreted and none else. Yet during the course of arguments, Plaintiff's Counsel freely referred to Exhibit "X". The other Articles of Association produced in evidence by Defendant's witness were for the years 1986 and 2007 marked as Exhibits "D/5" and "D/6", respectively.

51. A selection of articles which are most relevant to Issue Nos. (ii) and (iii) starting from the oldest version of the Articles of Association marked as Exhibit "X" (available on page 563 of the evidence file) to the Articles of Association for the years 1986 and 2007 are reproduced and discussed herein below.

52. The oldest Articles of Association and their most relevant provisions as adopted by the Defendant Company on 22.04.1952 (Exhibit "X"), provided as follows:

> "***Article 6***: The Company shall not be bound to recognise any equitable contingent, future or partial claim to or interest in such share on the part of any other person save as herein provided or save as ordered by some court of competent jurisdiction."
>
> "***Article 98***: Subject as aforesaid, the profits of the Company made during each year may be utilised for declaring a dividend to the members."
>
> **"*Article 99:*** No dividend shall be payable otherwise than out of the profits of the Company and no unpaid dividend shall ever bear interest against the Company."
>
> **"*Article 100*:** No Member shall be entitled to receive payment of any dividend or interest in respect of his share or shares whilst any money may be due or owing from him to the Company in respect of such share or shares or otherwise howsoever, either alone or jointly with any other person or persons, and the Directors may deduct from the dividend or interest payment to any Members all sums of money so due from him to the Company."
>
> "***Article 101:*** A transfer of shares will not pass the right to any dividend declared thereon after such transfer and before the registration of transfer."
>
> (Underlining added for emphasis)

53. The above-cited selected articles set out in the oldest Articles of Association also find repetition in the subsequent Articles of Association, albeit with slight amendments. Articles of Association as amended by Special Resolution passed by the Defendant Company on 21.06.1986 and produced as "Exhibit "D/5" (available on page 249 of the evidence file) provided as follows:

> "***Article 5***: The Company shall not be bound to recognize any equitable contingent, future or partial claim to or interest in such share on the part of any other person save as herein provided or save as ordered by some court of competent jurisdiction."
>
> "***Article 84***: Subject as aforesaid, the profits of the Company made during each year may be utilized for declaring a dividend to the Members."

> **"*Article 85:*** No dividend shall be payable otherwise than out of the profits of the Company and no unpaid dividend shall ever bear interest against the Company."
>
> "***Article 86:*** A transfer of shares will not pass the right to any dividend declared thereon after such transfer and before the registration of the transfer."
>
> "**Article 89:** The Directors may retain the dividends payable upon shares in respect of which any person is under the Transmission Clause entitled to become a Member, or which under any person under that Clause is entitled to transfer, until such person shall become a Member in respect thereof, or shall duly transfer the same.
>
> (Underlining added for emphasis)

54. The Defendant witness also produced as Exhibit "D/6" (available on page 321 of the evidence file) the Articles of Association of the Defendant Company, adopted vide Special Resolution passed at the Company Annual General Meeting held on 27.04.2007. The said Articles of Association of 2007 are also, once again, comparable to the iterations of the Articles of Association of earlier years of 1953 and 1983. The Articles of Association in 2007 provide as follows:

> "***Article 14***: "Except as required by law, no person shall be recognised by the Company as holding any share upon any trust and the Company shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these Articles or by law otherwise provided or under an order of a court of competent jurisdiction any other rights in respect of any share except an absolute right to the entirely thereof in the registered holder."
>
> "***Article 111:*** No dividend shall be paid otherwise than out of profits of the year or any other undistributed profits and in the determination of the profits available for dividends the Director shall have regard to the provisions of the Ordinance and in particular to the provision of Section 83, 235 and 248 of the Ordinance."

> "***Article 114:*** A transfer of shares shall not pass the right to any dividend declared thereon after such transfer and before the registration of transfer."
>
> "***Article 115:*** The dividend in respect of any share shall be paid to the registered holder of such share or to his banker or to a financial institution. . . ."
>
> **"*Article 117:*** No dividend payable in respect of a share shall bear interest against the Company."
>
> "***Article 118***: All dividend unclaimed for one year after having been declared may be invested or otherwise made use of by the Directors for the benefit of the Company until claimed, and the Company shall not be constituted a trustee in respect thereof."
>
> (Underlining added for emphasis)

55. In *Lucky Cement v. Commissioner of Income Tax*,[4] the Articles of Association were held to be the constitution of the company. Anything done beyond the scope of the articles is ultra vires and cannot be given legal sanctity. This is essentially what the Defendant's Counsel argued before this bench, too. He contended that unequivocally, over the several iterations appearing in the Articles of Association of the Dividend Company from 1953 till 2007, Articles 99, 85, and 117 of the Articles of Association consistently stated that no unpaid dividend shall ever bear interest against the Defendant Company. The Defendant's Counsel submitted that the Articles of Association bind the company and the members. Therefore, the Articles of the Articles of Association also bound the Defendant Company not to bear interest on any unpaid dividends. Thus, Defendant's Counsel claimed that Plaintiff never had any entitlement to recover interest on unpaid dividends. Defendant Company could not have acted against such articles and could not award any interest on unpaid dividends to Plaintiff contrary to Articles 99, 85 and 117 of the Articles of Association from 1953 to 2007. Any such action would be *ultra vires* of the Articles of Association. Defendant Counsel contended that if the Company made an exception for Plaintiff, other shareholders would be entitled to bring claims against the Company for acting in violation of the Articles. In support of this

[4] 2015 PTD 2210 at Page 2218A

submission, Defendant Counsel relied on the case of *Wood v. Odessa Waterworks Company*,[5] where the company attempted to pay interest on unpaid dividends upon an application submitted by one of the shareholders, the Chancery Division held that:

> *"Art. 102 speak throughout of dividends "to be paid" to the shareholders, and art. 104 provides that no unpaid dividend or interest shall bear interest against the company. It was said that that is merely a stipulation inserted in favour of the company and for the purpose of preventing shareholders from claiming as against the company interest on dividends. That argument appears to me to overlook what I have already pointed out, that the articles constitute an agreement between the shareholders inter se. . . ."* [6]

56. Defendant Counsel's submission that if one is to focus on Articles 99, 85 and 117 of the Articles of Association from 1953 to 2007, then Plaintiff and Defendant Company were bound by the Articles of Association, and the Articles of Association govern all rights and liabilities arising between the parties, restricted the Defendant company from paying any interest on unpaid dividends for the period for which the ownership of the shares was disputed carries weight. However, Plaintiff's Counsel claimed that despite the above-mentioned Articles, an interpretation focusing on the three articles, i.e. Articles 99, 85 and 117 alone, across the three versions of the Articles of Association of the Defendant Company from 1953 to 2007, does not provide a complete picture. He contended that all three iterations of the Articles of Association of Defendant Company from 1953 to 2007 contained Articles 6, 5 and 14 in the three Articles of Association, which provided an exception to Articles 99, 85 and 117. Plaintiff's Counsel argued that from 1972 onwards till 2007, Plaintiff had been claiming his shares, but the Defendant Company did not register the shares in Plaintiff's name. As a consequence, the disputed shares were not registered in Plaintiff's name. Articles 99, 85 and 117 of the Articles of Association did not apply to Plaintiff as he had no company shares registered in his name. Therefore, during the period from 1970 to 2007, Plaintiff's claim for

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[5] (1889) 42 Ch.D 636
[6] *Ibid* at Page 643.

interest on dividends did not arise out of the Articles of Association. The Plaintiff acquired title in the disputed shares from the Court. Hence, Plaintiff had recourse to invoke and rely on the equitable contingents, etc., as per Articles 6, 5 and 14. Therefore, Plaintiff's claim for profit on the unpaid dividends also turns on Issue No.(iii), i.e. whether the Defendant Company owed any fiduciary duty or was required as a trustee to exercise any duty of care towards Plaintiff with regard to investing the amount of unclaimed dividends relating to the disputed shares. Plaintiff's Counsel argued that the Defendant Company, in its capacity either as a trustee or under a fiduciary duty or any other obligation resembling a trust or other legal relationship and responsibility, was liable to compensate the Plaintiff interest or profit on the unpaid dividend, which was retained and used by the Company from 1973 to 2007 when the Court determined Plaintiff's rights as shareholder for the said period.

Law of Trusts – Defendant Company as a "trustee"

57. At the outset, Plaintiff's Counsel argued that during the period between 1973 and 2007, there was no contractual relationship between the Plaintiff and Defendant Company. During this period, the relationship between the Defendant Company and Plaintiff was that of trustee and beneficiary governed by the Pakistan (Indian) Trust Act 1882 (the "Act"). The Defendant Company's Counsel argued that the Trust Act and its provisions cannot be read in a manner which superimposes or overrides Company law and the Articles of Association of a company. Section 4 of the Act barred a trust where its purpose is forbidden by law or is of such a nature that, if permitted, would defeat the provisions of any law.

58. The law relating to trusts is found in the Act. The purpose of the Act is to codify and amend the law relating to private trusts and trustees. Barring a few exceptions, the rules contained in the Act are substantially similar to those which the English courts of equity were

administering under the names of equity, justice and good conscience in the courts of British India.[7]

59. Sections 3, 5, 6 and 8 of the Trusts Act 1882 read as follows:

> "Section 3. **Interpretation Clause**. "**Trust**". A "trust" is an obligation annexed to the ownership of property, and rising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner;
>
> "**author of the trust**" the person who reposes or declares the confidence is called the author of the trust";
> "**trustee**" the person who accepts the confidence is called the "trustee";
>
> "**beneficiary**" the person for whose benefit the confidence is accepted is called the beneficiary;
>
> "**trust property**" the subject-matter of the trust is called "trust-property" or "trust-money";
>
> **"beneficial interest"** the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and
>
> "**instrument of the trust**" the instrument, if any, by which the trust is declared is called the "instrument of the trust;
>
> "**breach of trust**" a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust.
>
> "**notice**": and in this Act, unless there be something repugnant in the subject or context, "registered" means . . . ; a person is said to have "notice" of a fact either when he actually knows that fact, or when, but for willful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Contract Act,1872, Section 229; . . . ."
>
> "Section 5. **Trust of immovable property**. No trust in relation to immovable property is valid unless declared

[7] Halsbury's Laws of India, Vol. 29 (b), Para 290.003

> by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.
> **Trust of moveable property**. No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee. . . .”
>
> ‘Section 6. **Creation of trust**. Subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.”
>
> “Section 8. **Subject of trust**. The subject-matter of a trust must be property transferable to the beneficiary. It must not be merely beneficial interest under a subsisting trust.”

60. The Indian Supreme Court considered the requirement of transfer of trust property / trust money for the creation of trust in an appeal relating to Income Tax law in the case of *Tulsidas Kilachand v. Commissioner of Income Tax*, AIR 1961 Supreme Court 1023. The facts in the case were that in 1951 Mr. Tulsidas made a declaration of trust in favour of his wife, a portion of which was as follows:

> “. . . I, Tulsidas Kilachand . . . hereby declare that I hold 244 of Kesar Corporation Ltd. and 120 shares of Kilachand Devchand & Co., Ltd . . . upon trust to pay the income thereof to my wife Vimla for a period of seven years from the date hereof or her death (whichever event may be earlier) and I hereby declare that this trust shall not be revocable.”

61. The Supreme Court formulated the following question: “The first question is whether there can be said to be a transfer of assets to the wife or to ‘any person’ for the benefit of the wife” and answered the question in the following terms:

> “The contention that there was no transfer at all in this case is not sound. The shares were previously held by Mr. Tulsidad Kilachand for himself. After the declaration of trust by him, they were held by him not

> in his personal capacity but as a trustee. No doubt, under Ss. 5 and 6 of the Indian Trusts Act if the declarer of the trust is himself the trustee also, there is no need that he must also transfer the property to himself as trustee; but the law implies that such a transfer has been made by him, and no overt act except a declaration of trust is necessary. The capacity of the declarer of trust and his capacity as trustee are different, and after the declaration of trust he holds the assets as a trustee. Under the Transfer of Property Act, there can be a transfer by a person to himself or to himself and another person or persons. In our opinion, there was, in this case, a transfer by Mr. Tulsidas Kilachand to himself as a trustee, though there was no formal transfer."

62. The requirement/issue of transfer of property for the creation of a trust under sections 5 and 6 of the Trusts Act was also considered in detail in the case of *Bai Mahakore v. Bai Mangla*, (1911) ILR 35 Bombay 403. The brief facts of the case were that D (the husband) made a credit entry of Rs. 20,000 in his books in the name of H (his wife), carrying interest at 4.5% and was treated as belonging to the wife. After the death of his wife, the husband wrote a letter to his four daughters that the money given by him to the mother (his wife) was placed to her credit in the shop accounts and that after his death, they should take the money and divide it among themselves. However, before his death, he made his last will, stating that the money never belonged to his wife but was all along his own. The daughters filed a suit to recover their share of the aforesaid amount treating it as belonging to H, their mother. The Defendants challenged the claim contending that the letter did not comply with the requirements laid down in section 5 and 6 of the Trusts Act as there was neither "a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered" nor "a transfer of property to the trustee" and consequently, there was no trust in favour of the daughters. The Court observed as follows:

> "Section 5 of the Trusts Act must be read with section 6. Section 5 lays down what may be called extrinsic conditions necessary to create a trust. In other words, it prescribes the mode of creation. Section 6 lays down the intrinsic conditions necessary for a valid trust; in other words, given an instrument in writing or transfer of the kind mentioned in section 5, it prescribes what

> is necessary to make out a trust from the words used in the instrument or the act denoting the transfer. The question must naturally have occurred, I presume, to the draftsman of the section in this way. Section 5 prescribes transfer as one of the two alternative modes for creating a trust of moveable property. But the word *transfer*, as defined in the Transfer of Property Act (section 5), excludes the conveyance or delivery of property by a man to himself. When a man creates a trust and constitutes himself its trustee, there can be no transfer. Hence, I apprehend, the exception was made in section 6 that in such a case there need be no transfer. Section 5, clause 2, lays down a general rule; section 6 creates an exception in the case of trust of moveable property."

63. In another case decided under the Trusts Act, *Manchershaw S. Narielwalla vs Ardeshir S. Narielwalla*, (1908) 10 Bom LR 1209, the facts in brief were that on 7 September 1892, one Shapurji Narielwalla purported to make a gift of Rs. 75,000 to his wife Virbaiji on her recovery from a dangerous illness by making two book entries of that date, a debit and a credit entry in the cash book. The material words of the debit entry were "given as a gift to Bai Virbaiji." The material words in the credit entry were "on account as follows: Sheth Shapurji Nareilwalla gave the amount as a gift to you, the same is credited." Both entries were initialed by Shapurji. It was alleged that the day after the cash book entries, Shapurji called all the adult members of the family by his wife's bedside and told them that he had given her Rs. 75,000 as a gift to celebrate her recovery.

64. Beaman, J. made the following observation about the creation of trust in the judgment:

> "That Act (Indian Trusts Act 1882) was in force when Shapurji made this gift. Section 5 prescribes the conditions under which alone a valid trust of immovable and of movable property can be created. A trust of movable property can only be created by such an instrument, as is mentioned in dealing with a trust of immovable property, by will, or by delivery. So far all is clear. But then comes Section 6. Here of course there is no writing of the kind required, nor is there any will, nor any delivery. So that unless the words in brackets in Section 6 form an exception to

> the rule of Section 5 the defendants must fail. Do they? I have found the utmost difficulty in finding a proper and useful construction for all the terms of Section 6. The section is expressly made subject to Section 5, but it goes on to enunciate the details which make a good trust, and it seems to me, since at the end, the last condition is coupled by the word " and" not disjoined by "or", that in effect the whole section can only apply to trusts of movable property. If that is so, what is required to be stated must be stated I suppose by word of mouth, or by some writing not of the kind mentioned in Section 5. If however that is so, including a trust by will in the bracketed sentence seems wholly superfluous. Waiving that difficulty for the moment, we find that to create a trust it is necessary to specify, certain things, and, (except where the author of the trust, and the trustee are one and the same person) to deliver the trust property. I must say, that if that means anything it seems to me to mean, at the first view, that where the author is himself also the trustee, the preceding requirements if satisfied will suffice to create a valid trust of movables, without any transfer. And that would be exactly the case here. But Mr. Lowndes contends that the whole of Section 6 is subject to Section 5 and therefore that the view I have just stated must be wrong. If it were right, he argues, we should have found the bracketed exception in Section 5. It cannot be denied that there is a good deal in that. If Mr. Lowndes is right the whole of Section 6 comes to this, in such a case as I am dealing with, that no trust of movable property could be created except by will or by an instrument in writing of the kind prescribed in Section 5. I do not believe that was the intention of the legislature. I believe that the legislature meant that a specific oral declaration on all the preceding points, would be enough where the author was himself the trustee, without transfer."

65. It is therefore clear that where the author of the trust makes a clear written declaration of trust, no actual transfer of movable trust property or trust money is necessary where the author of the trust is himself the trustee and the declaration need not be registered.

66. In the present case, there is no declaration of trust by the Defendant Company in favor of Plaintiff. Further, the three certainties to form a trust based on the judgments and the provisions of the Act, referred to above, are also missing. The three missing requirements, include, (1) Defendant Company intended to constitute a trust for unpaid

dividends; (2) Defendant Company intended to bind definite property (profit on unclaimed shares) by the trust; and (3) Defendant Company intended to benefit a definite person (Plaintiff) in a definite way. In view of the above, the Defendant Company was not acting as a trustee.

67. Yet the matter does not simply end here. Plaintiff's Counsel has also pleaded obligations in the nature of trust created in cases specified in sections 81 to 94 of Chapter IX of the Trusts Act as another ground for this Court to grant Plaintiff's claim for interest/profit on unpaid dividends retained by Defendant Company for almost 37.5 years knowing that the shares were disputed shares since 1970s.

68. When dealing with the definition of "trust" under section 3, we see that an obligation in respect of property to hold it *for the benefit of another* may arise out of confidence *expressly reposed in and accepted* by the trustee. In certain circumstances, the confidence is neither expressly reposed nor accepted, but the law implies a fiduciary relationship. Circumstances in which such a fiduciary relationship may be implied and the property held for the benefit of another are specified in Chapter IX of the Act. These circumstances give birth to obligations in the nature of trusts as different from obligations arising from trusts technically so-called under section 3. (See Mukherjee on Indian Trusts Act, 2nd Edition, p. 733).

69. To elaborate, the sections in Chapter IX of the Act refer to various relationships which are analogous to the relationship between a trustee and a *cestui que trust*, but are not trusts properly so-called and as defined in Section 3 of the Act. They are what is known in the English law as constructive trusts. (See Suryanarayana Iyer's The Indian Trusts Act, 5th Edition, p. 655).

70. Section 94 of the Act is a residuary section which makes provision for cases not covered by the preceding sections of the Chapter. The section is general and covers those cases where the legal and equitable interests are not united in the same person. It provides for cases not falling within the scope of the preceding sections (O.P.

Agarwala, The Indian Trusts Act, 1852, Seventh Edition, p.853). Section 94 also mentions the concept of constructive trust, but this section does not appear to apply to the circumstances of the present case. In other words, it is difficult to establish that the Defendant Company was a constructive trustee of Plaintiff and ought to have invested its unpaid dividends in some profitable scheme for the duration of the dispute.

71. Under section 95 of the Act, the person holding property in accordance with any of the sections of Chapter IX of the Act is required, as far as may be, to perform the same duties and is subject to, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it.

72. In the normal course, as mentioned earlier, Articles 99, 85 and 117 of the Articles of Association (1953, 1986 and 2007 versions) of the Defendant Company would have been fatal to the Plaintiff's claim except that Plaintiff's claim against the Defendant Company has crystallised on the basis of Articles 6, 5 and 14 of the Articles of Association. The iterations of these Articles rest on the shareholders' right to acquire company shares based on the Order of a Court of competent jurisdiction. In the present case, the Appellate Court's Order dated 20.12.2005 led Plaintiff to finally acquire the disputed shares, including the bonus shares of the Defendant Company from 1970 to 2007. This is key to the Plaintiff's claim for profit on unpaid dividends on the disputed shares. Shareholder right between the member and the Company did not crystallise in normal course. Plaintiff's rights accrued out of Articles 6, 5 and 14, which are a part of the Articles of Association of the Defendant Company from 1953 to 2007. These articles enable Plaintiff to raise an equitable contingent, future or partial claim to or interest in such shares provided this claim arises out of an Order from a Court of competent jurisdiction. The Court's involvement in determining Plaintiff's acquisition of shares under Articles 6, 5 and 14 appears to be the exception to the general rule under Articles 99, 88 and 117. Thus, the Appellate Court's Order dated 20.12.2005 enabled Plaintiff to claim

the present relief for loss of profit on the unpaid dividends retained by Defendant Company for its use from 1970 to 2007. Eventually, Plaintiff secured the dividends based on the disputed shares, including bonus shares issued during the period from 1970 to 2007. Even after the Appellate Court's Order dated 20.12.2005, Defendant Company only commenced paying the unpaid dividends to Nazir for onward disbursement to Plaintiff in 2007. Plaintiff now claims interest/profit on the said dividends, based on the Compromise Application with his claim allegedly saved by the Appellate Compromise Order/Decree dated 20.12.2005 read in the light of Articles 6, 5 and 14 of the Articles of Association.

73. According to Palmer's Company Law, Chapter on "Dividends", once a dividend has been declared, it is ultra vires to resolve that payment should be postponed. In the current scenario, the payment of dividends to the shareholders was postponed for 37.5 years. During all this time, the Defendant Company used the funds. While Articles of Association commonly exclude any claim for interest on unpaid dividends, it is difficult for any Company to justify using unpaid dividends for 37.5 years without repercussion, depriving the Plaintiff after the dividend had been declared from time to time and Plaintiff had submitted his application for registration of shares in 1973. In the present case, this Court passed ad-interim orders on 26.07.1978 on CMA No.2762/1978, granting ad-interim injunction as prayed (Exhibit "D/10" on page 559, 561 of the evidence file). Paragraph (b) of said CMA No.2762/2003 (available on page 671 of Part-II of the Suit file) required the Defendant Company to deposit the dividend and interest thereon, any accrual there against viz. accruing from or under the shares which may accrue in future to any person or body (which would eventually include the Plaintiff) till the final disposal of the suit to be deposited with the Nazir of the High Court. But the Defendant Company did nothing. Following the Court's Order of 26.07.1978, the Defendant Company could have started on its own to deposit with the learned Nazir the unpaid dividends accruing in relation to the dispute shares from 1973 till 2007, including the period of operation of the ad-interim Order. Yet

neither Defendant Company deposited the dividends with Nazir nor appealed the ad-interim Order dated 26.07.1978. Instead, the Defendant Company continued to use the unpaid dividend and earned profit/income without pause. This ad-interim injunction continued till judgment dated 07.08.2003 and Decree dated 25.08.1993 in Suit Nos.572/1998 and 472/1993. Further, no dividend was paid even after the Appellate Order dated 20.12.2005 until the year 2007, i.e. 37.5 years from the date of the dispute. As there is no specific provision in the Articles of Association in relation to the circumstances of the case relating to the Plaintiff's Claim, this bench is inclined to exercise its power to apply the principles of justice, equity and good conscience under the Sindh Regulation IV of 1827. The Sindh Regulation IV of 1827, which is still in force, laid down a provision which required the East India Company Courts to act according to the principles of justice, equity and good conscience. It reads as follows:

> "26. The law to be observed in the trial of suits shall be the Act of Parliament and [Pakistan Laws] applicable to the case, in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity and good conscience alone."

The above regulation has not been repealed and is still in force in the Province of Sindh.

74. As discussed above, there is no provision in the Trusts Act whereby the Defendant Company can be held liable as either a trustee under the normal course or a constructive trustee. However, on the basis of Sindh Regulation IV of 1827, read in the light of Articles 6, 5 and 14 of the Articles of Association from 1953 to 2007, it can be argued that based on recitals in paragraphs 47 to 67 of the Judgment dated 07.08.2003 in Suit 572/1978 and Suit No.472/1993, that Plaintiff gave notice to Defendant Company through Amirali Fancy (the brother of Aziz Fancy), who at that time managed and controlled the said Company, of the creation of the trust and the Plaintiff's name of the beneficiary of the shares of Defendant Company which was acknowledged by Amirali

Fancy/Defendant Company (paragraphs 47 and 49 of the Judgment) and consequently Defendant Company became a constructive trustee of the unpaid dividends (in equity) who ought to have invested such funds arising from the disputed shares in some profit earning scheme from 1970 onwards. After receipt of notice from Plaintiff, Defendant should have taken appropriate action to ensure that the monies accruing in terms of unpaid dividends were kept aside along with profit as and when the title of the share was determined by the Court (in 2007). The responsibility/requirement to deposit the dividend accruing in relation to the dispute shares (which included shares of Plaintiff) was flagged by the Court granting ad-interim Order dated 26.07.1978. If the Defendant Company had obeyed the Orders and/or safe guarded the interest of the future shareholders who would acquire rights by way of Articles 6, 5 and 14 of the Articles of Association through Orders passed by the Competent Court, it could have deposited the dividends with the Nazir of this Court who would have in turn placed such funds in some profitable scheme. Instead the Defendant Company decided to take upon itself the entire risk of the Orders of the Competent Court and continued to use the dividends for 37.5 years. By not doing its duty as a constructive trustee (in equity), Defendant Company is guilty of breach of trust and liable to account for the loss of profit and income suffered by Plaintiff. Even otherwise, from 1973 to 2007, the relationship between the Plaintiff and Defendant Company was not governed by the Articles of Association and was finally crystallised by the Orders of the Court. During this period of almost 37.5 years, Defendant Company denied Plaintiff dividends and, in turn, deprived him of loss of income/profit accruing from the unpaid dividends. In fact as established in evidence, the Defendant Company did not deny that it did not use the unpaid dividends. Instead, it took the defence that no interest is payable on dividends. The defence would have been acceptable in normal circumstances but not when the Defendant Company used the funds for 37.5 years knowing at all times it could deposit the dividends with the Nazir who could have placed the funds in some profitable scheme.

75. Apart from principles of equity, Plaintiff's Counsel also claimed profit accrued on unpaid dividends used by the Defendant Company on the basis of unjust enrichment relying on the case of *Habib Bank Ltd. v. Bashir Ahmad*, 2019 SCMR 362. He contended that the Supreme Court of Pakistan had held that the claimant was entitled to receive compensation on the amount which he had deposited with the bank by way of the price of auction. He argued that as the Bank used the money they were liable to return the same; similarly, the Defendant Company had retained the unpaid dividend for 37.5 years and was now liable to return the same. The Defendant's Counsel submitted that the *Habib Bank* case (supra) was not applicable to the present facts as the Respondent therein voluntarily deposited the amount with the Applicant Bank by way of the price of an auction property.

76. It is admitted that initially, the concept of unjust enrichment in Pakistan has been applied where the state utilises the resources of private citizens in an unjust and unfair manner; however, this position was departed in the *Habib Bank* case (supra). In the present case, Plaintiff voluntarily and willingly remitted funds to purchase shares that the Defendant Company never registered. The Company used the dividends from the disputed shares for almost 37.5 years (no denial is available on record). Consequently, the Defendant Company is now bound to compensate the Plaintiff for the unjust enrichment it has enjoyed for 37.5 years based on the Orders of the Appellate Court dated 20.12.2005 read in the light of Articles 6, 5 and 14 of the Articles of Association of 1953, 1986 and 2007.

77. In light of the above, Issue Nos.(ii) and (iii) are answered in the affirmative for the reason that the Plaintiff is entitled to profit/interest on the unpaid dividends on the basis of equity and/or unjust enrichment. The determination of the quantum by the Defendant Company to Plaintiff is taken up in the last and final issue.

Issue No.(iv)

78. Issue No.(iv) concerns whether the bonus shares and dividend accrued in respect of the Plaintiff's 92,800 shares during the period from 1970 to 31.12.2005 can be termed as unclaimed bonus shares and dividend, if not, its effect. This issue is easily addressable in the negative based on paragraphs 47, 49, 50, 51 and 56 of the Judgment of the High Court dated 07.08.2003 in Suit Nos.572/1978 and 472/1993, which paragraphs are neither contradicted nor opposed by the Defendant Company in the Written Statement filed in Suit 997 of 2007. In the situation, the share cannot be treated as "unclaimed". The several recitals in the Judgment dated 07.08.2003, in particular, paragraphs 47, 49, 50, 51 and 56 confirm that Defendant Company was well aware from early 1970s of Plaintiff's claim. Further the Defendant Company had also rejected at the initial stage (in the early part of 1970s) these claims for the shares filed by Plaintiff and other claimants. Thus, at no time of the dispute between Defendant Company and claimants were the shares "unclaimed". For ease of reference Paragraphs 47, 49, 50, 51 and 56 of the Judgment dated 07.08.2003 are reproduced herein below[8].

> "47. The case of Defendant No.10 is that Aziz Fancy was his close friend and business associate who in April 1970 informed him that Defendant No.12 [New Jubilee Insurance Co. Ltd. Kenya] was interested in selling 22,000 disputed shares (4,400 shares of Rs.25 each). The Defendant No.10 further claims that consideration of three Kenyan pounds per share was settled with Defendant No.12 [ ] and he paid the entire price of 13,200 kenyan pounds in Nairobi to Defendant No. 12 [ ]. The Defendant No.10 in his Written Statement also stated that the second set of 70,800 disputed shares of Rs.5 each which were originally 14,160 shares of Rs.25 each) were purchased by him through Aziz Fancy and on 06.12.1973 he remitted 4.396/- pounds in the bank account of Mr. Aziz Fancy with Chartered Bank in London. On the same day, i.e. on 06.12.1972, 22,650 pounds were also remitted to Aziz Fancy's Bank Account with Compagnie De Gestion De Banque of Geneva.

[8] It is clarified that paragraph 48 of Judgment dated 07.08.2003 (although not produced) confirms that the contents of the "Written Statement" of Defendant No.10/Plaintiff, which is referred to in paragraph 47 of the Judgment (and eventually formed a part of the Affidavit in Evidence of Defendant No.10/Plaintiff) that all the exhibits mentioned in the Judgment pertaining to Defendant No.10/Plaintiff were accepted but for one document which was a letter dated 04.07.1984 written from His Highness Prince Sadruddin Aga Khan's Secretariate to Defendant No.10/Plaintiff in relation to arbitration proceedings concerning the disputed shares.

Lastly on 19.04.1973, 15,455 pounds were remitted by Defendant No.10 to Aziz Fancy's Bank Account with Chartered Bank in London. In this manner, 42,501 pounds were remitted to Aziz Fancy Bank Accounts and the disputed shares which the Defendant purchased were held by Aziz Fancy in trust for him. The Defendant No.10 further states that the fact that he purchased the disputed shares was known to Amirali Fancy who was apprised of the transactions both by the Defendant No.10 and Aziz Fancy. It was further asserted by the Defendant No.10 that on the basis of knowledge of such transactions, Amerali Fancy, being fully aware of the true position, served the notice on the Defendant No.1 and objected to the transfer of the disputed shares. It is also the case of the Defendant No.10 that at all material times, Amirali Fancy assured the Defendant No.10 that his interest in the disputed shares would be watched and protected by him and the Defendant No.10 should have nothing to fear. The Defendant No.10 in his Written Statement has also stated that in the third week of February 1984 on his visit to Karachi from Kenya he learned about the present suit and, therefore, applied to be joined as a party, which application was granted. Thereafter the Defendant No.10 filed his Written Statement.

48. . . .

49. The Defendant No.10 in paragraph 7 of his Affidavit in evidence also deposed that Aziz Fancy passed away in London in October 1973 and thereafter the Plaintiff illegally and wrongfully took possession of the Share Certificates and blank transfer deeds of the disputed shares and tried to get them transferred in his name. However, Mr. Amirali Fancy the brother of Mr. Aziz Fancy and Chairman of Defendant No.1 being aware of the fact that Defendant No.10 was lawful owner of the shares objected to such transfer and did not allow it to take place. The Defendant No.10 further deposed that there was understanding between the parties that [His Highness] Prince Sadruddin Aga Khan would decide the dispute as to the entitlement of the shares. It is pertinent to mention that all the contesting parties including Defendant No.10 belonged to the same community and are Aga Khanis.

50. The crucial question that arises is that whether the Defendant No.10 has established that he made the payment for both the lots of the disputed shares and the money which he paid belonged to him. In this regard the first document pertaining to the first lot of 22,000 disputed shares (4400 shares originally is Ex.16/2 which

> is a letter dated 29.04.1970 written by Defendant No.12 company, the original owner of these shares.
>
> 51. In paragraph 11 of the affidavit in evidence at page 491 of the application part, which was filed on behalf of Defendant No.14, the son of Aziz Fancy, it is also acknowledged that payment for 22,000 disputed shares was made by Defendant No.10 however it is claimed by Defendant No.14 that such payment was from the funds belonging to late Aziz Fancy. In paragraph 15 of the same affidavit in evidence, it was further admitted by Defendant No.14 that Defendant No.10 credited payments to the account of Aziz Fancy in London for the remaining 70,800 shares. It was further alleged that such money was sale proceeds of Aziz Fancy's property in the hands of Defendant No.10. The Defendant No.14 never entered the witness box to establish his claim to the shares or to prove that the money which the Defendant No.10 paid for the shares actually belonged to Aziz Fancy. Thus by not submitting himself for cross-examination, the affidavit in evidence filed by Defendant No.14 lost its evidentiary value. . .
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> . . .
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> 56. Another aspect of Defendant No.10 evidence is that the Defendant No.10 in paragraph 7 of his Affidavit in Evidence at page 293 of the evidence file, categorically stated that as Defendant No.10 was the owner of the disputed shares and therefore Amirali Fancy served notice on Defendant No.1 calling upon it not to transfer shares and upon such notice, Defendant No.1 declined to transfer the disputed shares in the name of the Plaintiff. Significantly, no question was put to Defendant No.10 on any of his assertions made in paragraph 7 of his affidavit in evidence which also went unchallenged in its entirety."

79. Additionally, the Plaintiff's interest in the shares and dividends and bonus shares accruing therefrom cannot be said to be unclaimed based on Articles 6, 5 and 14 of the Articles of Association which following the Order of the Court of Competent Jurisdiction on 20.12.2005, mandate the Defendant Company recognize such shares to be registered in the name of Plaintiff. The Court's Order recording the compromise agreement was the basis on which the disputed shared and the bonus shares which accrued therefrom got registered in the names of Plaintiff and other Claimants, and the Defendant Company

paid the learned Nazir dividend arising out of these shares for onward distribution to the parties as per the Compromise Order dated 20.12.2005.

80. Given the above, Issue No.(iv) is answered in the negative as this Court finds that the disputed shares were not unclaimed.

Issue No.(v)

81. As Issue Nos.(i) to (iv) are decided in favor of the Plaintiff, Issue No.(v) determines what should be the decree.

82. According to the Plaint, Plaintiff has claimed interest on dividends on the entire disputed shares of 92,800 plus bonus shares issued by Defendant Company, which dividends accrued from time to time from the said shares remained unpaid from 1970 till 2007 to Plaintiff. Thus, Plaintiff's Counsel responded in the affirmative when the Court asked him if Plaintiff had arrived at his conservative estimated claim for the equalizer on the unpaid dividend income of Rs,334,689,495/- based on the entire 92,800 shares plus bonus shares. The Plaintiff's contention to claim interest on dividends on the entire 92,800 shares plus bonus shares does not appeal to reason. This is because Plaintiff has accepted the Appellate Court's Order of 20.12.2005 wherein he also accepted that he is not entitled to the entire 92,800 ordinary shares and bonus share accrued thereon but to 50% of the shares of 92,800 plus its bonus shares accrued thereon and the unpaid dividends arising out of such shares. Plaintiff in fact relied on the Court's Appellate Order wherein his shareholding was reduced to 50% of 92,800 shares including bonus shares and he cannot now turn around and claim in contraire to the terms of the Appellate Court's Order of 20.12.2005. He cannot blow hot and cold. He cannot rely on the Appellate Court's Order in parts and in bits and pieces. He must accept the Appellate Court's Order of 20.12.2005 in its entirety which means giving up 50% of the shareholding of 92,800 ordinary shares and the bonus shares accrued thereon. Accordingly,

for the purpose of this Court's determination of the quantum of the equalizer interest on the unpaid dividend income which the Defendant Company retained, (the same) is based on Plaintiff's shareholding of 50% of 92,800 ordinary shares plus bonus shares accrued thereon from 1970 onwards till end of June 2007.

83. According to Nazir's letter dated 14.03.2007 addressed to the Defendant Company (Annexure "R/17" of the Defendant's Written Statement available on page 537 of Part II of the suit file) and Defendant Company's reply to Nazir dated 08.06.2007 (Annexure "R/31" of the Defendant's Written Statement available on page 631 of Part II of the suit file), as of 08.06.2007, the Plaintiff was delivered 17 share certificates representing 8,428,324 ordinary shares while another 8,428,324 ordinary shares were to be distributed to Naushad Fancy (Shamsuddin Fancy Group) (20%), Amir Ali Fancy Group (15%), and the Jimmy Fancy Group (15%) (Total 16,856,648 ordinary shares as of 08.06.2007). However, in its letter dated 16.06.2007 addressed to Nazir, the Defendant Company also indicated issuing the original 92,800 shares to the aforementioned members (Annexure "R/34" of the Written Statement of Defendant Company available on page 643 of Part-II of the Suit File). Accordingly, as of 16.06.2007, the total shareholdings of the above-named members including Plaintiff tallied 16,949,448 ordinary shares. Thereafter, it appears that on 26.06.2007, the Defendant Company issued a further 4,330,161 ordinary shares of Defendant Company to the above-named members and Plaintiff, out of which six (6) share certificates representing 2,165,080 ordinary shares were issued to Plaintiff. Thus, as of the end of June 2007 the total number of ordinary shares was 21,279,609 ordinary shares (16,949,448 + 4,330,161).

84. When the Court sought assistance from the Counsels of Plaintiff and Defendant whether the total quantum of shareholding as on the date of filing of Suit 997/2007, i.e. on 03.07.2007 stood at 21,279,609 ordinary shares, none was offered. Counsels confirmed neither the total shareholding of the above-named members and

Plaintiff nor Plaintiff's share of 50% of the total, i.e. 10,639,804 ordinary shares. In the circumstances, it may be that for the purpose of Plaintiff's claim for the equaliser interest on the unpaid dividend income, which was retained by the Defendant Company from 1970 to 2007, the total number of ordinary shares may not be so important to know. What may be more relevant in arriving at the equalizer is to obtain the total sum of dividends which Defendant Company paid to Plaintiff up to the date of filing of the present suit based on shares Plaintiff acquired through a Court of Competent Jurisdiction between 1970 to 2006 in terms of Articles 6. 5 and 14 of the Articles of Association applicable for the years 1953 to 2007.

85. To this end, Plaintiff's Counsel could not explain how the figure of "Rs.334,689,495/- being the equalizer interest on the dividend income retained and utilized by Defendant for its own financial needs" mentioned in the Plaint was calculated by Plaintiff. Further he could not provide the final figure of unpaid dividend paid to the Nazir by the Defendant Company from 1970 till the date of filing of the Suit, i.e. on 03.07.2007 – a figure this Court could use to generate an equalizer to compensate Plaintiff in terms of the shares acquired through a Court of competent jurisdiction under Articles 6, 5 and 14 of the Articles of Association of the Defendant Company between 1970 and 2006. Equally, Counsel for Defendant Company could also not explain the totals of the dividends paid out by Defendant Company to Nazir in respect of the shares issued to Plaintiff from 1970 to 03.07.2007. He contended that he had instructions from Defendant Company to plead that nothing was payable by Defendant and thus had no explanation to offer regarding calculation of the dividends paid to Plaintiff prior to filing of Suit No.997/2007.

86. In the circumstances, to ascertain the precise sum of dividends accrued for the period from 1970 to June 2007, the Court proceeded to make the assessment of the total shareholding of Plaintiff and the dividends paid to Plaintiff on its own. For this purpose, the Court examined the documents produced in evidence and those

filed by the Defendant Company along with its Written Statement which Plaintiff had not denied. Plaintiff's Witness produced Judgment dated 07.08.2003 in Suit Nos.572/1978 and 472/1983 available on pages 15 to 93 of the Evidence File which included a copy of the Decree in Suit No.772/1978 (from pages 95 to 99 of the Evidence File). The exhibit was marked as Ex."P/3" and Decree dated 07.08.2003 in Suit No.472/1993 was marked as Ex "P/4" available on pages 101 to 105 of the Evidence File. In her examination in chief, Plaintiff Witness also produced certified copy of the Statements filed by New Jubilee Insurance Company, Defendant No.1 in Suit Nos.572/1978 & 472/1993, marked as Exhibit "P/5" (from pages 107 to 123 of the Evidence File). The Statements were in two parts. According to the First Statement, titled "Annexure – 1 (c) & (d) - Statement of Cash Dividend declared on the share including the bonus shares which are subject of lawsuit pending in the Sindh High Court of Jubilee Insurance Company Ltd. Kenya since 1970 to 2005", indicated that an amount of Rs.31,008,996 of unpaid dividend was outstanding (on pages 107 to 115 of the Evidence File). Whereas the Second Statement, titled "Annexure – 1 (c) & (d) - Statement of Cash Dividend declared on the share including the bonus shares of EWI Trade Establishment since 1970 to 2005", indicates that an amount of Rs.57,448,604 of the unpaid dividend was outstanding (on pages 117 to 123 of the Evidence File). Thus, according to the evidence file, the total amount of unpaid dividend outstanding, gross of tax, based on the two Statements from 1970 to 2005, totalled Rs.31,008,996 plus Rs.57,448,604 = Rs.88,457,600.

87. To verify the accuracy of the above figures, the Court proceeded to examine the Suit file to identify the various documents and communications evidencing payments made by the Defendant Company to the Nazir of this Court in respect of the unpaid dividends from 1970 upto the date of filing of this Suit, i.e. on 03.07.2007. According to the Written Statement filed by Defendant Company, by end of June 2007, pursuant to the Compromise Order dated 20.12.2005, the Defendant Company had paid to the learned Nazir in terms of the

dividend accrued on the said disputed shares, a sum of cash dividends net of taxes of Rs.27,908,096 + Rs.51,703,744 + Rs.767,257 + Rs.1,428,926 (Total Rs.81,808,023) (Annexures “R/9” on page 447, and “R/13” on page 481 of the Written Statement in Part II of the Suit file) and another sum of cash dividends net of taxes of Rs.30,509,006 (Annexure R/34 on page 643 of the Written Statement in Part II of the Suit file). The total unpaid Dividends net of taxes thus totalled Rs.112,317,029 (Rs.81,808,023 + Rs.30,509,006).

88. As two different figures of unpaid dividends for the period from 1970 to the end of June 2007 emerge in the two paragraphs, i.e. paragraphs 86 and 87, the Court sought assistance from Plaintiff and Defendant Counsels regarding this gap of Rs.23,859,429. At first instance, it appeared that the difference was partly due to the difference in the two periods taken to arrive at the total figure, i.e. the period in the First and Second Statements mentioned in paragraph 86 was for the years 1970 to 2005, whereas the payments to the Nazir as filed by Defendant Company with its Written Statement mentioned in paragraph 87 appeared to be for the years 1970 to 2007 when payment was actually received. As sums of money also varied between gross and net tax amounts, no precise reconciliation was possible. Once again, neither Counsel provided assistance to bridge the said gap. When neither Plaintiff nor Defendant Counsel were able to assist the Court in the reconciliation of the figure of Rs.23,859,429, the Court decided to reach out to the Nazir to ascertain the quantum of dividend the Defendant Company had paid to the Nazir and the amount which the Nazir had then in turn paid out to the Plaintiff and the remaining Claimants. In order to preempt any future objections, Counsels agreed inter-se, as recorded in the Court’s Order of 27.09.2023, that they would accept the amounts reported by the Nazir to ascertain the precise amount of dividend paid by the Defendant Company to Plaintiff. Counsel recorded their no objection to the information proposed to be submitted by the Nazir based on the data available with the Nazir’s Office arising out of the Order dated

20.12.2005 in HCA Nos.183 and 184 of 2003 vide this Court's Order dated 27.09.2023.

89. Accordingly, the Nazir submitted his Report which is/was taken on record and forms part of the Judgment. The Nazir's Report consists/consisted of information contained in two (2) tables, marked as "Table A" and "Table B". Table "A" shows/showed date-wise in chronological order unpaid dividends paid by the Defendant Company to the Nazir. It is/was observed that even though Judgment and Decree was passed in Suit No.572/1978 and Suit No.472/1993 on 07.08.2003 and the Appeals thereof were compromised vide Division Bench's Order dated 20.12.2005, the payments of unpaid dividends by the Defendant Company meant for Plaintiff were paid to the Nazir across a period of almost 18 months between 26.07.2006 and 25.06.2007. Table "A" also shows/showed a total sum of Rs.164,784,798 was paid by Plaintiff to Nazir, whereas Table "B" confirms/confirmed the total dividend payment to Plaintiff was Rs.82,192,402 net of taxes.

90. Based on the above information, it appears that from 1970 to 2007, for over a period of almost 37.5 years, the Defendant Company cumulatively retained a sum of Rs.82,192,402 net of taxes arising out of dividends on disputed shares and bonus shares accrued thereon. While the detailed reasoning of why this equalizer is justified is set out in Issues Nos.(ii) and (iii), a few strings of such discussion are taken up in this paragraph. On 26.07.1978, this Court in Suit No.572/1978 had allowed Naushad Shamsuddin Fancy's CMA No.2762/1978, granting ad-interim injunction, which included order for depositing with the Nazir, unpaid dividends on the disputed shares. The ad-interim injunction remained in place up to the Judgment and Decree dated 07.08.2003 in Suit No.572/1978. Yet the Defendant Company never deposited any unpaid dividends with the Nazir. The unpaid dividend retained by the Defendant Company was in respect of the very same shares which were disputed between Naushad Shamsuddin Fancy and Hasham Aliibai (Plaintiff in this suit and in Suit No.472/1993).

Plaintiff was also impleaded as a party in Suit No.572/1978 in the year 1984, but the Defendant Company continued to retain the unpaid dividends from 1970 to 2007 and never deposited the same with the Nazir as per the ad-interim injunction of this Court even though the dispute in respect of the shares was well within the knowledge of the Defendant Company from 1970 onwards. Even otherwise, to mitigate the risks of an adverse order by a Court of competent jurisdiction under Articles 6,5 and 14 of the Articles of Association from 1953 to 2007, the Defendant Company could have deposited the unpaid dividends with the Nazir, yet they chose not to do so. The Defendant Company accepted the risk and retained the dividend income on the disputed shares. As already discussed, this was never disputed in evidence of the Defendant Company.

91. In view of the above facts, circumstances and discussion, including the issues decided above in favor of Plaintiff, I am of the opinion that the Legal Heirs of Hasham Allibhai have established their claim against New Jubilee Insurance Company Limited. Therefore, the Defendant Company is liable to compensate the Plaintiff in the sum of Rs.154,110,753 (net of taxes) being the equalizer profit on the dividend income retained and utilized by the Defendant Company based on principles of equity and in the alternative, unjust enrichment. The Defendant Company retained Plaintiff's funds arising out the shares eventually registered in the name of Plaintiff by way of the Court's Order dated 20.12.2005 under Articles 6, 5 and 14 of the Articles of Association of 1953, 1986 and 2007 which provided an exception under the Articles of Association of Defendant Company that members may claim no interest. The said equaliser profit of Rs.154,110,753 is calculated based on simple interest of 5% p.a. of the aggregate of the unpaid dividend income of Rs.82,192,402 (net of taxes) spread over 37.5 years from 01.01.1970 to 30.06.2007.[9] The equalizer assumes that the Defendant Company made an annual profit of Rs.4,109,620 per year on the unpaid dividends. The period

[9] The gross amount of the equaliser profit may be determined based on add-back of the applicable tax deductions on such payment on the date of disbursement to Plaintiff.

of 37.5 years includes the delayed period of 18 months approx. from the Order of 20.12.2005 to the date of filing of the titled suit on 03.07.2007.

> Rs.82,192,402 x 5% = Rs. 4,109,620 per year x 37.5 years
> = Rs.154,110,753 (to be paid to Plaintiffs net of taxes)

92. Additionally, Plaintiff has also claimed further interest/mark-up of 14% per annum from the date of filing of this still till its disposal. However, no evidence was produced in support of and/or to justify a rate of interest/markup of 14% p.a. Plaintiff has failed to prove its claim for award of mark-up at the rate of 14% per annum. Accordingly, while this Court declines Plaintiff's claim for mark-up at 14% p.a., it has no hesitance in exercising its discretion under section 34 of the Civil Procedure Code, 1908, read with the judgment of the Supreme Court of Pakistan in *Raja Muhammad Sadiq and 9 Others v. WAPDA through Chairman, WAPDA House, Lahore and 3 Others*, PLD 2003 SC 290, and award the Plaintiff from the date of filing of the Suit, i.e. 03.07.2007 till the date of the decree, simple markup of 5% on 82,192,402 (the equaliser profit on the dividend income as assessed herein above). As this Court has used a base figure for the unpaid dividend, which is/was net of taxes, and awarded equalizer profit to Plaintiff net of taxes, therefore for consistency, the amount payable from the date of filing of the Suit, i.e. 03.07.2007 till the date of decree, by the Defendant Company to Plaintiff is the figure net of taxes, i.e. the sum of 5% p.a. of Rs.82,192,402 from 03.07.2007 till the date of decree is payable to Plaintiff net of taxes amount with the gross amount to be determined based on such tax deduction applicable to the payment on the date of disbursement.

> Rs.82,192,402 x 5% = Rs.4,109,620 per year x 16.33 years =
> Rs. 67,110,095 (to be paid to Plaintiffs net of taxes).

93. Finally, in case of any delay or default in payment to Plaintiff, after passing of this Court's decree, the Defendant Company will be liable to pay the Plaintiff for such delay an additional sum of simple

markup of 5% p.a. on Rs.82,192,402 from the date of decree till realization of the decretal amount.

94. The cost(s) of the Suit are also awarded to the Plaintiff.

Suit decreed as above.

J U D G E