

**IN THE HIGH COURT OF SINDH, AT KARACHI**

**High Court Appeal No.194 of 2008**

**Present:**

**Mr. Justice Nadeem Akhtar &**

**Mr. Justice Muhammad Iqbal Kalhoro**

Date of hearing : 20.10.2014.

Date of decision : .11.2014.

Appellant, Trading Corporation of Pakistan (Pvt.) Ltd., through p  
Mr. Syed Asfaq Hussain Rizvi, Advocate.

Respondent, M/s. Azmatullah Ltd., through Mr. Syed Mazhar-ul-  
Haq, Advocate.

**JUDGMENT**

**MUHAMMAD IQBAL KALHORO, J:** The appellant has assailed the judgment dated 09.06.2008 and decree dated 20.6.2008, passed by learned Single Judge of this Court whereby he decreed the suit No.904/195 filed by the appellant against the respondent for recovery of Rs.1,75,01,087.37 without awarding *interest* thereto as prayed by the appellant.

2. The appellant instituted the above stated suit with the following prayers:-

*“Decree for a sum of Rs.1,75,01,087.37 against the defendants within interest @ 14% per annum till payment.*

*Direct the defendants to hand over the stocks/stores in their possession to the plaintiffs.*

*Appoint the Commissioner to take the stocks/stores”.*

3. The relevant facts are that under a contract bearing No.RECP-5/M&M/79-80/3, executed on 24.10.1979, the respondent/Messers

Azmatullah Ltd. was entrusted with the work of handling rice crop for the year 1979-80 at Qasim Rice Godowns by the appellant/Trading Corporation of Pakistan (Pvt.) Ltd., for the performance of which the respondent was provided large quantities of rice, gunny bags and dunnages. Under the terms and conditions of the contract, the respondent was liable to render true accounts of all the stock entrusted to it from time to time but it failed to do so despite the repeated requests of the appellant. Due to such failure the appellant entered into correspondence with the respondent for settlement of the accounts. Responding to it, the respondent submitted the account but the appellant on scrutiny found it unsatisfactory hence returned the same to the respondent for submitting it afresh. However, in spite of several notices issued by the appellant, the respondent failed to settle the accounts and give explanation for the stock. The work-out done by appellant in respect of the record and R.S. account submitted by the respondent earlier (but returned being not satisfactory), the balance of stock lying with it as well as the cost of the stock which the respondent failed to account for are mentioned in Para Nos.14 & 15 of the plaint in tabular form, which need not reproduce. Since the respondent failed to submit the accounts as required under the contract, the suit was filed against them.

4. The respondent in the written statement refuted case of the appellant pertaining to the settlement of the accounts and the stock of Gunny Bags, rice and dunnage outstanding against it. It was also stated that the rice was brought from the up-country in the vehicles under the control of the appellant and was stored in their godowns which were dually secured by the private guards. No one, including the Forwarding Agents, was allowed to lift a single bag from there without a gate pass and maintaining the entries in the relevant record. When the rice for the purpose of export was brought at the wharf or Port, again the entries

accordance to which the shipping documents including bills of lading were prepared were checked by the staff of the Corporation. The said procedure showed that the rice and gunny bags were never entrusted independently to the respondent and the same always remained under the control of appellant. It was further stated that the rice could not be moved from the warehouse for export unless proper accounts were submitted, which were dually checked and maintained by the Corporation. The Corporation's own employees must have misappropriated the stock which was being foisted upon the poor contracts. On rechecking of the accounts, it transpired that no gunny bag was in the possession of the respondent and whatever quantity was shown missing was actually not traceable at that time, however, after finding it out, it was explained to the appellant that all the missing bags were present in its warehouse. The respondent also denied to have committed a default in performance of the contract or that it could be held liable for any amount in consideration of the rice or the gunny bags or the dunnage.

5. Learned trial Court found the parties at variance on the following points.

1. *Whether the defendant has rendered the true and faithful account of all stocks including & re/bags/dunnages entrusted to them? (Sic)*
2. *What is the effect of Defendant further to give the account of stocks mentioned in para 14 of the plaint?*
3. *Whether the Defendants are liable to pay Rs.1,75,01,087,37/- or any part thereof being the cost of the stocks mentioned in Para 14 of the plaint?*
4. *Whether the Bills of Rs.24,22,063.52 of the Defendant are still pending with plaintiffs?*
5. *Whether the Plaintiffs was employed regular check at different stages of handling?( Sic )*
6. *What should the decree be?*

6. The record reflects that the suit was dismissed for non-prosecution on 13.11.1998 but later on was restored to its original position on the application of the appellant. Ultimately the matter came up for recording the evidence on 12.09.2007, when appellants' witness namely Muhammad Atiq Khan submitted his affidavit-in-evidence. As no one was present to cross examine him, the side of the respondent was closed and the matter was ordered to be posted for final arguments. Yet none appeared for the respondent, thus, Learned Single Judge after hearing the learned counsel for the appellant decreed the suit as stated above. The appellant, being dissatisfied with the impugned judgment filed the instant appeal for claiming the *interest* on the principal amount.

7. Mr. Syed Ashfaq Hussain Rizvi, advocate for the appellant contended that the appellant's suit was not only for the recovery of the principal amount but for the *interest* thereon as well, which has not been granted in spite of the specific prayer about it; the appellant's witness in his affidavit-in-evidence reiterated the facts about the factum of the *interest* on the principal amount but that entirely skipped the attention of the learned Single Judge who even did not mention about it in the impugned judgment and decree. Per learned counsel since nothing was postulated in rebuttal of the claim of the appellant relating to the *interest* on the principal amount, the entire suit, which included the claim about the *interest*, ought to have been decreed. In order to bring home his contention, the learned counsel drew our attention to Section 34 CPC and stated that the decree passed in favour of the appellant was in respect of the money, therefore, awarding *interest* on the principal sum could not be withheld in absence of the strong circumstances justifying so. In

support of his above contentions, he placed reliance on the following decisions:

1. *TERNI S.P.A. Vs. PECO (Pakistan Engineering Company) Ltd. (NLR 1993 SCJ 1)*
2. *Hasnain Brothers Vs. Pakistan National Shipping Corporation, Karachi and 3 others (1986 CLC 2898)*

8. Rebutting him, Mr. Syed Mazhar-ul-Haq, advocate for the respondent contended that the respondent was not afforded a fair chance of hearing to rebut the alleged claim of the appellant; the appellant was not entitled to the *interest* even on merits as the contract on the basis of which the suit was filed, did not stipulate any condition concerning the *interest* payable by the respondent in the face of any alleged breach of the terms and conditions thereof; the learned trial Court did not apply its judicial mind to the entire material available on the record including the written statement filed by the respondent to ascertain the actual circumstances and nature of the dispute pending between the parties. According to him, under the law the learned trial Court was required to decide the suit on merits by give findings on each issue already framed, instead of decreeing the suit ex-parte in haste. Per learned counsel after restoration of the suit, no serious efforts were made to ensure proper service upon the respondent enabling it to appear and contest the suit on merits. Lastly, the learned counsel prayed for setting aside the impugned judgment and decree and remanding the matter to the trial Court to decide it afresh after affording an opportunity to the respondent. In order to strengthen his case, he relied upon the following case laws:

1. *Province of Punjab through Secretary Industries, Government of the Punjab, Civil Secretariat, Lahore Vs. Burewala Textile Mills Limited (2001 SCMR 396)*
2. *Messrs M.Y. Malik & Company and 2 others Vs. Messrs Splendours International through M.D. (1997 SCMR 309)*
3. *A. Ismailjee & Sons Ltd. Vs. Pakistan (PLD 1986 Supreme Court 499)*

4. *Amber Ahmed Khan Vs. Pakistan International Airlines Corporation, Karachi Airport, Karachi (PLD 2003 Karachi 405)*
5. *Raja Nasir Khan Vs. Abdul Sattar Khan and another (PLD 1998 Lahore 20)*
6. *Pakistan Railways through Chairman, Railway Board, Railways Headquarter, Lahore and 2 others Vs. Messrs Caltex Oil (Pakistan) Ltd., Karachi and 2 others (2008 CLC 1003)*
7. *Raja Muhammad Sadiq and 9 others Vs. WAPDA through Chairman, WAPDA House, Lahore and 3 others (PLD 2003 Supreme Court 290)*
8. *Khawaja Abdul Rashid Vs. The Bank of Tokyo Ltd., Karachi (PLD 1974 Karachi 411)*

9. We have given due attention to the submissions advanced by the learned counsel for the parties and perused the material available on the record including the case law cited at bar. We are of the humble view that the facts and circumstances of the present case are quite distinguishable to the ones prevailing in the above cited cases. In the case of TERNI S.P.A., mentioned above, the Hon'ble Supreme Court has been pleased to hold, inter alia, that Section 34 confers a general discretion on Court to allow *interest* where it considers the same just and proper in circumstances of the case, whereas in the case of Hasnain Brothers supra the principle of quantum meruit, among others, has been discussed by the learned Single Judge of this Court. In the case of Province of Punjab, quoted supra, the issue was that the Executing Court during execution of decree had allowed the *interest* for post-award period and while doing so it had modified /altered the decree. The order was set aside by the learned Lahore High Court, whose order was affirmed by the Hon'ble Apex Court. In the case of Messrs M.Y. Malik & Company and 2 others, mentioned above, the Hon'ble Supreme Court has allowed the payment of *interest* on the reduced amount of the decree to be calculated at the rate of 8% from the date of institution of the suit till passing of the decree and whereafter at 10% till the entire payment is

made. In the case of Amber Ahmed supra, the issue pertains to disability compensation of the plaintiff who was employed by the defendant as a flight engineer and had met with an accident while on duty. In the case of Raja Nasir Khan supra, learned Lahore High Court has allowed the compound *interest* at the rate of 15% per annum from the date of decree till realization of the amount. In the case of Pakistan Railways supra, the appellate court by exercising the suo moto jurisdiction had inflicted *interest* on the defendant, which finding was set aside by the learned Lahore High Court. In the case of Raja Muhammad Sadiq supra, the Honorable Supreme Court has held that the decree in suit for damages having been passed with *interest* in terms of Section 34 CPC, the decree-holder would be entitled to the *interest* from the date of the suit. In the case of Khawaja Abdul Rashid supra, the learned Single Judge of this Court did not allow the claim by a surviving partner against Bank for damages and *interest* thereon for wrongfully withholding the amount of two fixed deposits belonging to a partnership firm.

10. The argument of the learned counsel that the impugned judgment was not sustainable under the law as the same was passed without affording a proper opportunity to the respondent to defend the suit cannot be subscribed to for the simple reason that the respondent has not challenged the decree in any proceedings before or even after having acquired knowledge thereof through the instant appeal, which under the circumstances has attained finality to the extent of amount decreed against the respondent. During the course of arguments learned counsel replied in negative when a specific query was put to him about any proceedings initiated by the respondent before any Court to dislodge the impugned judgment and decree operating against it. Such failure undoubtedly leads to an irresistible conclusion about complacency on the part of the respondent over the findings of the learned trial Court to the

extent of granting decretal amount in favour of the appellant. That being so, under the law the respondent cannot challenge the validity of the impugned judgment holding field against it, in the present proceedings filed by the appellant exclusively for the grant of relief in respect of the *interest* on the principal sum decreed finally in its favor.

11. Now we come to the question of grant of the *interest* to the appellant on the principal amount already decreed. The perusal of section 34 CPC would show that it gives discretion to the Court to award *interest*, in the decree where and so far as it is for the payment of money, at such rate as the Court deems reasonable to be paid on the principal amount adjudged, from the date of the suit to the date of the decree, in addition to any *interest* adjudged on such principal amount for any period prior to the institution of the suit, with further *interest* at such rate as the Court deems reasonable on the aggregate amount so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit and proper. For the sake of reference, it is pertinent to reproduce section 34 CPC herewith.

**34. Interest.**---(1) *Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.*

(2) *Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.*

12. The record reflects that although the issues were framed but in respect of the one relating to the *interest* which has been specifically mentioned by the appellant in the prayer clause of the plaint, the



omission has occurred. However, the appellate Court, in exercise of its powers under section 107 CPC, can pass orders to determine finally the dispute in relation to the *interest* contemplated under section 34 CPC when it is either awarded or it has been altogether refused by the trial Court. What we have found on the examination of the record is that neither it has been awarded by the learned trial Court nor it stands refused specifically although the appellant has prayed for it categorically in the suit and its witness has supported it in his evidence. The question about determining the entitlement of the appellant to the *interest* under the circumstances prevailing in the suit does not find any mention in the impugned judgment, which reflects that the contentious issue appertaining to the *interest* has neither been adverted to nor in this regard is any reason assigned thereto. However it does not occur that the material pertaining to the *interest* claimed by appellant in the shape of oral as well as documentary evidence was pored over but was refused as on the record there is nothing to suggest that the Learned Single Judge, it is stated with respects to him, in his wisdom decided not to grant the prayer of the appellant seeking the *interest*. The respondent neither came in the witness box to deny the assertions of the appellant nor cross examined the appellant's witness to dispute him as such the claim of the appellant about the *interest* has admittedly gone unchallenged. Under the circumstances, when the respondent has failed to bring on the record any material disentitling the appellant from having the *interest* on the principal amount, we see no reason to disallow the same.

13. Accordingly the appeal is allowed as prayed with no order as to cost.

JUDGE

JUDGE