IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1215 of 1999

Plaintiff: S. Sardar Alam Zaidi, through Mr. Abid Hameed Puri, Advocate.

Defendant: M/s. Pakistan Gum & Chemicals Limited, through Mr. Abdul Razzaq, Advocate.

Date of hearing: 22.12.2016.

Date of Judgment:

JUDGMENT

YOUSUF ALI SAYEED, J. Through this Suit the Plaintiff has sought judgment and decree against his former employer, the Defendant, for sums said to be due on account of arrears of salary, increment, differential in gratuity, and pension, as well as further compensation for innovation of a manufacturing process to the benefit of the Defendant.

1. The preceding facts, as stated, are that the Plaintiff was in the employ of the Defendant from 01.01.1974 until the expiry of his service contract on 30.06.1998, when he opted against further renewal. Whilst the Plaintiff was admittedly paid a certain amount towards settlement at that time, it is contended that he was additionally entitled to receive further amounts as claimed, the purported basis and computation of which is as follows:

   (a) Due to the modification/variation of the Contract of Employment dated 30.6.1997 (for the period (01.07.1997 to 30.06.1998), as recorded in terms of letters dated 01.01.1998 and 02.01.1998, the Plaintiff had received a reduced salary of Rs.27,379.13 per month from 1.10.1997 to 31.3.1998, as against the earlier contracted salary of Rs.54,758.26 per month, and it is contended that as per the varied terms of contract the Plaintiff was entitled to demand and receive the differential for this six month period along with an increment of at least 10% over the salary for 1996, which is said to work out to Rs.164,274/- on account of the differential and Rs.80,758/- on account of the 10% increase;

   (b) An amount of Rs.81,466/- on account of short payment in gratuity due to the failure on the part of the Defendant to factor in the 10% increment whilst determining the Plaintiff's entitlement;

(c) An amount of Rs.561,820/- on account of pension; and

(d) An amount of US$ 80,000/- on account of development of a new and unique manufacturing process, which was said to have been utilized by the Defendant during its operations for commercial benefit.

2. It is submitted that the Plaintiff addressed the Defendant in respect of these claims vide a letter dated 24.03.1999 as well as in terms of a legal notice dated 06.05.1998, but no response was forthcoming. Hence the instant suit had to be filed, wherein the Plaintiff has prayed, inter alia, for judgment and decree against the Defendant in the sum of Rs.883,318/- as well as US$80,000/- or its equivalent in Pak rupee at the rate of exchange applicable on the date of actual payment.

3. The Defendant filed its written statement and whilst proceeding to assail the maintainability of the Suit on a point of jurisdiction, essentially contended that the claims had no basis in law and that no case was made out on merit, hence the Suit merits dismissal.

4. From the issues proposed by the respective parties the following were adopted and settled by the Court on 21.02.2000:

(i) Whether the Suit is not maintainable?

(ii) Whether this Honourable Court has no jurisdiction to proceed with the instant case which exclusively falls within the jurisdiction of Federal Service Tribunal in view of enactment of Section 2A of Service Tribunal Act, 1973?

(iii) Whether the claim of the plaintiff is outside of scope of service contract agreement?

(iv) Whether the plaintiff has already received payment as being full and final settlement on his account in terms of his Service Contract under reference?

(v) Whether the plaintiff is not entitled to recover Rs.8,88,318/- and US $ 80,000/- in equivalent Pak rupees from the defendants?

(vi) What should the decree be?

5. Since Issues Nos. 1 and 2 concerned the maintainability of the Suit, the same were taken up as preliminary issues, and after hearing the respective counsels for the parties, were answered in the negative in terms of an Order made on 16.10.2001, which was not assailed by the Defendant.

6. Thereafter, the matter proceeded to evidence, and the Plaintiff filed his affidavit-in-evidence (**Exhibit PW-1/1**) and was examined in Court, whereas two witnesses, namely Abdul Rehman, son of Ghulam Mehmood, and Sharif Khan, son of Waheed Khan, filed their respective affidavits-in-evidence (**Exhibits D/6/1** and **DW-2**) and were examined in Court as witnesses from the Defendant's side.

7. On the case coming up before me, it was pointed out by learned counsels on the date of hearing that their respective written arguments had already been placed on record. It was submitted that they reaffirmed the same and desired the decision of the case on that basis. Judgment was reserved accordingly.

8. In the written arguments of Plaintiff's counsel it has been submitted that the signatory of the written statement, namely one Mirza Mehmood Agha, did not file his affidavit in-evidence nor was examined in Court. It was submitted that hence the written statement had not been proved through its signatory, due to which the case of the Plaintiff had gone unchallenged and unrebutted, hence proven. With reference to the appointment of the two persons who did appear as witnesses of the Defendant, it was submitted that the letter of authority (**Exhibit D/6/1/1** and **Exhibit DW-2/1**) produced by them in that regard purports to have been signed by one Meer Asad Waseem, who is stated to be the Chief Executive Officer of the Defendant. It is contended that this letter does not refer to any Board resolution conferring power / authority on the

executant to act on behalf of the Defendant. Furthermore, it was pointed out that under cross-examination, the Defendants' witness, Abdul Rehman, had admitted that no such Resolution has been passed. It has been argued that there is therefore no representation or rebuttal from the Defendants to the Plaintiff's claim and in these circumstances the Court may be pleased to pass Judgment and decree in favour of the Plaintiff. Reliance has been placed in this regard on the judgments reported at 1986 CLC 288, PLD 1972 SC 25, 1996 CLJ 474 and PLD 2010 Supreme Court 604. As these objections pertain to an evidentiary matter, I intend to first consider the same as well as the case-law cited before embarking on any discussion on merit.

9. In the case of **Mst. Sakina and Another v Hussain and 5 Others**, reported at **1986 CLC 288**, it was observed by a learned single judge of this Court that the pleadings of the parties are not to be treated as substantive evidence, and that averments made in such pleadings carry no weight until the author personally turns up to support them, and more importantly, offers himself for cross examination. Reliance was placed on the principle evolved in the case of **Khair-ul-Nisa v. Malik Muhammad Ishaque**, reported at **PLD 1972 SC 25**.

10. It is pertinent to mention that the underlying facts of Khairunnisa's case were that a suit for specific performance had been filed against the vendor as well as a third party who was a subsequent purchaser to the plaintiff, wherein enforcement was sought of the earlier contract of sale in favour of the plaintiff. The defense raised by the subsequent purchaser in his written statement was that he was a "transferee for value who has paid his money in good faith and without notice of the original contract" and as such was covered by the exception to Section 27 of the Specific Relief Act, and the rule of specific performance of the earlier contract could not be enforced against him. However, during the pendency of the suit this purchaser died prior to recording his evidence in support of his contentions in the written statement, which was therefore ignored and rejected from consideration. The contentions raised by the advocate for the said defendant as to the effect of the written statement were disposed of by the Court as follows:

> "Raja Muhammad Anwar, learned counsel for the appellants, has contended that the deceased had denied the factum of the notice in the written statement and this should be considered as evidence in the case under section 32 of the Evidence Act. The contention of the learned counsel is not well-founded. Written statements cannot be the exhibits in the case without the person who filed the same being examined in the Court. The statement made in the written statement are not on oath. They are only verified and, therefore, they cannot be treated as evidence in the case".

It was observed that support for this view was to be found in the cases reported at AIR 1917 Cal. 269(2) and PLD 1962 Dacca 643, and in view thereof the denial by the deceased subsequent purchaser in his written statement was of no avail and could not be of any assistance in the discharge of the onus which lay on the appellants to prove that the deceased was a transferee for valuable consideration in good faith and without notice.

11. Applying this principle, it was held by the learned single Judge in Sakina's case that the written statement filed by one of the defendants could not be utilized by the respondent/plaintiff as he had failed to examine the author of the written statement. It appears that this approach was adopted by his Lordship, as he then was, as the contents of the written statement were sought to be used by the Plaintiff against and to the detriment of a defendant other than the one who had filed such written statement, which would then have constituted a different circumstance altogether.

12. Similarly, in the case of **Haji Adam Ali Agaria v Asif Hussain etc**, reported at **1996 CLJ 474**, it was held with reliance on the principle laid down in Khairunnissa's case, that the averments made in the written statement could not be taken into consideration as a valid piece of evidence after the death of the defendant without the same being exhibited and proven through the Defendant's witness.

13. Likewise, in the case of **Federation of Pakistan through Secretary Ministry of Defence and Another v Jaffar Khan and Others**, reported at **PLD 2010 Supreme Court 604**, it was held by the Apex Court that a document which has not been brought on record through witnesses and has not duly exhibited, cannot be taken into consideration by the Court, and it was observed that a written statement cannot be exhibited in the case without the filer being examined in the Court and cannot be treated as substantive evidence except where such statement amounts to admission of plaintiff's plea.

14. In response, learned counsel for the Defendant has submitted that these contentions are hyper-technical, and stated that a person who is familiar with the facts, can appear as a witness and give evidence particularly where there is no objection to his appearance and there is no requirement under law and none has been quoted by the plaintiff to suggest that a witness requires a resolution by the Board of Directors to tender evidence. He further states that the admitted position in this case is that the Chief Executive of the company had instructed the witness to appear and tender evidence and the name of the witness was contained in the list of witnesses. Without prejudice to the above it is submitted that the plaintiff did not seek that an issue be made on this point and none was made. It is further submitted that technicalities should be avoided.

15. As far as this evidentiary objection raised by the Plaintiff is concerned, it appears from the record that a resolution had been passed through circulation by the Board of Directors of the Defendant (**Exhibit D/6/1/24**), whereby the signatory to the written statement had been authorized generally to represent the Defendant for the purposes of the Suit, including engage advocates. In such capacity, he had signed a Vakalatnama for the purpose of appointing legal counsel on behalf of the Defendant in the matter, who in turn had prepared and filed a list of witnesses which had been submitted in Court under his signature. The two persons named in this list were the very witnesses who then appeared in Court and tendered evidence on behalf of the Defendant.

16. At the time of appearance, these witnesses produced the letter of authority purportedly issued by the Managing Director, authorizing them in that regard, and in the absence of any objection at that juncture this letter was exhibited accordingly. Thereafter, the examination in chief of both these witnesses was conducted in full and the entire corpus of documentary evidence produced by them was allowed to be exhibited without any serious objection being raised at the relevant time as to their capacity to appear and/or bring such documents on record. It was only during the course of cross-examination that questions were put to them as to whether they had been authorized pursuant to any resolution of the Board of Directors. Furthermore, as per the record, the witnesses named in the list filed on behalf of the Defendants by the validly appointed counsel were produced by him in Court on behalf of the Defendant and examined accordingly. Suffice it to say that the Defendant never disavowed either of these witnesses or the evidence tendered by them.

17. The point presently arising for consideration is different from that of authorization for institution of proceedings, where it is imperative that specific authority sanctioning institution be present at the outset. In the instant case the reasonable satisfaction of the Court as to the credentials of the witness appears sufficient. Furthermore, the matter at hand is not a case where the written statement is sought to be exhibited or relied upon in evidence without the defendant being deposed. Even otherwise, the present Defendant is a juristic entity and two witnesses have deposed in evidence on its behalf and been subjected to cross examination accordingly.

18. Under these circumstances, I am of the opinion that the cases cited by learned counsel for the Plaintiff are distinguishable and the evidence that has been presented before the Court by the Defendant's witnesses cannot be set at naught on the basis thereof. However, to what extent the evidence presented may be considered for the purpose of determination of the case on merits is a further matter to be considered in light of the pleadings, as dealt with herein below.

19. Issues Nos. 1 and 2 have already been answered in the negative, as mentioned herein above, and no further finding on these issues is required.

20. Issues Nos. 3, 4 and 5 appear intertwined as a determination thereof necessitates that the employment terms prevailing at the relevant point in time firstly be ascertained, and then interpreted. As such, these issues may conveniently/properly be considered together. Having examined the respective contentions of the parties in light of the evidence produced, my finding on these issues is as follows hereinafter.

21. In advancement of the claims set up in the plaint, as regards the factual backdrop, it has been submitted that the relationship inter se the Plaintiff and the Defendant at the relevant time was such that the service contract was subject to renewal from year to year. Around the period 1996-1997, the business of the Defendant began to decline, with the result that the Defendant sought to curb/reduce its costs and in a gesture of support certain employees opted to voluntarily forego their increments due on 01.07.1997, and subsequently to work on the basis of a reduced salary.

22. It is submitted that the Contract of Employment dated 30.6.1997 (**Exhibit PW-1/21**, which was also produced on behalf of the Defendant as **Exhibit D/6/1/15**), pertaining to the period 01.07.1997 to 30.06.1998, was subsequently modified on the terms recorded in two letters dated 01.01.1998 and 02.01.1998 respectively (**Exhibits PW-1/4** and **PW-1/5**, which were also produced on behalf of the Defendant as **Exhibits D/6/1/16** and **D/6/1/17**). It is submitted that vide the letter of 02.01.1998, further terms over and above what had been proposed as per the Defendants letter dated 01.01.1998 were added for the benefit/protection of employees. This letter of 02.01.1998 thus forms the basis of the Plaintiff's claim on account of salary arrears, increment and short payment on gratuity, as alleged.

23. The underlying document which undisputedly forms the substratum of the service contract in this case is the letter of 30.07.1997, captioned "**RENEWAL OF CONTRACT PERIOD OF COVERAGE JULY 01 1997 TO JUNE 30 1998**", addressed to the Plaintiff by the then Managing Director of the Defendant, the relevant paragraph of which states as follows:

> "As you are aware, due to non-availability of raw material, the company is going to face a tremendous loss this year, which has already been reflected in the results for the first 6 months. I greatly appreciate the gesture by the PakChem Management Team of which you are a member, to voluntarily forego your increments due on July 01 1997, as your contribution to controlling the company's Fixed Costs. In view of this decision the terms of your employment remain unchanged-until further notice-from those detailed in my letter of June 30, 1996." [Underlining added]

24. Subsequently, this contract was modified in terms of a letter dated 01.01.1998, also addressed by the Managing Director, which was captioned "**MODIFICATION TO RENEWAL OF CONTRACT PERIOD OF COVERAGE JULY 01 1997 TO JUNE 30 1998**", and wherein it was stated inter alia that due to the unavailability of an essential raw material the business forecast for the year 1998 was even worse than that of the preceding year and that action would be taken to retrench many workers on a permanent basis. It was further stated as follows:

> "You form part of the Management staff. Other activities not related to production, have to continue and unfortunately these have not reduced in any way as a result of an idle plant. We really do not know where the company is heading under these conditions, but we know that we have to reduce our fixed costs. You have been given every opportunity to voice your opinions on how to run this business, during the weekly Management meetings. I do not think anybody can come up with any other solution.
>
> We should take solace in the fact that this financial crisis is in no way whatsoever, due to any action which the Management of this company has taken. Nor is it any reflection on your personal performance which has been exemplary.

I regretfully see no alternative, however, but to propose to you that at least for the first 6 months of 1998, you continue to work on 50% salary, as you have been doing for the last three months of 1997.

Naturally I would not like to force this decision upon any of our valued managers. If anybody does not agree, I would very reluctantly have to accept their resignation. To those who do agree, let us hope that this tremendous sacrifice on your part will lead us into a future where we will once again be able to lift our heads high and be proud of the organization of which we are part. As you know, we have a plan to get away from the cyclical weather changes in the not-too-distant future." [Underlining added]

25. Whilst this letter was signed in acceptance of the terms stated, it is contended that the matter had nonetheless been kept alive by the Plaintiff as well as other employees to whom such an arrangement of continuing in employment on varied terms had been proposed, in as much as they jointly addressed a letter dated 02.01.1998 to the Managing Director, bearing the same caption as the Managing Director's letter of the previous day, wherein it was mentioned as follows:

"This has reference to the letter dated January 01 1998 addressed by you to Grade IV and V Officers of PakChem. We informed you that before signing the same, we wished to discuss the contents amongst ourselves.

We have now had a meeting, and, understanding the difficult conditions under which the company is laboring at present, would agree to sign the letter under reference, on the following conditions:

1) The reduction in salary will not affect our retirement benefits in any way.

2) If at any time during the tenure of the current contract, we feel that it is not possible-for any reason, for us to continue working on half salary, we may demand that our full salary-along with arrears and at least a 10% increment over the salary for 1996 be restored to us, and the company will do so forthwith, without question.

We hope that you can agree to the foregoing, so that the letter in question may be signed by us. We join you in looking forward to better times for this company which we have loyally served for so many years." [Underlining added]

26. The authenticity of the letter of 02.01.1998 has not been disputed by the Defendant, in as much as it stands admitted that the same was presented by the Plaintiff and other personnel before the Managing Director, and was signed by him in acceptance of these terms. However, it has been submitted that this was done without seeking any approval or direction from the Board of Directors, and when the matter was placed before the Board, the implementation of this arrangement was held not to be mandatory and it was directed that no such claim be entertained. Instead, in the meeting of 21.04.1998 (the minutes of which have been placed in evidence as **Exhibit D/6/1/18**), the Board of Directors decided that full salary be paid to the Plaintiff and others effective 01.04.1998 onwards, which was paid and accepted. It has thus been contended that the arrangement of 02.01.1998 was not binding on the Defendant.

27. Having considered the matter, I find myself unable to accept this contention, in as much as the past practice apparent on the face of the record shows that the Managing Director had previously executed past renewals of the employment contract and there was no reason for the parties to have doubted his capacity to represent and contractually bind the Defendant on this occasion.

28. Even otherwise, under the principle of indoor management evolved from the judgment in the case of **Royal British Bank v. Turquand**, and based on the maxim *omnia presumenter rite esse acta*, it may be assumed that a functionary in a position of ostensible authority has been properly authorized and that all official acts in that regard have been properly done.

29. Furthermore, in **Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd**, [1964] 2 QB 480, where the authorities on this question were reviewed by the Court of Appeal, it was held by Diplock L.J, that four conditions must be satisfied to entitle a third-party to enforce a contract entered into on behalf of a company by an agent without actual authority.

30. For the purposes of this four pronged test, it must be shown (1) that a representation was made to the third party that the agent had authority on behalf of the company to enter into a contract of the kind sought to be enforced; (2) that such representation was made by a person or persons who had 'actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates, (3) that he (the third-party) was induced by such representation to enter into the contract, that is, that he in fact relied on it: and (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent. In the matter at hand, when the conduct and past practice is examined, all of these conditions appears to be met, as previously discussed.

31. Accordingly, I am fortified in my assessment that the terms of the letter of 02.01.1998 form part of the overall contract of service, which is thus comprised of the letter of 30.07.1997, as modified in terms of the subsequent letters dated 01.01.1998 and 02.01.1998 referred to and partly reproduced herein above, and the cumulative understanding encapsulated in these three documents constitutes the pith and substance of the service contract. The claims of the Plaintiff under the various heads have to thus be viewed in juxtaposition with reference to this framework in order to determine whether they are outside/beyond the scope thereof and what the Plaintiff's entitlements are, if any.

Salary Arrears, Increment & Gratuity

32. As the claims on account of salary arrears, increment and short payment on account of gratuity all revolve specifically around the interpretation of the terms encapsulated in the letter of 02.01.1998, I propose to consider these first.

33. In advancement of these claims it has been argued by learned counsel for the Plaintiff that as per the modified service contract, the Plaintiff received a reduced salary of Rs.27,379.13 per month from 1.10.1997 to 31.3.1998, as against the earlier contracted salary of Rs.54,758.26 per month. However, by virtue of the understanding recorded in the letter dated 02.01.1998, he was entitled to demand and receive the salary differential of Rs.164,274/- for this six month period as well as a sum of Rs.80,758/- on account of the 10% increment over the salary for 1996, which was never paid. It is also contended that due to the failure to factor in the 10% increment in salary, there has been a consequent short payment of Rs.81,466/- in the amount which the Plaintiff received from the Defendant by way of gratuity, hence the Plaintiff is entitled to the shortfall.

34. Whilst the payment of half salary between 1.10.1997 to 31.3.1998 is not in dispute, it has been contended on behalf of the Defendant that even if the letter of 02.01.1998 relied upon by the Plaintiff as the basis of his claim to salary arrears and increment is recognized as forming part of the service contract, the phrase "during the tenure of the current contact", as used therein, is of particular significance as the operative part of this letter hinges on this phrase. Thus, it was only if within that given timeframe that the Plaintiff felt that it was not possible to continue working on half salary that he could have demanded the arrears.

35. It has been pointed out that, however, the Plaintiff opted not to renew his service contract, which therefore lapsed on 30.06.1998. It has been pointed out further that, at that time, towards settlement of account, the Plaintiff received Rs.814,101.56 as gratuity (**Exhibit D/6/1/20**), Rs.1,715,695.34 from the provident fund (**Exhibit D/6/1/21**), Rs.72,178.29 as salary (broken up into Rs.57,133.26 as salary for June 1998, Rs.11,145.03 as medical reimbursement and Rs.3,900/- as petrol reimbursement), and Rs.99,222.10 on account of earned leave encashment (**Exhibit D/6/1/22**).

36. It is submitted that the Plaintiff did not, whether at the time of such settlement or at any earlier point in time whilst he was in the employ of the Defendant, demand any amount as arrears of salary or espouse any of the other claims, all of which it is suggested were only taken up as an afterthought many months later.

37. It was submitted further, without prejudice to the Defendant's earlier contention, that it is reasonable to believe that the possibility of seeking reimbursement of arrears of the 50% reduced amount in terms of the language of Para 2 of the letter dated 02.01.1998 could even otherwise only have arisen if in the future raw material would have become available so as enable the company to resume normal functioning and so at least break-even, if not make a profit. However, it is evident from the Annual Report of 1998 (**Exhibit D/6/1/25**) that the Defendant was substantially in loss, and it was acknowledged in the Plaintiff's own letter dated 15.06.1998 (**Exhibit D/6/1/19**), that the company's future was "absolutely dark", and indeed it is for this reason that the Plaintiff and other persons had agreed to work on 50% reduced salary in the first place. As such, the reimbursement claim was not only baseless for the reason of the Plaintiff's acquiescence in the decision of the Board, but was also not in consonance with the rationale underpinning the variation of the service contract. Furthermore, no other employee was paid the differential for the period that they had received half salaries, nor had any of them ever espoused any claims such as those raised by the Plaintiff.

38. As regard the claim made on account of gratuity, it was submitted that this claim is predicated on a baseless assumption that 10% increase in salary would have been allowed. The Plaintiff was paid the amount due on account of gratuity on 30.06.1998, which he accepted when settling his account. The 10% increase was neither due nor sanctioned and is only wishful thinking on the part of the Plaintiff. There was neither any legal basis nor does the contract of employment cater for such increase.

39. From a comparative appraisal of the arguments advanced on behalf of the contestants, to my mind, the matter in relation to alleged salary arrears, increment, and short payment in gratuity, is essentially one of interpretation of the service contract, particularly the effect of modification/variation in terms of the letter dated 02.01.1998.

40. The principles as to the interpretation of deeds, documents, contracts and for that matter, of statutes, are well settled. As stated in "Chitty on Contracts" (30th Edition), the object of all construction of the terms of a written agreement is to discover therefrom the common intention of the parties to the agreement. The task of ascertaining the common intention of the parties must be approached objectively; the question is not what one or other of the parties meant or understood by the words used, but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

41. Dilating on this aspect in the case of Cargill International SA v. Bangladesh Sugar and Food Industries Corporation [1997] EWCA Civ 2757; [1998] 1 WLR 461, the (English) Court of Appeal observed as follows:

> "On the other hand, modern principles of construction require the Court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result." (per Potter, LJ)

42. From a combined reading of the aforementioned letters, viewed within the framework of the factual matrix of the case, it appears from the letter dated 01.01.1998 that the object and intendment of the variation of contractual terms at the outset was to reduce the costs of the Defendant in view of the plant being idle to due to unavailability of an essential raw

material. This letter envisages that, moving forward, employees could either accept the option of continued employment on the basis of half salary or opt resign. Needless to say, the right to terminate the service contract at one month's notice or salary in lieu thereof remained with either side.

43. By contrast, the wording of the letter of 02.01.1998 suggests that after some discussion and deliberation, in order presumably to placate the employees and retain them in service, the option was extended whereby they could call upon the Defendant to restore their full salary, with arrears, and increment, as provided therein. The question that arises is whether from the wording of this letter of 02.01.1998, especially the phrase "during the tenure of the current contact", this option could only have been exercised up to 30.06.1998 or could continue to be exercised thereafter.

44. I am of the opinion that the wording of the operative part of the letter of 02.01.1998 (i.e. Clause 2 thereof) is sufficiently clear on the point that a triggering demand thereunder could only validly have been made by the employees or any of them during the tenure of the then prevailing contract, which was not done. No real argument has been advanced on behalf of the Plaintiff in support of any contrary interpretation that would continue to entitle him to the benefit of this provision, and, even otherwise, the same ought to be interpreted *contra proferentem* as against the employees in the exigencies of the given situation.

45. However, the matter does not end there, as the conduct of the parties subsequent to the letter of 02.01.1998, and the effect thereof vis-à-vis the arrangement, also merits consideration, in as much as the Defendant's Board of Directors had rejected the arrangement in relation to the payment of arrears for the past period during the tenure of the contract by directing that "no such claim be entertained". As such, this arrangement was unilaterally altered and thus repudiated by the Defendant at that time.

46. In the English case of **Rigby v Ferodo Ltd**, [1988] ICR 29, decided by the House of Lords, the facts were that the employer, Ferodo Ltd, cut wages by 5% to stay afloat. The trade union agreed not to strike. The plaintiff employee, Mr. Rigby, who worked as a lathe operator on a weekly wage of £129 in terms of a contract terminable on 12 weeks' notice, made it known that he did not accept this reduction. Thereafter, he nonetheless continued to work and after over a year, claimed the differential/shortfall. The judge at first instance held there had been a unilateral variation of the contract, which amounted to a breach, and Mr. Rigby was hence entitled to damages. The Court of Appeal agreed. The employer appealed to the House of Lords, where it was held by their Lordships that there had been a repudiatory breach of contract, entitling the employee to claim the shortfall in wages. If the employee continued to work, this did not necessarily imply that he accepted the change, nor was it the case that the contract was automatically brought to an end. Moreover, a notice of unilateral variation could not be implicitly construed as giving notice of termination, and because the employer had not terminated the contract the damages receivable by the employee could extend beyond the 12 week notice period on which the contract could legitimately have been terminated.

47. In the instant case, however, the facts and circumstances are different as the unilateral variation, through reversion to the original salary basis and rejection of the claim to arrears, was not met with any apparent protest on the part of the Plaintiff, who, instead, received his full monthly salary from time to time without demurrer as to the decision concerning payment of arrears or invocation of the letter dated 02.01.1998 as per its terms. Needless to say, one of the ways whereby a unilateral variation may be given effect without constituting a breach of the underlying contract is through implied agreement by conduct, which appears to be there on the part of the Plaintiff in the given circumstances of the case.

48. Accordingly, I am of the opinion that the alleged entitlement in respect of the claim to salary arrears, increment and short payment on account of gratuity, remains unsubstantiated, and hence is denied.

Pension

49. As regards the claim to pension, in furtherance of the case set up in the plaint it has been elucidated in the written arguments that the sum of Rs.561,820/- claimed on this account is due to the Plaintiff, as evinced by the relevant entries under the head of "Pension Fund" set out in the calculation sheets appended with the letters dated 30.06.1990, 30.06.1991, 29.04.1992, 28.02.1994, 30.06.1994, 30.06.1995. 30.06.1996 and 30.06.1998 (**Exhibits PW-1/14** to **PW-1/21**) issued to the Plaintiff by the Defendant, as exhibited in evidence, showing amounts to be due for the respective years, which aggregate to the amount of the claim. As such, there can be no doubt that the aspect of pension forms part of the service contract.

50. The written arguments of the Defendant regarding the pension claim, as indeed the evidence that was led on this aspect, proceed on a different plane. It merits consideration that in response to the averments made in the Plaint with reference to the aforementioned letters and calculation sheets, the contents of the relevant para of the Plaint as framed were simply denied in the written statement as being false and incorrect, without any elaboration whatsoever on the part of the Defendant. No objection was taken as to the genuineness or veracity of these documents, and even at the stage of evidence, no question was posed to the Plaintiff regarding his claim on account of pension, whether in respect of the entries in these calculation sheets, where amounts are showed as having accrued for the relevant period in respect of pension.

51. However, at the stage of the Defendant's evidence, it was submitted in the affidavit-in-evidence of its witness, Mr. Abdur Rehman (**Exhibit D/6/1**), that pension benefits are payable by the trustees of the Pakistan Gum & Chemical Limited Executive Staff Pension Fund, who have not been sued and are not party to the suit, and that this relief cannot be claimed against Defendant company which is a separate and distinct legal entity. Additionally, it was stated that no pension was payable to the Plaintiff as he had resigned, which was a different thing from retirement for the purposes of the trust deed, and that a "certificate of retirement" was required to be submitted, which requirement had not been fulfilled in the Plaintiff's case.

52. These points have then been advanced in the written arguments, where reference has also been made to the statements of Mr. Abdur Rehman during cross-examination that (a) if the trustees would have been made a party they would have confirmed that pension is only payable to a member after he retires on attaining the age of sixty years, and at the time of his resignation the plaintiff was below the age of 55. It has been submitted that the Plaintiff has to rely upon his own case and evidence in support of his claim and has failed to prove that he is entitled to pension from the trustees of the Pakistan Gun & Chemical Limited Executive Staff Pension Fund whom he chose not to make party to the Suit.

53. In the aforestated context, the question that arises is whether such oral evidence as to the pension fund could have been introduced in the complete absence of any foundational pleading in the written statement to the effect that the matter of pension was the subject of a trust, and that the trustees were necessarily required to be impleaded. On the contrary, not even a passing suggestion was made in the written statement in that regard, and no issue was framed on that point. Furthermore, it merits consideration that the constitutive documents of the said trust were never brought on record, albeit it being narrated in the affidavit-in-evidence of the Defendant's witness, Mr. Abdur Rehman, as follows:

> "I say that the financial entitlement, right and benefits available to the Plaintiff were calculated and paid and such amount was received by him in settlement without raising any objection at that time or thereafter. These entitlements are governed by the Pakistan Gum & Chemicals Limited Executive Staff Pension Fund and its rules as well as the contract of service which have been placed on the record of this case". [Underlining added]

54. It need scarcely be stated that the purpose of pleadings is essentially to let the other party know what case it has to meet as well as the facts which parties have to prove or establish the cause of action or the defendants to establish their defense. Anything not specifically claimed in the pleadings could therefore not be allowed in evidence and if evidence was so recorded then the same ought to be declared irrelevant. In the matter of

drawing up a written statement, Rule 2 of Order 8 CPC lays down certain guidelines, as follows:

> "The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint, as for instance fraud, limitation, release, payment, performance, or facts showing illegality."

55. These words indicate the broad test for determining whether a particular defense plea or fact is required to be incorporated in the written statement. If the plea or ground of defense raises issues of fact not arising out of the plaint, such plea or ground is likely to take the plaintiff by surprise, and is therefore required to be pleaded. If the plea or ground of defense raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint, itself, no question of prejudice or surprise to the plaintiff arises. Nothing in the Rule compels the defendant to plead such a ground, nor debars him from setting it up at a later stage of the case, particularly when it does not depend on evidence but raises a pure question of law turning on a construction of the plaint.

56. In the matter at hand it is evident that the Defendant first sought to raise the point of alleged non-joinder of the trustees at the evidentiary stage, and did so for the obvious purpose of mounting a defense to the Plaintiff's claim. Furthermore, from a reading of the Plaint it is apparent that the existence of a trust is not a point that arises in any way from the facts narrated therein, in as much as the claim of the Plaintiff is directed squarely at the Defendant and there is no indication of a trust from the documents forming the basis of the Plaintiff's claim under this head (**Exhibits PW-1/14** to **PW-1/21**) or even in the Annual Report of the Defendant company for the year 1998 (**Exhibit D/6/1/25**), wherein the subject of pension is addressed in terms of Note 2.4 to the Accounts.

57. In fact, it merits consideration that Note 2.4 is couched in similar terms to Notes 2.2 and 2.3, which pertain to the Gratuity Scheme and Provident Fund scheme respectively, and payments under these heads (i.e. gratuity and provident fund) have apparently been made to employees by the Defendant directly, as evinced by the relevant Debit Vouchers and attached detail sheet (**Exhibits D/6/1/20** and **D/6/1/21 respectively**) which the Defendant has itself brought on record during the course of evidence.

58. Accordingly, I am of the view that under such circumstances the objection to non-joinder ought to have been specifically pleaded in the written statement or, having been overlooked, should have been addressed subsequently in terms of an additional written statement filed subject to permission of the Court. In the absence of any factual foundation, such evidence could not have been introduced and cannot now be considered.

59. In the case of **Sardar Muhammad Naseem Khan v Returning Officer, PP-12 and Others**, reported at **2015 SCMR 1698**, whilst deciding an election petition it was observed by his Lordship Saqib Nisar, J (now the Honourable CJP), as follows:

> "In election disputes, the petition (the election petition) and the reply thereto are the foundational documents, which are of utmost importance and significance. And undoubtedly for all intents and purposes these are akin to the pleadings of the parties in a purely civil litigation, which (pleadings) are structural in nature, whereupon the edifice of the case is rested. The election petition lays down the foundation of the claim of an election petitioner, whereas the written reply thereto of the respondent (returned candidate) is the underpinning of his defence. The importance of the pleadings and its legal value and significance can be evaluated and gauged from the fact that it is primarily on the basis thereupon that the issues are framed; though the pleadings by themselves are not the evidence of the case, the parties to a litigation have to lead the evidence strictly in line and in consonance thereof to prove their respective pleas. In other words, a party is bound by the averments made in its pleadings and is also precluded from leading evidence except precisely in terms thereof. A party cannot travel beyond the scope of its pleadings. It may be pertinent to mention here, that even if some evidence has been led by a party, which is beyond the scope of its pleadings, the Court shall exclude and ignore such evidence from consideration.

> Thus, it is clear that if any party to a lis wants to prove or disprove a case and some material has to be brought on the record as part of the evidence, which (evidence) otherwise is not covered by the pleadings, it shall be the duty of such party to first seek amendment of its pleadings".

The principle laid down in the aforesaid Judgment of the Honourable Supreme Court proceeds on the time honoured principle that parties are bound by the averments made in the pleadings, as well as the rule encapsulated in the maxim *secundum allegata et probata*. Further authorities on this point may also be found in the cases reported at **2014 SCMR 914** and **2016 CLC 1042**.

60. Even otherwise, broadly stated, a 'necessary party' is one that ought to have been joined and in whose absence no effective decree can be passed, and the question whether a person is a necessary party in a case always depends on facts of that particular case. In the matter at hand, the cause of action and prayer, as stated, relate to and are directed at the Defendant, and as the Plaintiff has only prayed for a money decree, there is no underlying issue of the same being rendered ineffective.

61. As earlier observed, the plaint makes no mention of a trust or the pension fund being vested in trustees, nor indeed have the constitutive documents of the alleged trust or any other document indicating the existence of such an arrangement been brought on record - the onus of which in my opinion lay on the Defendant. The implications of Notes 2.2 and 2.3 to the Accounts set out in the Annual Report for the year 1998 have already been addressed herein above.

62. Turning to the merits of the pension claim, as observed earlier, the Plaintiff rests his entitlement on the letters issued by the Defendant between June 1990 to June 1997 by way of renewal of the Plaintiff's service contract, and the calculation sheets attached therewith (**Exhibits PW-1/14** to **PW-1/21**). Each of these calculation sheets provides the details of the salary and benefits that the Plaintiff was entitled to receive, and bears an entry for the financial year showing the amount accrued on account of pension.

63. The authenticity of these letters and calculation sheets and the correctness of what is stated therein has not been rebutted in the pleadings or during the course of evidence, hence the same have considerable probative value. In fact, during the course of cross-examination the Plaintiff reasserted/reaffirmed that these documents formed the basis of his claim.

64. Other than the point of non-joinder, which has already been considered and dispelled, the only further contentions in the written arguments of the Defendant regarding the pension claim, based on the testimony advanced in the affidavit-in-evidence of the Defendant's witness, Mr. Abdur Rahman, are (a) that the act of resignation on the Plaintiff's part serves to disentitle him to pension as a certificate of retirement is required to be submitted in support of a claim, and (b) that the Plaintiff had even otherwise not attained the age of sixty years, which is the age at which the pension entitlement matures.

65. However, no documentary evidence was ever produced for substantiation of these contentions, despite this point being put to the witness. As such, the mere statement of the Defendant's witness would be of no value where documentary evidence in support of such fact was said to be available but was not produced. Even otherwise, on the contrary, Mr. Abdur Rahman went on to admit under cross-examination that when he resigned from the employ of the Defendant he nonetheless received pension, and also conceded that his statement regarding retirement being a disqualification was incorrect. Furthermore, it was also conceded by him that at the time of his resignation he was below sixty years of age.

66. In view of the foregoing, I am of the opinion that the preponderance of proof/evidence supports the Plaintiff's entitlement to pension to the extent of Rs.561,820/-, as claimed, being the aggregate of the amounts specified in Exhibits PW-1/14 to PW-1/21.

Innovation

67. From a comparative reading of the pleadings as well as the evidence recorded, it appears that a process, termed as Rotary Furnace Technology, was devised/invented in the year 1996 by the Plaintiff in concert with three other employees of the Defendant, which had the potential to be utilized by the Defendant during its operations for commercial benefit. In terms of the present suit it has been contended by the Plaintiff that a sum of US$ 80,000/- is due to the Plaintiff on account of such development.

68. The basis advanced for the computation of this claim is that a Textile Thickener Technology had been supplied to the Defendant in the year 1997 by its principals, for which the principals had charged such sum in addition to 3% running royalty computed on Net Sales Value of any and all Products for a period of five (5) years. Hence, the present claim proceeds on a parallel basis to that precedent, which is said to be analogous. It has been submitted that despite repeated requests for a suitable return from the defendants for his personal time, efforts and labour applied, the plaintiff was kept on hopes till 1998 when his full and final settlement sums were paid without any payment on such ground.

69. The Defendant has traversed this claim and submits that it is bereft of any legal basis, whether under the service contract or otherwise. It has been submitted that the innovation was not the outcome of the Plaintiff's sole effort, as projected in the plaint, but, in fact, was brought about in collaboration with three other employees. It has been submitted that this task was undertaken by the Plaintiff and other concerned employees during the course of their duties, for which they were each admittedly paid a "Special Innovation Bonus" of varying amounts, with the Plaintiff having paid an amount of Rs.250,000/-, as reflected in the Debit Voucher dated 13.06.1996 (**Exhibit PW-1/25**).

70. It is submitted that no proprietary claim was ever espoused/advanced by the Plaintiff in this regard during the course of his employment, nor indeed has any such claim ever been advanced by any of other employees, and, even otherwise, the very basis of the Plaintiff's computation (i.e. on the analogy of a like amount having been paid by the Defendant to its foreign principal for licensing of a certain textile thickener) is inapplicable and completely unjustified.

71. The right of an employee inventor to receive compensation on account of an invention of exceptional economic value, whether unpatented or the right to patent in respect of which belongs to the employer, has come to be recognized in terms of Section 12 of the Patents Ordinance 2000, subject to the test/criteria and determinants prescribed therein. However as far as the Plaintiffs claim to compensation for the development of technology is concerned, the same predates this enactment and therefore, in the absence of such statutory framework, has to be viewed on the basis of any contractual understanding in this regard.

72. In this respect, it has to primarily be seen as to whom the proprietary right/interest in the invention vested, and if the same did vest in the Plaintiff, on what terms was the same made available to the Defendant for commercial exploitation. Conversely, if the proprietary right/interest did not so vest, was there otherwise any express or implied understanding that the Plaintiff was to be compensated for his efforts in a manner and to an extent co-extensive to the benefit to potentially be derived by the Defendant, as the case has been set up by the Plaintiff.

73. Whilst in terms of the Plaint the Plaintiff was solely credited for development of the said technology, from an examination of the documents filed therewith, as subsequently exhibited in evidence, it appears that no proprietary claim was ever espoused by him. In fact, in terms of his letter dated 24.03.1999 the Plaintiff specifically acknowledged that "this technology was the basis for an agreement with the Principal, where it was agreed that the same would be the sole and exclusive property of Pakistan Gum and that for a period of next 10 years such technology would not be used by the group". Furthermore, the legal

notice dated 06.05.1996 addressed to the Defendant on his behalf also recognizes that as per this arrangement the technology is the "sole and exclusive propriety" of the Defendant. As such, it appears that the Plaintiff did not consider the technology to be his property.

74. Furthermore, during the course of cross-examination, the Plaintiff has conceded that there is no written contact between him and the Defendant regarding the technology. With reference to the sum of Rs.250,000/-, which he acknowledges was paid to him as an "award", he goes on to concede that no additional amount was demanded by him in writing, but suggests that he had been complaining to the Managing Director time and again for the "inadequate compensation paid".

75. As far as the question of adequacy of compensation is concerned, the same has to logically be viewed in the context of the benefit derived by the Defendant and there is nothing on record to suggest the derivation of any extraordinary commercial benefit by the Defendant. On the contrary, the evidence shows that, despite the invention, the business of the Defendant remained stricken. The Plaintiff's acknowledgment (**Exhibit D/6/1/19**) of the dire circumstances confronting the Defendant is a case in point. Neither the averments in the pleadings nor evidence are so compelling as to warrant any inference being drawn as to a *quasi-contract* entitling the Plaintiff to any further compensation on the basis of *quantum meruit*, whether to the extent claimed or otherwise.

76. In light of the foregoing discussion, the findings on Issues Nos. 3, 4 and 5 are as follows:

Issue No.3: In the negative.

Issue No.4: In the negative to the extent of the claim to pension amounting to Rs.561,820/-, being the amount of the claim of the Plaintiff in respect of pension for the period 1990 to 1998, and otherwise in the affirmative as regards all other claims.

Issue No.5: Same finding as in respect of Issue No.4.

Issue No. 6

77. In view of the findings arrived at on the earlier issues, this issue is decided partially in favour of the Plaintiff to the extent that the Suit is decreed as against the Defendant in the sum of Rs.561,820/- on account of pension for the period stated, whereas all other claims are dismissed.

78. Let the decree be prepared accordingly. Parties shall bear their own costs.

JUDGE

Karachi
Dated _____