IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 178 of 1990

N. N. Textile Mills (Pvt) Limited --------------------------------- Plaintiff

Versus

Government of Pakistan & others ------------------------------ Defendants

Date of hearing(s):	**14.12.2016 & 25.10.2017.**
Date of judgment:	**17.11.2017.**
Plaintiff:	**Through Mr. Habib-ur-Rahman along with Mr. Ghulam Mujtaba Phull Advocates.**
Defendants 1&2:	**Through Mr. Salimuddin Patoli Assistant Attorney General.**
Defendant No.3	**Through Mr. H. A. Rehmani along with Ms. Naheed Akhtar Advocates.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction and the Plaintiff through amended plaint has sought the following relief(s):-

"a) That the export was frustrated due to circumstances beyond the control of the Plaintiff and the Plaintiff is not be penalized for shortfall in export, and the letter dated 25.1.1990 issued by Defendant No. 2 is of no consequence.

b) That the Plaintiff is entitled for extension of time till the short fall in export against remittance of principal amount and interest under "PAY-AS-YOU-EARN" Scheme is recovered.

c) Permanent Injunction restraining the Defendants from encashing of undertaking dated 26.8.1987 (two undertakings), 23.9.1987, 23.2.1988, 3.3.1988, 22.3.1988. 9.8.1989 (six undertakings), 18.11.1988 (continuing undertaking) furnished in respect of year 1987-88 and dated 25.8.1988, 14.9.1988,25.2.1988 and 18.3.1989 furnished in respect of year 1988-89 or any other undertaking furnished by the Plaintiff or their behalf in this

respect and further retrain their agents / functionaries from imposing / realizing the penalty and interest amount thereon.

d) Cost of the Suit.

e) Any other relief, which this Hon'ble Court may deem fit and necessary in the interest of justice."

2. Precisely, the facts as stated are that the Plaintiff is a small unit of Open End Spinning Yarn Mill with 1176 Rotors, manufacturing cotton yarn from machinery imported from abroad under "PAY-AS-YOU-EARN" scheme. The plaintiff was granted permission through letter dated 1.6.1982 and was allowed to import machinery and equipment up to the value of D.M. 620,000/- from Germany and up to the value of Swiss Franc S.Fr. 2,399,884.66 from London on C&F basis. The total value whereof was Rs. 20,433,800/-. The plaintiff was further permitted to import machinery and equipment upto the value of SFR. 1,080,000/- again from London on C&F basis. The Payment for such import was to be made in foreign exchange within certain period through half yearly installments and the foreign exchange requirement was to be met from 50% of the total exports made by the plaintiff and in case of shortfall, the Federal Government had the power to allow payment of the shortfall amount in foreign exchange from its own resources. It is the case of the Plaintiff that after installation of the machinery, manufacturing of cotton yarn started and in the year 1986-87 the target of export was met in order to make payments to the suppliers of the machinery from 50% of the total export. However, in the year 1987-88 for the reason that it was a worst year for export of open end cotton yarn as 5 rupee per Kg. export duty was levied which was thereafter increased to Rs. 10 per Kg, it was beyond the control of the Plaintiff Company to meet the International competition which resulted in a shortfall in exports due to circumstances as above to the tune of Rs. 1,893,473/-. The Plaintiff approached Textile

Commissioner to explain such position with a request for extension of time through Letter dated 28.7.1988. It has been further stated that in the year 1988-89 due to policies of the Government again the Plaintiff was unable to meet the export target and there was a shortfall in that year to the tune of Rs. 7,059,446/-. The Plaintiff made a representation to Defendant No.1 through Letter dated 25.7.1989. The Textile Commissioner vide its Letter dated 22.8.1988 and 14.1990 recommended the case of the Plaintiff to Defendant No.2 for extension of time to recover the shortfall and on the basis of said recommendations the case was further recommended by Defendant No.2 to Defendant No.1 vide Letter dated 19.9.1988 but such request was not acceded to, whereas, the Defendant No.3 directed Defendant No.4 to encash the guarantees as penalty of 27% with interest was imposed on the amount of shortfall in export earnings. This raised a cause of action and instant Suit was filed. Written statement was filed and on 22.12.1991 following issues were settled:-

> "1) What are the rights and obligations of the Plaintiff under the P.A.Y.E. Scheme?
>
> 2) Whether the imposition of the penalty by the Defendant No.3 on the Plaintiff was malafide and / or discriminatory?
>
> 3) Whether the failure of the Plaintiff to export was caused by any restriction imposed by the Government of Pakistan on the export of goods and if so, what is its legal effect?
>
> 4) Whether the Plaintiff has any cause of action against the Defendant No.4 and / or is entitled to any relief against the Defendant No.4?
>
> 5) What should the decree be?"

3. Learned Counsel for the Plaintiff has contended that the default in fulfilling the export requirements and payment to the suppliers from such foreign exchange was never willful and rather occurred due to abrupt changes in the Government policies including levy of export duty

on open end yarn which resulted in lesser exports. He has further contended that all along the Textile Commissioner was apprised of the situation and he being an expert in this field, recommended the case of the Plaintiff to the Defendants as per Exhibit PW-1/23 & 24; however, the Defendants did not approved such recommendations, but at the same time failed to give any reasoning for such refusal. Per learned Counsel consequently the Defendant No.3 approached Defendant No.4 without issuing any Show Cause Notice or passing of any reasoned order, imposed penalty in a mechanical manner and sought encashment of the Bank Guarantees, and therefore, they have erred in law as it is not necessary or mandatory to always impose penalty in such matters.

4. On the other hand, Learned Counsel for the Defendant No.3 the only contesting Defendant before the Court has raised a preliminary objection regarding maintainability of the Suit as according to the learned Counsel instant Suit has been incompetently filed as the person who has signed the plaint was never authorized by the Plaintiff Company. In support of this contention he has relied upon the cases reported as *Government of Pakistan V. Premier Sugar Mills and others (PLD 1991 Lahore 381), Dr. S. M. Rab V. National Refinery Ltd. (PLD 2005 Karachi 478), Messrs Gulf Air V. Messrs Shakil Air Express (Pvt.) Ltd. (PLD 2003 Karachi 156), SDA and others V. HBC (2014 MLD 1110), Messrs Razo (Pvt.) Limited V. Director, Karachi City Region Employees Old Age Benefit Institution and others (2005 CLC 1208), Rafiq Dawood and 4 others V. Messrs Haji Suleman Gowa Wala & Sons Ltd. and others (2009 CLC 1070), Messrs Cargil Incorporated and another Vs. Messrs Trading Corporation of Pakistan and another (2010 CLC 420), Gul Begum Vs. Muhammad Riaz and another (2006 MLD 480) and Khan Iftikhar Hussain Khan of Mamdot Vs. Messrs Ghulam Nabi Corporation Ld. Lahore (PLD*

1959 SC (Pak.) 258). In respect of Issue No. 2 learned Counsel has submitted that no corroborative evidence has been produced by the Plaintiff regarding the alleged change in Government Policy and therefore, no case is made out.

5. I have heard both the learned Counsel and perused the record. The facts have already been discussed hereinabove and need not be reiterated for the sake of brevity. All the issues are more or less interlinked with each other and therefore, they are being decided through this common opinion. Firstly, I would like to address the objection raised by the learned Counsel for Defendant No.3 regarding maintainability of the Suit. At the very outset, I may observe that though the learned Counsel has vehemently argued this point, and it appears that though there was an objection in this regard in the written statement, but there was no issue framed regarding maintainability of Suit and in such situation it was never available to the Plaintiff to lead any evidence to that effect. The defendant No.3 ought to have an issue framed before leading of evidence and only then ends of justice could have met. Mere arguments of such nature in a Civil Suit which is being decided after evidence, depriving a party to properly lead its evidence is not an appropriate course of action. Whereas, even otherwise, when the Plaintiff's witness was cross examined, he replied, "*That It is correct to suggest that before filing of this Suit the Company has passed a resolution in this regard, it must be on record."* Again to a question, he has replied that, "*It is incorrect to suggest that before filing of the Suit the Company has not passed any resolution"*. In these circumstances, I am of the view that since no issue was framed whereas, the Plaintiff's witness has satisfactorily responded to such question in his cross examination, there is no further need to decide except, that the Suit has been competently filed.

6. The precise controversy on merits in this matter appears to be that whether the Plaintiff was liable to pay 27% penalty mandatorily for having defaulted in meeting the export targets. The Plaintiff has led its evidence through various documents including Exhibits PS-1/23 & 24, wherein, the Textile Commissioner has in detail explained the then situation prevailing in the export market and the difficulties being faced by the exporters. In this regard, it would be advantageous to refer to some of the letters issued by the Textile Commissioner. Exhibit PW-1/23 is a letter dated 28.8.1988 and the same reads as under:-

"GOVERNMENT OF PAKISTAN
MINISTRY OF INDUSTRIES
TEXTILE COMMISSIONER'S ORGANIZATION
....

2ND Floor, Kandawala Bldg.,
M.A. Jinnah Road,
Karachi, the 22nd August,88.

No.TEX/COM/S(325)/86

OFFICE MEMORANDUM
……………………………………..

SUBJECT:- <u>EXTENSION IN TIME TO RECOVER SHORTFALL OF EXPORT EARNING AGAINST REMITTANCE OF PRINCIPAL AND INTEREST UNDER 'PAY" SCHEME.</u>

M/s. N.N. Textile Mills have approached this Organization for utilization of more than 50% of the exporting earnings for re-payment of their debt liabilities. They have also requested that State Bank of Pakistan may be advised not to charge penalty according to SRO.223(1)/73 dated 21.2.1973. A copy of their representation is enclosed.

The case was examined by this Organization and our views on the subject are as under:-

i) **It is a fact that the Rotors Spinning units were in difficult position for a few month when the Govt. imposed heavy duty on the export of yarn irrespective of count of the yarn. Since Open End Spinning unit produce coarse yarn maximum upto 16s count therefore, the import of duty was higher on the Opened End Spinning which restricted export.**

ii) **M/s. N.N. Textile Mills had an export earning of Rs.15,780,935 against their liabilities of Rs.9,783,941 hence they have a short fall of Rs.3,786,947 to clear debt liability from the 50% of their export earnings. Inspite of difficulties they have earned sufficient foreign exchange and short fall is only 10% which they can cover in the next financial year.**

iii) **In case if at this stage 27% penalty and interest on short fall is imposed this will ruin their liquating position and it will become further difficult for them to repay their liabilities in foreign exchange from their export earnings.**

iv) In this connection para 7 of "PAYE" Scheme is reproduced asunder:

"Provided further that the Federal Govt. may, in special cases, allow the utilization of more than fifty percent of annual foreign exchange earnings for the repayment of debt liability."

In view of the above position Ministry of Industries may take the following action:-

a) **Their request may be forwarded to Ministry of Finance to adjust/recover the shortfall through the export earnings of the subsequent year 1988-89 as a special case.**

b) **In the meantime the State Bank of Pakistan may be requested not to impose penalty till the final decision is taken by Ministry of Industries/Ministry of Finance.**

(G.N. KHAN)
TEXTILE COMMISSIONER
PHONE:711697

Ministry of Industries
(Mr. Inamul Haque
Additional Secretary)
Government of Pakistan,
ISLAMABAD."

7. Similarly, Exhibit PW-1/24 is a letter dated 14.1.1990 and the same reads as under:-

"GOVERNMENT OF PAKISTAN
MINISTRY OF INDUSTRIES
TEXTILE COMMISSIONER'S ORGANISATION
. . . .

2ND Floor, Kandawala Bldg.,
M.A. Jinnah Road,
Karachi, the 14th January, 1990.

No.TEX/COM/S(325)/86

OFFICE MEMORANDUM

SUBJECT:- EXTENSION IN TIME TO RECOVER SHORTFALL OF EXPORT EARNINGS AGAINST REMITTANCE OF PRINCIPAL AND INTEREST UNDER PAYE SCHEME.

This refers to Ministry of Industries Letter No.2(31)/84-Dev.I dated 12th Oct. 1989 on the above subject. The case of M/s. N.N. Textile Mills (pvt) Ltd. Has been examined and the views of this office are as under:-

1) **The open-end industry was developed in the country as a result of boom in the corduroy, denim, Towel & canvas industries. As this industry has technical restriction to economically spin only course yarn upto 16's, a such it had performed very well when the international market responded to increase demand of open-end yarn.**

2) The year 1987-88 and 1988-89 were the worst years for open-end units as the international demand of O.E. yarn in our conventional market like Hong Hong, Korea, Taiwan etc. remained suppressed due to international decline in the demand of Corduroy, Denim etc. The competition posed by China and the local industry in the above market has also ascerted pressure for low up list of on our open-end yarn.

3) There were internal factors also such as voluntary restraint and export duty on cotton yarn, which was changed from time to time and increase in prices of raw cotton last year which rendered it in competitive. The demand of the Ring spin yarn had increased specially in Japanese market which was attracting good prices and hence the Government had to impose restriction to monitor export of yarn. But all such measure were without any consideration of the hard hit Open-End industry for which the Open-End units had been making representation of the Government for withdrawal of the export duty or revising it at a different rate for the course yarns. They also had been making appeal through Press campaign. They desired withdrawal of the export duty to make them competitive in the export market but no decision could be taken in this regard. In view of the above the open-end units were placed at dis-advantageous position and most of them failed to fulfill their export commitment as stipulated in the PAYE Scheme.

4) On one side we are restricting the export of yarn by imposing export duty on yarn for meeting the local requirement of ancillary industry and at the same time we are punishing the open and rotor spinning units by importing penalty for not meeting their export commitment under PAYE Scheme. Actually speaking we should have exempted all PAYE scheme units from the export obligation.

5) This office is of the view that M/s. N.N. Textile Mills (pvt) Ltd. Had genuine reason for their failure to meet their commitment for compulsory export under PAYE Scheme as such their case may be sent to Ministry of Finance with recommendation to exempt them for payment of penalty. In the meantime State Bank of Pakistan may kindly be informed that this case is under consideration of Ministry of Industries for decision and they may not impose penalty till it is decided by Government under intimation to this office.

This issue with the approval of Textile Commissioner.

Sd/-
(M. IDREES AHMED)
DIRECTOR (TEXTILES)
FOR TEXTILE COMMISSIONER
PHONE:711696

Ministry of Industries
(Mr. Muhammad Sharif S.O.)
Government of Pakistan,
ISLAMABAD."

8. Both these letters have been brought in evidence however, the Defendants have not been able to controvert the contents of the said letters. In fact there is no denial that these Letters were issued from the office of the Textile Commissioner. It further appears that based on these letters the Ministry of Industries Defendant No. 2 issued a Letter dated

19.9.1988 Exhibit PW-1/25 and forwarded the case to the Ministry of Fiancé Defendant No.1. Again this letter is a matter of record and reads as under:-

"NO.2(**)/84-Dev.I.
GOVERNMENT OF PAKISTAN
MINISTRY OF INDUSTRIES

Islamabad the 19th September, 1988.

OFFICE MEMORANDUM

SUBJECT:- EXTENSION IN TIME TO RECOVER SHORTFALL OF EXPORT EARNINGS AGAISNT REMITTANCE OF PRINCIPAL AND INTEREST UNDER "PAY' SCHEME.

The undersigned is directed to enclose herewith a photo copy of letter dated 28-7-1988 alongwith its enclosure received from M/S N.N. Textile Mills (Pvt) Limited on the subject cited above.

The case has been examined and the views of this Ministry are given below:-

i) **It is a fact that the Rotors Spinning units were in difficult position for a few months when the Govt. imposed heavy duty on the export of yarn irrespective of count of the yarn. Since Pen End Spinning unit produce course yarn maximum upto 16s count therefore, the import of duty was higher on the open-end Spinning which restricted export.**

ii) **M/S. N.N. Textile Mills had an expert earning of Rs.15,780,935 against their liabilities of Rs.9,783,941 hence they have a short fall of Rs.3,786,947 to clear debt liability from the 50% of their export earnings. Inspite of difficulties they have earned sufficient foreign exchange and short fall is only 10% which they can cover in the next financial year.**

iii) **In case if at this stage 27% penalty and interest on short fall is imposed this will ruin their liquidity position and it will become further difficult for them to repay their liabilities in foreign exchange from their export earnings.**

iv) **In this connection para 7 of 'PAYE' Scheme is reproduced as under:**

"Provided further that the Federal Govt. may, in special cases, allow the utilization of more than fifty percent of annual foreign exchange earnings for the repayment of debt liability".

In view of the position stated above it is suggested that:-

a) **Request of the unit to adjust/cover the shortfall through export earnings of the subsequent year 1988-89 may be accepted as a special case.**

b) **In the meantime the State Bank of Pakistan may be advised not to impose penalty till the final decision is taken by Ministry of Finance**.

(MUHAMMAD SHAREEF)
Section Officer
Tele: 826863

Ministry of Finance
(Mr. Idris Ahmad,
Section Officer,
Islamabad.

Copy forwarded to:-

1) State Bank of Pakistan
Karachi. A photo copy of N.N. Textile Mills (Pvt) Limited Letter dated 18-7-1988 is enclosed.

2) Textile Commissioner's Organization
Kandawala Building, M.A. Jinnah Road,
Karachi."

9. On the other hand, in response to these recommendations, the Textile Commissioner informed the Plaintiff through Letter dated 4.2.1990 PW-1/26 and stated as follows:-

"GOVERNMENT OF PAKISTAN
MINISTRY OF INDUSTRIES
TEXTILE COMMISSIONER'S ORGANISATION
. . . .

2ND Floor, Kandawala Bldg.,
M.A. Jinnah Road,
Karachi, the 4th Feb. 1990

No.TEX/COM/8(325)/86

M/s. N.N. Textile Mills
(Pvt) Limited,
D-64 S.I.T.E.,
K A R A C H I-28

SUBJECT:- EXTENTION IN TIME TO RECOVER SHORTFALL OF EXPORT EARNINGS AGAISNT REMITTANCE OF PRINCIPAL AND INTEREST UNDER PAYE SCHEME.

Dear Sirs,

I am directed to refer to your letter dated 25th July, 1989 on the above subject, addressed to the Secretary Finance, Government of Pakistan Islamabad with a copy to the Secretary, Ministry of Industries and Textile Commissioner's Organisation and to say that your request was considered by the competent authority and has not been acceded to as intimated by the Ministry of Industries in their O.M. No.2(31)/89-Dev.I(Pt.) dated 25.01.1990.

Yours truly,

(R.H. Zubair)
Deputy Director
For Textile Commissioner
Phone:713413"

10. Perusal of the aforesaid letter (Ex-PW-1/25) reflects that the request of the Plaintiff was considered by the competent authority and has not been acceded to. No reasoning has been assigned by Defendant No.1 for not appreciating the recommendations of Defendant No. 2 and the Textile Commissioner. The Defendant No.3 then directed the Defendant No.4 to make the payment of the penalty and interest on the shortfall in the export earnings of the Plaintiff as guaranteed failing which coercive measures would be initiated. Now when all the aforesaid letters are examined in juxtaposition to the evidence led by the witness of Defendant No.3 it appears that nothing has come on record so as to disbelieve the contention of the Plaintiff. The witness stated that *"I am not author of written statement filed by Ms. Naheed A. Shah on record*". He however, stated that *"I do not know whether the duty per Kg. of Rs. 5 were increased to Rs. 10/- in 1997 and 1998*." He further states *"that my Advocate did not tell me the facts of the case and question asked by the Counsel for the Plaintiff I cannot answer*". He was again questioned that whether you have read the affidavit in evidence and understood it before signing to which he replied, *"I did not read it and understood it before signing. My Advocate told me to sign and I signed it."* While confronted, he has admitted regarding letters issued by the Textile Commissioner to the Ministry of Industries, copy whereof was endorsed to Defendant No.3. After perusal of the said evidence led on behalf of Defendant No.3 it appears that insofar as the documentary evidence so relied upon on behalf of the Plaintiff including various letters is concerned, they are not disputed. The learned Textile Commissioner time and again referred the matter to Ministry of Industries and Finance with certain sound reasoning's, but Defendant No.1 i.e. Ministry of Finance rejected his recommendations without assigning any reasons whatsoever. The question before the Court is that whether under the given facts and

circumstances, the Plaintiff can be subjected to payment of 27% penalty along with interest mandatorily, or the same can be dispensed with according to the situation prevailing at the relevant time. The case of the Plaintiff is to the effect that initially the Plaintiff met the export target for payment to the suppliers in foreign exchange, but in subsequent years, due to change in policies and implosion of export duty, the export targets could not be met which resulted in shortfall of foreign exchange to make payments to the foreign suppliers. It is not in dispute that insofar as the foreign suppliers are concerned, the payments were made from the foreign exchange reserves of the Federal Government, whereas, the Plaintiff has paid the same in equivalent amount in the local currency. It is only a case wherein, the Plaintiff has not been able to generate enough foreign exchange from its earnings of exports during a given year and has allegedly burdened the Government to generate the same. In that case, the defendants were required to come before this Court with some evidence so as to rebut the stance of the plaintiff. However, it is in fact on the contrary. The documentary evidence if the shape of Government own correspondence is a matter of record and has not been controverted in any manner by the defendants.

11. It is by now a settled proposition of law that penalty could not be imposed in absence of a definite finding against a party, and in any event, it could only be imposed after taking into consideration the facts and circumstances of a case, whereas, admittedly it is not the case of the Defendants that any subjective analysis was made in respect of the Plaintiff's case. A compulsory penalty of 27% has been imposed for having defaulted. There is nothing on record in shape of material or evidence so as to justify that firstly the default of the Plaintiff was willful, and secondly, any quantum of loss was ever sustained by the Defendants

in the case of Plaintiff for default in generating foreign exchange. It is also a settled law that the authorities at the helm of affairs must exercise the discretion and public powers fairly and reasonably whereas, the burden through imposition of penalty must bear a reasonable nexus that harm has been caused to the Government. All this is lacking in this case. A somewhat similar controversy was brought to the notice of a learned Division Bench of this Court in the case of ***Messrs Neelam Textile Mills Ltd. V. State Bank of Pakistan and 2 others (PLD 1999 Karachi 433)*** and the relevant findings are as under:-

> "13. It may be seen that the legislature conferred upon the rule making body the power to make a rule which may provide that Industrial Unit or Enterprise may be liable to pay, by way of penalty, the sum not exceeding a maximum limit under two situations i.e. (i) failure to repatriate foreign exchange earnings and (ii) failure to generate adequate export earnings to meet debt liabilities in terms of the Scheme. In the first place the expression "penalty" itself denotes that the person required to defray the same has through some wilful act of commission or omission incurred some financial burden which the legislature considers expedient to impose. Khawaja Shamsul Islam appears quite right in asserting that the expression "penalty" does not apply when a financial obligation is incurred without any fault of the persons required to bear such burden. Secondly the expression "liable to pay" indicates that the legislature intended to confer a certain amount of discretion upon the concerned authorities to levy or not to levy a penalty or levy penalties in different amounts depending upon the gravity of. the offending act. In the case of Shamroz Khan v. Muhammad Amin (PLD 1978 SC 89), the Honourable Supreme Court observed as under:-
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> > "If a person is liable to suffer a penalty he is potentially subjected to l rY4 ~,,, that penalty and this means that the penalty may be enforced against him at the discretion of the authority entitled to enforce a penalty."
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> <u>14. Moreover, the two situations tinder which a penalty contemplated by section 4 of the Act can be levied are so dissimilar that it would be very difficult to conceive that the legislature intended to provide for an automatic levy irrespective of the causes of failure to comply with the requirements of law. In other words, it would be difficult to assume that the Act required a person consciously involved in flight of capital and depleting foreign exchange reserves of the country by failing to remit earnings made abroad, should be treated at par with another who may for reasons entirely beyond his control be unable to achieve a productivity charge within a given time</u>
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> 15. Thirdly, it may be observed that section 4 of the Act (reproduced in para. 12 above) enables Federal Government to make rules for the administration of a Scheme and the contents of the Scheme prepared by the Government cannot be

overlooked while interpreting the rules. It may be observed that para. 6 of the Scheme which enables the Federal Government to allow any eligible person to make advance payment in foreign exchange for import of machinery up to 15% of its value requires that in case such machinery is not imported within given time such person may either repatriate the foreign exchange to Pakistan and only when he fails to do so; he would pay a penalty equal to 27 % of such foreign exchange together with interest. On the other hand rule 7 which is applicable in the present case does not speak of any penalty, but on the contrary provides that in a special case the Government may allow utilization of more than 50% of the annual foreign exchange earnings for repayment of debt liability. Rule 10(2) also enables the Government to extend time for repayment of debt liabilities. It is, therefore, evident that framers were conscious of the fact that at times it might not be possible for an importer of machinery to generate sufficient foreign exchange earnings for reason beyond his control, and therefore, ample discretion was conferred upon the Government to provide appropriate relaxation in a fit case. We, therefore, find considerable force in Khawaja Shamsul Islam's contention to the effect that penalty could not be imposed in the absence of a definite finding of willful default on the part of I the petitioner and in any event it could only be imposed after taking into consideration all the facts .and circumstances' of a particular case. It would be highly incongruous to assume that while a person obtaining foreign exchange in advance and yet failing to import machinery will escape penalty if he repatriates the amount after expiry of the time allowed for import, but one who generates foreign exchange through export earnings and repatriates all such earnings would be mechanically liable to penalty merely because the amount was repatriated after a particular date. We are, therefore, of the view that if rule 4 is construed in the manner suggested by Mr. Rehmani the same would be liable to be struck down as being repugnant to the parent Act and ultra vires the rule making power.

16. Faced with the aforesaid situation Mr. Rehmani attempted to argue that the penalty in question may not be treated as penalty in the strict legal sense imposed by law, but, could be considered as contractual "ability of the petitioner by way of consideration for providing foreign exchange to meet debt liability. From the aforesaid point of view the question of mens rea according to learned counsel became irrelevant and the moment the petitioner availed of a particular facility he was liable to incur its cost laid down in rules. We are not impressed by this argument either inasmuch as once the matter is held to fall within the domain of contract law the provisions of sections 73 and 74 of the Contract Act would get attracted. Even if the petitioner is found to be in breach of contractual obligations no penalty in terrorem would be permissible and the respondent would only be entitled to reasonable compensation as held by the Honourable Supreme Court in Government of West Pakistan v. Mistri Patel (PLD 1969 SC 80). In the absence of any material on record showing the quantum of loss sustained by the respondents owing to late repatriation penalty of 27% of the amount involved could not be treated as reasonable.

13. The aforesaid Division Bench judgment is a complete answer to the case of Defendants, whereby, in identical facts penalty was imposed and was set aside. This judgment was further impugned by the State Bank of Pakistan i.e. Defendant No.3, before the Hon'ble Supreme Court by way of Civil Appeal No.528 of 2000 (**State Bank of Pakistan v Neelum Textile Mills Limited, and others**) and through order dated 26.10.2009, the Hon'ble Supreme Court was pleased to dismiss the appeal of State Bank by affirming the findings of the Division Bench specially at Para Nos.14 & 15 as above. After this, in my view there is nothing left in this case insofar as State Bank of Pakistan is concerned, and surprisingly, they are still contesting this matter on same facts and instead of assisting the Court in this matter which is pending since 1990, resistance has been shown as against the case of the plaintiff. State Bank of Pakistan, after making all efforts of litigation till the last resort has not been able to get any favorable orders in support of its illegal levy of penalty in these matters, and was required to give up, but instead, impedance resilience has been shown which is to be deprecated. It has an onerous responsibility and is required to act more responsibly and is not supposed to generate money or taxes or for that matter penalty, for the State Exchequer. Not only this, there are other cases of similar nature with identical facts which have been decided by this Court as well as the Lahore High Court against the State Bank of Pakistan. In the case of ***Ishtiaq Textile Mills Limited v Islamic Republic of Pakistan*** (Suit No.1628 of 1999) a judgment and decree dated 14.5.2008 was passed which was impugned by State Bank in High Court Appeal No. 09 of 2009 which was also dismissed vide order dated 17.1.2013 along with High Court Appeal No.185 of 2008. Similarly in the case of ***Suleman Spinning Mills Ltd v Federation of Pakistan*** (**PLD 2001 Lahore 324**), a learned Judge of the Lahore High Court allowed the

petition and directed State Bank of Pakistan to refund the amount of penalty recovered from the petitioner. This judgment was also assailed before the Hon'ble Supreme Court by way of an appeal which was dismissed and is covered by the same judgment dated 26.10.2009 as referred to hereinabove. The relevant observation of the Hon'ble Supreme Court to the effect that "nothing has been placed on record that before imposing the penalty appellants served any show cause notice upon the respondents and or applied their mind that the respondents failed to repatriate foreign exchange earnings and or that there was a failure on the part of respondents to meet debt liability" squarely applies to the case of plaintiff in this case.

14. In view of hereinabove facts and circumstances of the case, the issues are answered in the following terms:-

ISSUE NO. 1	No answer required.
ISSUE NO. 2	In the affirmative.
ISSUE NO. 3	In the affirmative.
ISSUE NO. 4	In the affirmative.
ISSUE NO. 5	Decreed as prayed.

15. Accordingly, the Suit of the Plaintiff is decreed as prayed.

Dated: 17.11.2017

J U D G E

ARSHAD/