

# IN THE HIGH COURT OF SINDH, KARACHI

IIInd Appeal No. 38 of 2010

Trading Corporation of Pakistan.....*Versus*.....M/s Marina Chandlers

## **J U D G M E N T.**

Date of hearing : 19<sup>th</sup> March, 2018.  
 Date of Judgment : 07<sup>th</sup> June, 2018.  
 Appellant. : Trading Corporation of  
 Pakistan  
 Respondents : M/s Marine Chandlers

>>>>>>>> <<<<<<<<<<

**Mrs. Kausar Sultana Hussain, J:-** This second appeal is directed against the order dated 02.02.2010 and decree dated 15.02.2010 passed by learned District & Sessions Judge, Karachi (Central), whereby Civil Appeal No. 66 of 2007 was disposed off by modifying the judgment and decree passed in Civil Suit No. 906 of 2002 (old No. 1339 of 1997) to the extent that the appellant is entitled for a relief to recover sum of Rs.7,38,379.71.

2. The facts of the case, relevant for the purpose of disposal of this appeal, in brief, are that the appellant filed Suit No. 906 of 2002 (old No. 1339 of 1997) against the respondent for a recovery of Rs.7,39,389.71 with markup/interest @ 20% per annum from the date of suit till realization. It was alleged that appellant entered into a contract dated 23.02.1995 with the respondent in terms and conditions mentioned therein for stevedoring of rice consignment at the rate of Rs.83.09 per

M. Ton, to which the latter deposited Rs.1,00,000/- as a security. It was further alleged that appellant failed to provide services as per terms and conditions, to which letter dated 07.09.1995 followed by another letter dated 09.09.1995 were sent/reminded. It was further alleged that the respondent instead of providing services as per contract, expressed inability to perform the work it appellant/plaintiff did not agree for an increase of Rs.20/- per M. Tons over and above the rate settled in the contract. The appellant vide letter dated 18.09.1995 informed to the respondent that action as far as increase of K.D.L.B cess will be taken in accordance with clause 26 of the contract and required the latter to furnish written assurance within three days for willingness to perform the contracted work as per agreed terms. It was asserted that on refusal of the respondent to perform the contract, the said contract was cancelled at its risk and constrained to invite tender for performance of said work and awarded the same to M/s. Naseer Enterprises who submitted lowest tender @ Rs. 107.67 per M. Tons. It was alleged that due to said reasons, the appellant suffered damages, liable to be paid by the respondent. The detail of damages was given as follows

- a. Exports during the remaining period of validity of the defaulters contract from 23.02.1995 to 02.10.1995-

**Rs.33,769 M. Tons.**

- b. Amount admissible @ Rs.83.08 per M. Ton of cancelled contract-

**Rs. 2,805,528.52.**

c. Amount admissible @ Rs. 107.67 per M. Tons of new contract-

**Rs. 3,635,908.23**

Difference (c-b)

**Rs. 830,379.71**

Plus expenses on publication of tender notice **Rs. 8000.00**

Total **Rs. 838,379.71**

Less amount of Security money forfeited. (-) **Rs. 100,000.00**

**Rs. 738,379.71**

3. The respondent contested the matter, filed written statement, wherein admitted the contract arrived at between the parties. The respondent denied to have defaulted in the services as per contract on the contrary the objection of unsatisfactory services was raised when respondent demanded legitimate claim of increase or Rs. 20/- per M. Tons due to levy of Central Excise Duty and increase of D.L.B. consignee Cess by the Government as well as K.D.L.B and such demand was raised as per clause-26 of the contract. It was alleged that the appellant did not pay any response to said requests, resulting in heavy financial loss to the respondent. The respondent denied to have committed any default in arranging gang for loading an M.V. Kaghan, on the other hand the gang remained idle at the Port due to clearing and forwarding agent and non fulfilment of their official requirement. It was the appellant, who committed breach of contract as such not entitled for any relief, rather caused

heavy financial losses to the respondent to which counter claim has been placed for a decree in a sum of Rs. 48,30,000/- being the losses suffered during the period w.e.f. 02.10.1995 till 22.02.1998 and damages at the rate of Rs. 20,00,000/- per annum w.e.f. 23.2.1998 till the respondent is permitted and allowed to participate in the work of R.E.C.P with profit thereon at the rate of Rs. 20% per annum from the date of counter claim till payment is realized.

4. Out of pleadings of the parties, the learned trial Court framed the following issues.

1. Whether the defendant had legitimately claimed/entitled to increase Rs. 20/- per M. Tons over the contractual rate of 83.08 per M. Tons for stevedoring contract of rice?
2. Whether the Government vide S.R.O. No. 681(1/95) dated 11.07.1995, levied 10% central excise duty and also in K.D.L.B. increase the consignee cess, if yes, its effect ?
3. Whether any tender was awarded to M/s. Naseer Enterprises, if yes, at what rate and on which consideration and circumstances ?
4. Whether the defendant suffered damages and losses on account of the cancellation of the contract dated 23.02.1995, executed between the plaintiff and the defendant and whether the defendant is entitled to claim such damages security deposit from the plaintiff?

5. The appellant led evidence and its witness was also cross-examined by the respondent's counsel, however, thereafter, respondent failed to participate in the further proceeding and after hearing arguments advanced by learned counsel for appellant, the learned trial Court decreed the suit in favour of the appellant, whereas dismissed the counter claim of the respondent. Being aggrieved with the judgment and decree of trial Court, the respondent preferred Civil Appeal No. 66 of 2007 disposed off by the learned District Judge, Karachi (Central) and modified the judgment and decree passed by the learned trial Court to the extent of recovery in the sum of Rs. 7,38,379.71, vide order and decree dated 02.02.2010 and 15.02.2010, respectively.

6. The learned counsel for the appellant while attacking the impugned order/decreed passed by the learned appellate court emphasized on two grounds, firstly that learned appellate court gravely erred on law and failed to apply legal mind ignored the fact that the appeal preferred by the respondent is time barred as it was filed on 30.08.2007 against the judgment dated 28.02.2007 and decree dated 06.03.2007; secondly, that the learned appellate court failed to appreciate that the respondent failed to led evidence in denial of claim of appellant and the latter in the prayer clause categorically prayed for grant of markup/interest. He has argued that mere non settlement of a particular issue in respect of markup

interest did not bar to grant such a relief, when it was established that due to defect of the respondent, heavy loss ceased to the appellant.

7. Considered the submissions so advanced by the learned counsel for the appellant, none has come forward from the side of the respondent. I have meticulously perused the impugned order/decreed so also the record. It is noted that suit was decreed by the learned trial Court in favour of the appellant to the tune of Rs. 7,38,379.71 with markup @ 10% per annum. Per findings of the learned appellate court, it is revealed that the respondent's side did not challenge the principal amount as decreed by the learned trial Court and only disputed the grant of markup/compensation as awarded in the decree. Thus, now the two points for consideration involves in this appeal, which require to be resolved viz; whether the markup/compensation declared by the learned appellate court was justified and lawful; and whether the appeal preferred before the appellate court was barred by limitation and not maintainable on the said account.

8. As regards, the point of markup/compensation, I deem it appropriate to vet the operating/discussing point of the learned appellate court for declining the same, reproduced for ready reference.

*"The parties led their respective evidence and the learned trial Court decree the plaintiff suit for the sum of Rs. 7,38,379.71 and also allowed markup/compensation @ 10% per annum. It is very strange that no issue in respect of that whether plaintiff is entitled for an amount claimed or to what extent decree is to be passed. Apparently all of above issues seems to be framed regarding the defence of the defendant, so far as the counter claim is concerned the learned trial Court dismissed the same. However, during the arguments the learned counsel for the appellant did not dispute the amount of Rs. 7,38,378.71 is due to the plaintiff but strongly opposed the judgment and decree passed by the learned trial court in respect of the markup/compensation.*

*The learned counsel for the respondent very frankly conceded that the trial court has failed to frame issue in respect of markup/compensation or also that what should the decree be. However, he strongly contended that the judgment/decreed cannot be set aside on above ground, however, the amount which is admitted by the appellant/defendant for which the plaintiff entitled and on technicality the same may not be disallowed to them. As there is ample law on this point that the parties, who are entitled for relief may not be refused on the basis of*

*technicality. In the light of the judgment and decree is modified to the extent that the plaintiff/respondent is entitled for a relief claimed to recovery sum of Rs. 7,38,379.71. Appeal stands disposed of what above terms with no order as to cost.”*

9. Carefully analysis of the findings of learned lower appellate court in the perspective of relevant provisions of law, it is revealed that learned appellate court while decking the markup based its conclusion on the facts that no issue in connection to such point was framed. Such a view drawn by the learned appellate court at the face of it quite perverse, arbitrary, unjustified, non-speaking and contrary to the material available on record, rather the same is in contravention of maxim ACTUS CURIAE NEMINEM GRAVABIT (an act of the court not to prejudice any person). At this juncture, I would refer the case of **Fazal Muhammad Bhatti & another Versus Mast. Saeeda Akhter & another case of Malik Safdar Ali Khan & others (2004 SCMR 1219)**, the Hon’ble apex court has already set the principle that if the parties are well aware of question involved in case and wherein evidence adduced by the parties exhaustively grant towards such issue, thus mere non-framing of specific issue on point involved does not put any fence upon the court to grant such relief and no prejudice would be caused to any of the party in doing so. Even the Hon’ble apex court in another



case of **Pakistan Railways through its General Manager Versus Javed Iqbal (1995 SCMR 446)** also held that even if no relief of interest is claimed, yet the court is competent to grant interest to the plaintiff as an ancillary relief. It is noted that the appellant in the prayer clause of suit manifestly sought recovery of principal amount coupled with markup/compensation @ Rs. 20% per annum. The learned trial Court passed the decree in favour of the appellant against the respondent for recovery of Rs. 7,38,379.71 alongwith compensation/markup. It has already come on record that the respondent's side did not challenge the recovery of principal amount meaning thereby liability as to the principal amount has been admitted by the respondent. It would be thus quite illogical and far fetched to a prudent mind that a person, who under obligation to discharge his liability, is allowed to protract such liability as far as may be without any consequence. Since, respondent was held liable to pay the decretal amount, not challenged in appeal, in circumstances, with holding of such amount for such a long period must be clipped with markup/compensation as rightly did so by the learned trial Court. The learned appellate court erred on law as well as factual controversy involved into the matter and travelled erroneously and un-justified manner while declining the markup/compensation, thus hereby set aside.

10. Reverting to the second point concerning the maintainability of the appeal under Limitation Act, 1908, not taken into account by the learned appellate court, as pointed out by the learned counsel for the appellant. The available record before this court, reflects that respondent filed Civil Appeal No. 65 of 2007 before the lower appellate court on 30.08.2007 against the judgment and decree dated 28.02.2007 and 06.03.2007, respectively. Per law, the said appeal could be preferred within a period of 30 days, but the same was preferred with a delay of more than 04 months beyond the period of 30 days from the date of decree. None on behalf of the respondent is present to controvert the above position and/or give any explanation whatsoever in the above contest. There is nothing on record to show that such point was taken into consideration by the learned appellate court as the impugned order in this appeal is silent in this regard. Per law, it is the duty of the court to determine question of limitation irrespective of the fact whether such plea is raised or not by virtue of section 3 of the Limitation Act, 1908. Reliance is placed to the case of ***Almas Ahmed Faiz Versus Secretary Government of Punjab Housing & Physical Planning Development, Lahore and another (2006 SCMR 783)***. In such circumstance, the appeal filed by the respondent was fettered and hit under the Limitation Act, 1908.

11. For the reasons, recorded above, appeal in hand is accepted. Consequently, the order dated 02.02.2010 and decree dated 15.02.2010 passed by the learned District & Sessions Judge Karachi (West) in Civil Appeal No. 65 of 2007 is set aside and judgment and decree passed by the learned trial Court is upheld. There is no order as to costs.

**J U D G E**

*Faheem/PA*