Form No: HCJD/C

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

R.F.A No. 93 of 2013

M/s Seco Safe Works

Versus

The Capital Development Authority through its Chairman

APPELLANT BY:	Mr. Muhammad Safdar Ali Bhatti and Raja Muhammad Tariq Khan, Advocates.
RESPONDENT BY:	Mr. Amir Latif Gill, Advocate.
DATE OF HEARING:	23.08.2022

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BABAR SATTAR, J. - The appellant has impugned judgment and decree dated 29.01.2013 pursuant to which Civil Court decreed the appellant's suit to the extent of Rs.241,330 while dismissing the claim for escalation charges and not granting any interest.

2. The appellant was granted a contract for furnishing 24 parliament lodges at the rate of Rs.194,495/40 per suite amounting to a total of Rs.4,667,889/60 by work order dated 14.01.1997 (Ex-P3). The work order was to be completed within a period of sixty days and the starting date for the project was reckoned as 15.01.1997. The appellant claimed to have completed the work within the prescribed period of 60 days. But the payments were not made within the period of one month

after completion of work as required under the terms of the tender/contract **"Contract"** (Ex-D7). The appellant filed various applications for payment of consideration and was paid an amount of Rs.2,359,871 in various installments and an amount of Rs.2,514,493 remained outstanding at the time of filing of the suit on 24.02.1999. By order dated 19.06.1999 the Civil Court farmed the following issues:

1. Whether the plaintiff has no cause of action to file the instant suit? OPD
2. Whether the plaintiff has miserably failed to fulfill his contractual obligations? OPD
3. Whether the suit has not been filed by legally competent person? OPD
4. Whether the suit is false, frivolous and liable to be dismissed? OPD
5. Whether the suit is hopelessly barred by time? OPD
6. Whether the plaintiff is entitled to the decree as prayed for? OPP
7. Relief.

3. After recording of evidence and hearing arguments of contested parties, the Civil Court recorded in relation to issue No.6 that further amount had been paid by the respondent CDA to the appellant during pendency of the suit and outstanding amount had been reduced to Rs.241,330. The Civil Court found that there was an admission on part of CDA that an amount of Rs.241,330 was still outstanding. CDA claimed that it did not pay such outstanding amount due to certain defects in the work performed by the appellant. But the Civil Court found that

no reliable evidence was produced to establish that any defect on part of the appellant was made out. Consequently, the claim for recovery in the amount of Rs.214,330 was allowed. The Civil Court further found that the Contract did not provide for escalation charges and therefore refused to award such charges. The Civil Court did not record any reasons as to why it refused to grant interest against the outstanding amount or damages for breach of contract on part of CDA even though it rendered in its finding that CDA was in default of its obligations to pay consideration to the appellant under provisions of the Contract. Issue No. 2 was decided in favour of the appellant on the basis that CDA had already paid majority of the outstanding consideration and could therefore not raise a plea that the appellant had no cause of action. In relation to issue No.3, it was held that no evidence was led to establish that the appellant had failed to discharge its contractual obligations. Likewise, issue No. 4 as to whether the suit was frivolous and issue No. 5, as to whether the suit was barred by time, were decided against CDA. CDA neither filed any appeal against the judgment and decree nor filed cross objections in the appeal. It was the appellant who challenged the impugned judgment and decree for its failure to grant damages, interest and escalation charges.

5. Learned counsel for the appellant submitted that the appellant had discharged its obligations under the contract in very limited time and made innumerable

requests for payment of consideration. However, once such requests fell on deaf ears and efforts for amicable resolution of the dispute failed, the appellant filed the suit on 24.02.1999. CDA continued to make payments in bits and pieces up until 2011 by which time the total outstanding amount was Rs.241,330. He contended that under the Contract the work was to be performed within a period of sixty days and was so performed. The CDA had a period of one month to make payment for the work done. The Contract prescribed a defect liability period of sixty days. But no defects were identified within such prescribed period by CDA and consequently the entire consideration was due and payable as of 15.04.1997. As CDA subsequently paid the consideration, except for an outstanding amount of Rs.241,330, it stood established that the delay in payment of consideration was not due to any defect in discharge of services by the appellant. He submitted that under clause 8 of the Contract the appellant was liable to be paid within one month of the presentation of his full bill, which bill was presented on 15.03.1997 and consequently the appellant was entitled to payment of escalation charges as well as interest on the amount that was due and payable as of 15.04.1997.

6. Learned counsel for the respondent (i.e. CDA) submitted that the appeal was not maintainable as it had been filed in the name of the sole proprietor who was not entitled to file the appeal in view of the law as explained by

this Court in ***Javed Ahmed Mir Vs. Muhammad Afzal and others*** ***(2022 CLC 668).*** On merits, he argued that under the Contract consultant for the project had to issue a certificate of services and goods having been supplied in a satisfactory state. This certificate was not issued. The payment was stopped due to deficiencies in the work. He submitted that certain defects had been pointed by the consultant through his report exhibited as Ex-D/21, which established that services as rendered by the appellant were deficient. He submitted that the Design House had acted as consultant and by letter dated 08.10.1997 (Ex-D/21) had identified deficiencies in the items supplied by the appellant. He further submitted that the Contract did not provide for the grant of escalation charges and also did not provide for grant of interest.

7. The halfhearted challenge of the learned counsel for the respondent to the maintainability of this appeal is without merit. In **Javed Ahmed Mir** the contention of the respondent was that the suit ought to have been filed in the name of sole proprietorship. And such objection was dispelled on the basis that sole proprietorship does not have independent juristic personality. The situation in the present case is the reverse. Here the appellant is the sole proprietor and the appeal has been filed through Abdul Sattar son of Nawab Khan, who is the owner/proprietor of Seco Safe Works (i.e. the appellant). Thus the appeal has been filed by the sole proprietor and is maintainable.

8. The Civil Court correctly appreciated the evidence produced by the parties and the subsequent conduct of the respondent to conclude that payment of consideration under the Contract was not contested and the obligation to pay the consideration was substantially discharged by the respondent during the pendency of the suit. This is why it passed the decree only to the extent of Rs.241,330, which was the outstanding amount that remained to be paid out of the total consideration payment. The Civil Court also correctly appreciated the evidence to conclude that goods and services provided by the appellant pursuant to the terms of the Contract were not deficient and therefore the respondent was not entitled to make any deduction.

9. Mr. Mashooq Ali, Deputy Director Works Division, CDA had appeared as DW-1 on behalf of the respondent who admitted that the Contract was awarded to the appellant and the appellant furnished 24 suites and performed hundred percent of his obligations under the Contract. He refused to answer questions with regard to the defects identified in the work of the appellant on the basis that he was not the author of the defects report prepared by the consultant Design House. He also confirmed that the furniture supplied by the appellant was never returned to the appellant and remained in use at the Parliament Lodges. He also admitted that the payments made to the appellant were made many years after completion of the work. The document in support of the respondent's

argument that the appellant's work was deficient was a letter issued by Design House, the purported consultant for the project. But neither such consultant was produced before the court nor the individual within Design House who had purportedly identified deficiencies in the work of the appellant was produced as a witness.

10. Clause 7 of the Contract provided that the final bill was to be submitted by the contractor within one month from the date of the completion of the work i.e. 15.03.1997 failing which the Engineer-in-Charge's certificate of measurement and determining the total amount payable to the contractor would be deemed final and binding on all parties. Clause 8 of the Contract envisaged that the bills would be cleared within ten days of the presentation and vested in Engineer-in-Charge the authority to measure the work. Within the additional terms and conditions of the Contract was included clause 18, which provided that the contractor would be liable for rectifying defects and clause 35 of such additional terms and conditions provided that the security deposit would be released after a period of 12 months of the conclusion of the Contract. Clause 41 of such additional terms and conditions provided that no escalation would be paid due to any fluctuation in the market rates.

11. What emerges from the terms of the Contract and the evidence adduced by CDA is that Engineer-in-Charge never identified any defects in the work performed by the appellant or put the appellant on notice to remove

such defects. CDA in fact never produced any document or led any evidence as to who was endowed with the power of Engineer-in-Charge under the Contract. The manner of the release of the consideration payment to the appellant also reflects that it was not just the security deposit or payments in lieu of any identified defects that payment of consideration was withheld. But the payment of consideration as a whole was withheld initially without cause and was subsequently released in small installments without requiring the appellant to remedy any defects within the furniture supplied. This fact pattern defeats the argument of the respondent that payment of consideration was withheld due to any defect in the work performed by the appellant, as has been correctly found by the Civil Court. This is probably why CDA also filed no appeal or cross objections against the judgment and decree.

12. The appellant's claim for payment of escalation is without merit. Clause 41 of the additional terms and conditions of the Contract clearly provides that *"no escalation whatsoever will be paid due to any fluctuation in the market rates".* The said provision is unambiguous. Even otherwise, payment of escalation is linked to delay in performance of contract and escalation of costs in performance of services or supply of goods. In the present matter it is the appellant's claim that the services were discharged within the period fixed and consequently the question of escalation charges to compensate additional

cost incurred while providing services under the Contract cannot possibly arise. The finding of the Civil Court that the appellant is not entitled to escalation charges is therefore correct.

13. The only remaining question is that of entitlement of the appellant to interest payment. Section 34 of the Civil Procedure Code, 1908 **("CPC")** provides that where a decree is for payment of money, the Court may *"order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date* of *payment, or to such earlier date as the Court thinks fit."* It has been correctly held by the Civil Court that CDA was in breach of its obligation to pay the appellant for goods and services provided in terms of the Contract and consequently a decree for payment of money in favour of the appellant has been issued. The Civil Court, however, erred in not considering that the appellant was entitled to payment of interest on the outstanding amount due and payable as of 25.04.1997 i.e. ten days from the expiry of the 30-day period for submission of invoice after the date fixed for completion of work, which was 15.03.1997. The failure to pay such consideration at the time fixed in accordance with

the Contract established that CDA was in breach of its obligation to make such payment.

14. The principle that forms the basis of calculation of damages for breach of contract is restitution. The policy of contract law is to make the non-defaulting party whole as if the default never took place. It is also policy of contract law to mitigate the ability of one party to benefit from free use of credit afforded by the counter party in breach of provisions of a contract.

15. In the present case the contractor/appellant was out of pocket for over a decade during which period CDA continued to benefit from goods and services supplied by the appellant without having paid for such goods and services in accordance with the terms of the Contract. After the appellant had established as a plaintiff that he was not in default of his obligations under the Contract and had completed the supply of goods and services within the period prescribed within the Contract i.e. 15.03.1997, and CDA on the other hand was in default of its obligation to pay consideration by the period fixed within the Contract i.e. 25.04.1997, the appellant was entitled to payment of interest on the amount as well as for monetary award in view of breach of contract on part of CDA. The appellant, however, did not claim any compensation for breach of the Contract and led no evidence for such purpose to enable the Civil Court to adjudicate such claim and quantify it. The appellant mistakenly sought escalation charges which it was

not entitled to under the contract. Had the appellant sought damages for breach of contract and led evidence before the Civil Court to quantify such damages, this would have been a fit case for grant of such damages. But as such claim was never made by the plaintiff/appellant, it is not for this Court to grant it. Thus, in failing to grant any damages for breach of CDA obligation to make timely payments under the Contract, the Civil Court also did not err in law.

16. But it was on the question of appellant's entitlement to payment of interest on the outstanding amount due and payable by CDA under the Contract that the Civil Court erred. Once the Civil Court had concluded that the appellant was not a defaulting party and CDA was the defaulting party and had withheld payments to the appellant in breach of the provisions of the Contract, it ought to have granted interest on the outstanding payments from date of which payment of consideration had become due, as under section 34 of CPC the Court is empowered to grant interest on payments even for a period prior to the institution of the suit.

17. The law with regard to the entitlement of a contractual party to grant of interest was reiterated by the Supreme Court more recently in ***Najm Koreshi Vs Chase Manhattan Bank now Muslim Commercial Limited, Lahore and others (2015 SCMR 1461)*** as follows:

> *"It is clear from the foregoing provisions of section 34, C.P.C. that the Court passing a decree has*

> *discretion to order interest at such rates as it deems reasonable, accruing for different periods either on principal or aggregate amounts. The said legal provision expressly contemplates the award of interest pendente lite on the principal sum adjudged and also post decretal further interest on the aggregate of the said principal sum together with interest accrued thereon till the date of payment of the aggregate amount. As the award of interest on a decree is discretionary therefore, the terms on which it is ordered must be spelled out clearly in the contents of the decree. Otherwise, silence of the decree in the matter of further interest is to be deemed as refusal under section 34(2), C.P.C. The rate at which interest is ordered to accrue and whether such interest is to be calculated at a simple rate or a compound rate are also discretionary elements that ought to be specified in a decree."*

It was clarified by the Lahore High Court in ***Lahore Development Authority Vs. M/s Faisal International Construction Corporation Limited*** ***(2004 CLC 1879)*** that, "*grant or refusal of interest is a discretion vesting in court exercisable on the basis of known principles of administration of justice."* In ***Federation of Pakistan Vs. M/s Aalme Engineers (Pvt.) Ltd.*** ***(2015 CLC 1273)***, this Court held that delay in payment of determined claims attracted provisions of section 34 of CPC and awarded interest on the basis of notified bank rate in relation to the claims as determined, finding such rate reasonable within the meaning of section 34.

18. Just as discretion vested in executive authorities cannot be exercised arbitrarily, the discretion vested in the court must be structured and exercised in a manner guided

by principles of equity and fair administration of justice. In other words, courts are not vested with "hard discretion" as Ronald Dworkin has argued (see for example Taking Rights Seriously, Harvard University Press), but soft discretion in terms of finding the right answer in the case before the court while being guided by law, precedent and principles of equity. It is therefore not for the court to refuse to consider the grant of interest in terms of section 34 of CPC in an appropriate case, merely because such grant is considered discretionary. Where a court refuses to grant interest on outstanding claims or payments, it must record reasons for why interest ought not be paid (whether due to terms of the contract or consideration of equity and restitution etc.).

19. The rule remains that the non-defaulting party to a contract is entitled to restitution and to be made whole as if the defaulting party had never defaulted. Similarly, a defaulting party cannot be allowed to benefit from its own wrong in terms of not discharging its obligation to pay or using free credit supplied by the courter party, while suffering no consequences whatsoever. The principle of equity is not that losses shall be allowed to lie where they fall, but that they have to be borne by the party whose conduct is found wanting and thus responsible for causing the loss.

20. As the payment of the entire consideration under the Contract became due on 25.04.1997, the appellant is entitled to interest on the outstanding amount of

consideration from such date till the time that the amount has been paid. As the consideration was paid in various installments the appellant is entitled to simple interest at the rate of eleven percent (11%) (which is the average Bank Rate approximately if the average is calculated from 1997 through 2023) on the outstanding amount till such time that the said amount has been paid. Such average Bank Rate of interest, in view of this Court, is a reasonable rate, once we take into account the interest rate as has been determined by State Bank of Pakistan between 1997 and 2023.

21. In view of the above, the instant appeal is **allowed** to the extent that CDA would pay interest, in addition to the decretal amount, calculated on the total consideration payable starting from 25.04.1997. To calculate the exact amount of interest to be payable the executing court will seek the schedule of payments as made by CDA and calculate the interest due at the rate of 11% per annum on the basis of the outstanding amount as determined on a monthly basis in view of the schedule of the payment. In other words the executing court will calculate simple interest due on the total consideration payable starting 25.04.1997 till the month when the first installment in lieu of consideration was paid. Such amount will then be deducted from the total amount due and the interest will be calculated on remaining outstanding amount till the month of the next installment payment, and so on

till the date of the decree. From the date of the decree till the date of payment of the decretal amount, simple interest at the rate of 11% shall be calculated on the decretal amount.

22. This Court also awards the appellant cost of litigation in the amount of Rs.30000 to be paid by the respondent within a period of 30-days. Learned counsel for the respondent will file a compliance certificate with Deputy Registrar (Judicial) of this Court certifying that the order as to cost has been complied with.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **19.06.2023.**

JUDGE

Approved for reporting.

Saeed