

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 520 OF 2017

Sahebrao s/o Gajmal Patil,
Age: 74 Years, Occu: Agri. & Social Work,
R/o : Pachora, Tq. Pachora,
District Jalgaon. ..Appellant

Versus

The Municipal Council, Pachora,
Through Its Chief Officer,
Municipal Council, Pachora,
Tq, Pachora, Dist. Jalgaon. ..Respondent

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Mr. Milind M. Joshi, Advocate for Appellant.
Mr. S.S. Patunkar, Advocate for Respondent.

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**CORAM : P.R. BORA, J.
RESERVED ON : 12th JULY, 2018.
PRONOUNCED ON : 16th OCTOBER, 2018.**

JUDGMENT:-

1. Entitlement and manner of granting interest for the period prior to the date of filing of the suit, pendente lite and future is the point at issue in the present appeal.

2. The appellant has filed the present appeal against the judgment and decree passed in Regular Civil Appeal No. 966 of 2012 by learned District Judge-3, Jalgaon on 03.04.2017. The aforesaid appeal was preferred by respondent-

municipal council against the judgment and decree dated 31.03.2008 passed in Special Civil Suit No. 371 of 1995 by Civil Judge Senior Division, Jalgaon.

3. The respondent-municipal council had allotted construction work of a commercial complex having 36 tenaments therein to the appellant. The tender was published in that regard and the tender submitted by the appellant was accepted by the respondent. It was the case of the appellant in the civil suit filed by him that though, he successfully completed the construction work, the respondent did not pay his final bill amount of Rs. 1,33,688/- and also did not return the amount of security deposit to the tune of Rs. 1,10,000/- to him. It was the further contention of the appellant that even after several demands when, the respondent did not pay the aforesaid amounts, he was constrained to issue notice to the respondent demanding the aforesaid amount and since, the respondent did not pay the amount as demanded by him, he was constrained to file a suit for recovery of the said amount against the

respondent.

4. The respondent-municipal council had disputed the contentions in the suit plaint by filing its written statement. In order to substantiate the contentions raised in the plaint, the appellant himself deposed before the Court and placed on record certain documents. Site Engineer of the respondent-municipal council deposed for and on behalf of the municipal council. The learned Civil Judge Senior Division after having assessed the oral and documentary evidence brought on record before him, decreed the suit with costs and thereby directed the respondent to pay the amount of Rs. 2,43,688/- to the appellant with interest on it at the rate of 12% p.a. with monthly rest from 16.10.1992 till the date of the complete payment.

5. Aggrieved by the judgment and decree passed by the Civil Court, the respondent-municipal council filed Regular Civil Appeal No. 966 of 2012 before the District Court at Jalgaon. The record shows that the appeal was initially preferred in the High Court and after enhancement of the pecuniary jurisdiction of the District Courts, the

said appeal was transferred to the District Court and was renumbered as Regular Civil Appeal No. 966 of 2012. The learned First Appellate Court though did not cause any interference in the findings recorded by the Trial Court, on the issues as about the entitlement of the appellant to recover the final bill amount as well as the amount of security deposit, set aside the order passed by the Trial Court so far as the grant of interest by the said Court at the rate of 12% p.a. with monthly rest, on the amount of Rs. 2,43,688/- from 16.10.1992. Instead, the First Appellate Court directed the respondent to pay Rs. 1,33,680/- plus Rs. 1,10,000/- to the appellant within two months from the date of the order and on failure to pay the decretal amount within the said period, made the respondent liable to pay interest at the rate of 9% p.a. on the decretal amount from the date of the order passed by the said Court. Aggrieved by, the appellant i.e. original plaintiff has filed the present second appeal.

6. This Court (Coram : N.W. Sambre, J.) vide order passed on 04.08.2017 admitted the appeal on

the following substantial question of law:

"Whether the lower Appellate Court committed any error in refusing interest to the present appellant, particularly when appellant is held entitled for balance amount including amount of security deposit, by answering issue in favour of appellant?"

7. Shri Milind Joshi the learned Counsel appearing for the appellant submitted that, the trial Court had passed a well reasoned Judgment and had rightly held the plaintiff entitled for the interest on the suit amount at the rate of 12% per annum with monthly rest from 16.09.1992 till the date of actual payment. The learned Counsel submitted that, the First Appellate Court for wrong reasons has set aside the order passed by the trial Court granting interest to the plaintiff on the suit amount from 16.10.1992. The learned Counsel submitted that, the fact that the plaintiff had issued notice dated 12.11.1994 has been admitted by the defendant. In the circumstances, according to the learned Counsel, the plaintiff cannot be deprived of the interest on the ground that, he did not place on record copy of the said notice. The learned Counsel submitted that, in the suit plaint,

the plaintiff has specifically averred that, he had issued a notice to defendant on 12.11.1994 and has demanded the balance amount with interest thereon at the rate of 21% per annum. The learned Counsel further submitted that, in the suit the plaintiff had specified the amount of said interest to the tune of Rs.1,44,260/- and has claimed the said amount in addition to the principal amount from the defendant. The learned Counsel further submitted that, the plaintiff has paid the adequate court fee stamp on the aforesaid amount. The learned Counsel further submitted that, in view of the facts as aforesaid, the plaintiff was legally entitled for the interest payable for the period prior to date of filing of the suit. The learned Counsel further submitted that, the amount of the said interest was specified by the plaintiff in the suit plaint and as such, the plaintiff was also entitled for the pendente lite interest and future interest on the principal amount + the amount of interest as specified in the suit plaint.

8. The learned Counsel relied upon the Judgment of the Hon'ble Apex Court in the case of

Central Bank of India Vs. Ravindra and Others, AIR 2001 Supreme Court 3095 in order to support the claim so made by the plaintiff. The learned Counsel submitted that, in view of the Judgment delivered by the Constitution Bench of the Hon'ble Apex Court the plaintiff was entitled for the interest under Section 34 of the Act on the 'the principal sum adjudged'. The learned counsel submitted that as has been interpreted by the Hon'ble Apex Court the expression "the principal sum adjudged" occurring in S.34 includes the amount of interest, charged on periodical rests, and capitalized with the principal sum actually advanced, so as to become an amalgam of principal in such cases where it is permissible as per contract between parties or an established Bank practice.

9. The learned Counsel relying upon the Judgment of the Hon'ble Jammu & Kashmir High Court in the case of **State Bank Of India vs Sh. Ghulam Nabi and Anr, AIR 1998 J&K 46** submitted that, if the Court disallows the interest, it must justify the same by giving cogent reasons. The learned Counsel submitted that, the First Appellate Court

without assigning any reason has wrongly disallowed the interest to the plaintiff on the amounts payable to him from the defendant - Municipal Council. The learned Counsel for the above reasons prayed for setting aside the order passed by the First Appellate Court and to restore the order passed by the trial Court.

10. Opposing the submissions made on behalf of the appellant, Shri Patnurkar the learned Counsel appearing for respondent - Municipal Council supported the Judgment and order passed by the First Appellate Court. The learned Counsel placing his reliance on the Judgment of the Full Bench of this Court in the case of **Union Bank Of India vs Dalpat Gaurishankar Upadhyay, 1992 (1) Bom.C.R. 354** submitted that, the principal sum would not be inclusive of the interest calculated by the plaintiff of the period prior to the date of the filing of the suit. Learned Counsel further submitted that, First Appellate Court had rightly declined to award the interest to the plaintiff by observing that, for non-payment of the final bill amount the plaintiff himself was responsible since

he did not remain present for the final measurements despite service of notice upon him in that regard. The learned Counsel submitted that, the final bill amount was not liable to be determined without the final measurements, for which, the presence of the plaintiff at the construction site was mandatory. The learned Counsel submitted that, considering the evidence on record, no case is made out for grant of interest as claimed by the plaintiff. The learned Counsel, therefore, prayed for dismissal of the appeal.

11. I have given due consideration to the submissions made by the learned Counsel appearing for the respective parties. I have perused the impugned Judgment and the oral as well as documentary evidence on record. As is revealing from the pleadings in the suit plaint, the final bill of the construction work carried out by the plaintiff for the defendant – Municipal Council had remained to be paid. The amount of the said bill has been quantified by the plaintiff to the tune of Rs.1,33,680/-. In addition to the final bill amount, the amount of security deposit to the tune

of Rs.1,10,000/- was also payable to the plaintiff from the defendant – Municipal Council. Insofar as these two amounts are concerned, the trial Court as well as the First Appellate Court both have recorded the finding in favour of the plaintiff. Thus, there is no dispute that, the aforesaid amounts were payable to the plaintiff by the defendant – Municipal Council.

12. Two questions fall for consideration in the present appeal, first, "Whether the appellant-plaintiff is entitled for the interest on the amount of final bill as well as the security deposit for the period prior to date of filing of the suit?" and the second "Whether he is entitled for pendente lite interest and future interest and if yes at what rate and on what amount".

13. The Trial Court has granted the interest on the amount of Rs. 2,43,680/- from 16.10.1992 i.e. from the date prior to filing of the suit till actual realization of the amount at the rate of 12% p.a. at monthly rest whereas in the appeal the learned First Appellate Court has refused to grant interest for the period prior to the date of filing

of the suit as well as pendente lite and held the plaintiff entitled only for the future interest at the rate of 9% p.a. Both the orders are erroneous and cannot be sustained for the reasons elaborated herein-below.

14. First, I wish to deal with the issue of interest payable for the period prior to the date of filing of the suit. Law is well settled that, the interest payable for the period prior to the date of filing of the suit is governed by The Interest Act-1978. As provided under Section-3 of the said Act, the following among other conditions must be fulfilled before interest can be awarded under the Act of 1978.

15. The Hon'ble Apex Court in the case of ***"Thawardas Pherumal Vs. Union of India, AIR 1955 SC 468"*** has laid down the conditions which must be followed before the interest can be awarded under the Interest Act 1978. Those conditions are-(1) there must be a debt or a sum certain; (2) it must be payable at a certain time or otherwise; (3) these debts or sums must be payable by virtue of

some written contract at a certain time; (4) there must have been a demand in writing stating that interest will be demanded from the date of demand.

16. The Hon'ble Apex Court has further clarified that where even one of above elements is absent, the Court cannot allow the interest simply because it thought the demand was reasonable.

17. It was sought to be contended by the learned counsel appearing for the appellant that in view of the fact that issuance of notice dated 12.11.1994 has not been denied or disputed by the respondent-municipal council, the appellant cannot be denied the interest of the period prior to filing of the suit. I am, however, not convinced with the submission so made. It is not in dispute that the appellant did not file on record the copy of the said notice allegedly issued by him to the municipal council on 12.11.1994. It is thus evident that contents of the said notice were not there on record. Though, it is true that the respondent-municipal council has not denied or disputed receipt of notice, on such admission, the only fact which can be said to have been proved is that the

appellant had issued notice dated 12.11.1994 to the municipal council. However, in absence of the office copy of the said notice on record, nothing can be said as about the contents of the said notice. The appellant was under an obligation to prove not only the fact of issuance of notice but also the contents of the said notice. When the appellant produced several other documents on record, it was possible for him to produce on record office copy of the notice dated 12.11.1994 and the acknowledgement receipt evidencing the service of the said notice on municipal council. Why these documents are not filed on record is not explained by the appellant. The fact remains that there is no evidence on record to show what was actually demanded by the appellant from the municipal council vide notice dated 12.11.1994.

18. Secondly, the appellant-plaintiff did not bring on record any evidence to show that there was an agreement between him and the respondent for payment of interest if the payment is delayed. In fact nothing has been brought on record by the appellant-plaintiff to show as to within how many

days the municipal council was supposed to pay the amount of bill. In view of the fact that the plaintiff did not bring on record any evidence to show that there was a written agreement/contract as about the time limit for the payment of final bill amount or the amount of security deposit and also did not file on record the copy of the notice allegedly sent by him to the municipal council demanding in writing the amount of interest from the date of demand, no interest was liable to be granted to the plaintiff having regard to the law laid down in the case of **"Thawardas Pherumal Vs. Union of India, AIR 1955 SC 468"**.

19. The next question which falls for consideration is about the pendente lite interest. Such interest can be granted by the Court under Section 34 of the Code of Civil Procedure. Ordinarily, the interest is to be granted at the rate not exceeding 6% p.a. The proviso however, permits the grant of interest at the rate more than 6% if the transaction is a commercial transaction, however the same also shall not exceed the contractual rate of interest or where there is no

contractual rate, the rate at which moneys are lent or advanced by Nationalized Banks to commercial transactions.

20. As noted herein-above, both the courts below have held that the appellant was entitled to receive the final bill amount of Rs. 1,33,680/- and the amount of security deposit to the tune of Rs. 1,10,000/-. From the material on record it is revealed that the amount of security deposit was liable to be refunded in favour of the appellant-plaintiff six months after the successful completion of the project work. The appellant-plaintiff is certainly entitled to receive *pendente lite* interest on both the aforesaid amounts.

21. It was the contention of the learned counsel for the appellant that the transaction between the appellant and the municipal council was a commercial transaction. In the circumstances, according to the learned counsel, the appellant is entitled to receive the interest at the commercial rate i.e. at the rate of 21% p.a. as was claimed by the appellant-plaintiff in the suit filed by him.

22. Per contra it was submitted by the learned counsel for the respondent-municipal council that the transaction between the appellant and the respondent cannot be held to be a commercial transaction. The learned counsel submitted that tender work was performed by the appellant and the cost of such work was to be paid by the respondent-municipal council. The learned counsel further submitted that since the appellant-plaintiff did not remain present for final measurements the final bill could not be paid to him. In the circumstances according to the learned counsel, Municipal Council is not liable to pay any interest.

23. The contention as has been raised by the respondent-municipal council is difficult to be accepted in view of the evidence on record. Two documents are important in this regard. First is the possession receipt at Exhibit 62 and the another is completion certificate at Exhibit 63. The aforesaid documents show that the plaintiff had made the construction to the satisfaction of the

defendant-municipal council and had also handed over the possession of the said construction to the municipal council. As has been rightly observed by the First Appellate Court, no dispute was raised by the defendant-municipal council while taking possession of the construction and while issuing the completion certificate. The allegations made by the defendant-municipal council that the plaintiff has not fixed the shutters of required gauge therefore does not carry any substance.

24. Similarly, the another contention of the respondent-municipal council that the plaintiff did not remain present for measurement of the work carried out by him and as such final bill amount cannot be worked out and in the circumstances, delay if any caused in making payment of the final bill amount is because the lapses on part of the plaintiff is also liable to be rejected. The learned First Appellate Court has referred to Appendix-24 of the Maharashtra Public Works Manual which says that the person recording measurement must satisfy himself personally on the verification of the spot that each dimension he is writing down

in the measurement book does actually measures that much. The manual also says that measurement book should be considered as important document and shall be maintained accurately. The measurement book is at Exhibit 65. The measurement book shows the balance to the tune of Rs. 1,33,688/-. The fact as mentioned in the measurement book has not been denied or disputed by the defendant-municipal council. In the circumstances, the objection raised by the defendant-municipal council that the plaintiff did not remain present for measurement on the construction site and hence the final bill amount could not be worked out has been falsified.

25. After having considered the material on record and having regard to the submissions made by the learned counsel appearing for the parties, it appears to me that a different criteria would apply in the present case for grant of pendente lite interest and future interest. The material on record reveals that the civil suit filed by the appellant was dismissed in default and after a long lapse, it was restored. The suit was dismissed for want of prosecution. The material on record

reveals that despite due opportunities given to the appellant-plaintiff, since he failed to adduce any evidence in order to prove his claim, the Civil Court was constrained to dismiss the suit of the appellant. The suit was admittedly filed in the year 1995 and it took more than 12 years for its final disposal. It was finally decided on 31.03.2008. While awarding the pendente lite interest the above facts will have material bearing.

26. It was contended by the learned counsel for the respondent that considering the lapses on the part of the appellant in conducting civil suit, no interest is liable to be paid to the appellant of the period pending suit. The submission so made on behalf of the respondent cannot be accepted. Considering the over all circumstances in the matter, I deem it appropriate to grant pendente lite interest to the appellant-plaintiff at the rate of 9% p.a.

27. Now about the future interest. The respondent municipal council admittedly did not pay the amount of outstanding bill as well as the

amount of security deposit even after filing of the suit till its decision and even thereafter till filing of the appeal and obtaining the interim order in its favour by this Court. The amount of final bill to the tune of Rs. 1,33,680/- and the amount of security deposit to the extent of Rs. 1,10,000/- totaling to Rs. 2,43,680/- was liable to be paid to the appellant by the respondent. I have no doubt in my mind that the transaction between the appellant and the respondent was a commercial transaction as such the interest more than 6% can be awarded. As prescribed in the proviso to Section 34, where there is no contractual rate, the rate at which moneys are lent or advanced by Nationalized Banks in relation to commercial transaction, the interest can be awarded at the said rate. Though there is no concrete information on record as about the rate at which moneys are advanced by the nationalized banks in relation to commercial transaction, I see no difficulty in awarding the future interest on the outstanding amount at the rate of 12% p.a. from the date of decision of the suit by the Trial Court till realization of the said amount.

28. After having considered the entire material on record it thus revealed that the Trial Court was wrong in awarding the interest from the date prior to filing of the suit that too at commercial rate and with the compounding effect. The first appellate Court erred in declining the interest of the entire said period and to grant it only from the date of order in the appeal. Both the decisions, therefore, cannot be sustained.

29. For the reasons recorded by me herein before, the appellant though cannot be held entitled for the interest from the date prior to filing of the suit, he is held entitled to receive the pendente lite and future interest at the rates prescribed herein-above i.e. at the rate of 9% and 12% p.a. respectively. Hence, the following order:

ORDER

- i) The respondent-municipal council is held liable to pay the amount of Rs. 2,43,680/- to the appellant.
- ii) The respondent-municipal council shall pay the interest on the aforesaid amount at the rate of 9% p.a. from the date of

filing of Special Civil Suit No.371 of 1995 till the decision of the said suit and shall pay the future interest at the rate of 12% p.a. on the aforesaid amount from the date of decision of the suit till actual realization of the said amount.

- iii) The decree be drawn accordingly.
- iv) The amount which may be determined in the decree to be prepared on the basis of the decision of this Court, if already not received to the appellant, the respondent-municipal council shall pay the same to the appellant within three months from the date of this order.
- v) If it is noticed that the respondent-municipal council has paid the amount in excess to the amount for which this Court has held the appellant entitled, the appellant shall refund the excess amount so received to him to the respondent-municipal council within three months from the date of this order or else it will carry the interest at the rate of

12% p.a.

vi) The appeal thus stands allowed in the
aforesaid terms.

(P.R. BORA, J.)

Mujaheed//