(2001) 07 P&H CK 0149

In the Punjab And Haryana At Chandigarh

Case No : Regular First Appeal No. 347 of 1997

Tilak Raj — APPELLANT

Vs

Punjab State Civil Supplies Corporation Ltd., Chd. — RESPONDENT

Date of Decision : 06-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 73
Evidence Act, 1872 — Section 34
Interest Act, 1839 — Section 1
Negotiable Instruments Act, 1881 (NI) — Section 80

Citation : (2001) 07 P&H CK 0149

Hon'ble Judges : J.S. Narang, J

Bench : Single Bench

Advocate : Mr. H.R. Mittal, for the Appellant; Mr. Naresh Prabhakar, for the Respondent

Judgement

J.S. Narang, J.—This judgment would dispose of two RFAs No. 347 and 1780 of 1997 and RSA No. 2232 of 1998, for reference it may be clarified that the first RFA has been filed by Shri Tilak Raj and the second RFA has been filed by Punjab State Civil Supplies Corporation Ltd. (PUNSUP) against the common judgment dated October 29, 1996 rendered by Additional Civil Judge (Senior Division), Moga. The RSA has been filed by Shri Sikander Singh defendant No. 2.

2. The facts which need be noticed have been taken from RFA No. 347 of 1997. The PUNSUP filed a civil suit for recovery of Rs. 16,47,214/- against Shri Tilak Raj-defendant No. 1, Shri Sikander Singh-defendant No. 2, for the loss caused to the Corporation on account of shortages of the goods which had been found in the godowns situated at Moga and set up by PUN-SUP.

3. The claim of PUNSUP is that Tilak Raj was working as Inspector of the plaintiff under the control of District Manager PUNSUP, Faridkot who has been impleaded as plaintiff No. 2. Shri Tilak Raj was posted at Moga vide order dated March 30, 1984 and joined his dub at the place of posting on April 6, 1984. It is the case of

PUNSUP that on the orders of the Managing Director PUNSUP the physical verification of the stocks at Moga Centre in the godowns maintained by PUNSUP was carried out. The checking party conducted physical verification from June 21, 1985 to June 26, 1985 at Moga and found shortage of 4513 bags of wheat in the godowns. The details of the short- ages as were noticed by the checking party and which have been spelt out in the plaint read as under :-

Sr.No.

Commodity

Shortage

1.

Wheat, 1983-84

1911-33. 500 qtls.

2.

do 1984-85

2529.67.00 qtls.

3.

do 1985-86

142.70.00 qtls.

4.

Cement

270 bags

5.

Unserviceable crates

686 crates

6.

Serviceable crates

420 crates

7.

Tat

16.64.000 qtls.

8.

Patn

33.63.000 qtls.

9.

Tea chest

39 Chest qtls.

10.

B. Class Bardana

15810 bags

11.

Petty cash balance

Rs. 3440.33

Defendant No. 1 deposited another 210 bags of wheat weighing 200 qtls from 25.6.1987 to 11.8.1987, apart from 2400 bags which had been deposited by him earlier. After adjusting 200 qtls. of wheat deposited by defendant No. 1 the net shortages are as under :-

S.no.

Commodity

Shortage

Rate

Amount

1.

Wheat 1983-84

1711.33.00 qtls

219.71 PQ

375997.41

2.

Wheat 1984-85

2529.67.00 0qtls

197.87 PQ

500545.80

3.

Wheat 1985-86

142.70.000 qtls

186.00 PQ

26542.20

4.

Cement

270 bags

60.17 P. Bag

16245:90

5.

Unserviceable crates

686 crates

37.48 P. crate

4628,03

6.

Serviceable Crates

420 crates

60.00 P. Crate

25200.00

7.

Tat

16.64 qtls

95.00 PQ

1580.80

8.

Patri

33.63.00 qtls

255.00 PQ

8575.65

9.

Tea chest

39 chest

10.00

390.00

10.

B. Class Bardana

15910 bags

7.40 P. Bag

11,6994.00

11.

Petty cash balance

3440.33

1080140.12

4. A list was prepared in the presence of the defendants showing the shortages which was signed by the members of the raiding party in token of correctness and it was further signed by both the defendants. Both the defendants were suspended and were directed to hand over the charge of their respective offices to Shri Harnek Singh and Shri Gurnam Singh. Subsequently an audit report dated February 10, 1986 was submitted which further corroborated various other shortages arid stock of the articles, "Against the total shortage 4513 bags of wheat defendant No. 1 Shri Tilak Raj deposited 2400 bags of wheat weighing 2320 quintals within one month approximately from June 26, 1985 to July 16,1985. Shri Tilak Raj further deposited another 210 bags of wheat weighing 200 quintals in a span of one and half month i.e. June 25, 1987 to August 11, 1987. It has been averred that the shortages occurred during the period of posting of both the defendants at Moga when they are incharge of the Moga go-downs. Shri Tilak Raj defendant No. 1 was actual holder of the stocks and Sikander Singh defendant No. 2 was the Senior Supervisor posted at the said centre. It is further the case of PUNSUP that the shortage/removal of bags could not have occurred without the knowledge, connivance and active participation/ assistance of defendant No. 2 i.e. Shri Sikander Singh. Thus, the loss has been suffered by PUNSUP on account of misappropriation and unauthorised use of stocks by both the defendants in furtherance of their own interest and benefits. Thus, both the defendants are equally responsible and liable to make good the shortages and losses suffered by plaintiff on this account. It is also the case of PUNSUP that both the defendants were served with registered notices for depositing the amount of shortages but they have failed to do so and as a sequel thereto a suit for recovery in the sum of Rs. 16,47,214/- has been filed against

the defendants out of which a sum of Rs. 5,67,073.88 has been charged as interest w.e.f. June 24, 1985 to May 23, 1988 indicating Rs. 10,80,140.12 as the principal amount.

5. Both the defendants have filed separate written statements and have set up defences accordingly.

6. The plea of defendant No. 1 is that, he was posted at Moga on April 6, 1984 and that the articles were lying in as many as eight godowns and six open plinths. The said godowns were located at different places stretched in an area of more than 3 kms from each other. It is further the case of defendant No. 1 that he had never committed any embezzlement or caused any loss to the assets of the plaintiff and that the entire affair was inspected by defendant No. 2 Shri Sikander Singh and these are his activities which have caused the alleged loss to PUNSUP. It is further averred that defendant No. 2 did visit the godowns during odd hours, caused beatings to the chowkidars and others and he even made appointments of such chowkidars of his own choice to achieve success in designs from removing the stocks. Another plea taken by the said defendant is that the matter having been finally decided between him and PUNSUP by this Court and thereafter finally by the Apex Court, the suit is not sustainable and is barred by the principles of res judicata. It is also the plea of defendant No. I that the suit is bad for nonjoinder and mis-joinder of necessary parties. Apart from this, another plea has been taken that since he has already been punished by the Appellate Committee and by virtue of the said order, he has been subjected to a liability of 2/3rd of the shortages and that if the same are deposited no liability against the said defendant would be sustainable. Thus, the filing of the suit against the defendant is hit by doctrine of double jeopardy.

7. Defendant No. 2 Shri Sikander Singh has taken different stand from defendant, No. 1. The plea is that an Inspector is the custodian of the stock and is the real holder of the stock. The admitted case is that defendant No. 1 was posted as Inspector on April 6, 1984 and that he had taken charge from the previous Inspector and that if any shortage occurs the liability and responsibility is that of the Inspector. In the present case, defendant No. 1 admittedly was posted as Inspector and had taken over the charge from the previous Inspector and thereafter shortage was found in the stocks. Defendant No. 2 was posted as a Supervisor (Assistant Manager, Field) and that his duties are specifically defined in the Accounting Manual Part-I and that his position is the same as that of plaintiff i.e. the District Manager. Thus, no shortage can be attributed to defendant No. 2 as none has occurred at his instance. It is also the plea of defendant No. 2 that the chowki-dars on daily wages were never employed by him and that according to Accounting Manual Part-I it is the duty of the Inspector/Supervisor to employ the chowkidar for watch and ward. It is also the plea of defendant No. 2 that he himself on April 10, 1985, made a complaint in writing to the District Manager against defendant No. 1, in respect of shortages which may have occurred. Photo copy of the said complaint is stated to have

been attached with the written statement. It is also the case of defendant No. 2 that defendant No. 1 has himself admitted the shortage of 4513 bags and out of which 2400 bags have been deposited earlier and 210 bags have been deposited later on. If the bags had not been misappropriated by defendant No. 1 from where could he bring 2400 and 210 bags for being deposited in the stocks. In this view of the matter, nothing is sustainable against defendant No. 2.

8. On the pleadings of the parties, the following issues were framed :-

1. Whether the plaintiff is a registered company under the Companies Act, 1916 ? OPP

2. Whether the Secretary-cum-Manager (Legal) has been authorised to file the plaint ? OPP

3. Whether defendant No. 1 deposited 2400 bags from 26.6.1985 to 16.7.1985 ? If so its effect ? OPP

4. Whether Audit Party conducted audit at Moga and Faridkot ? OPP

5. Whether defendant No. 1 was held guilty by the Enquiry Officer ? If so its effect ? OPP

6. Whether defendant No. 1 deposited 200 bags more from 25.6.1987 to 11.8.1987 ? If so its effect ? OPP

7. Whether defendant No. 1 was employed as In-charge of Moga Godown and defendant No. 2 was Senior Supervisor Officer posted at Moga and is an Assistant Manager Field ? If so, what are his duties ? OPD

8. Whether defendant No. 2 made a complaint against defendant No. 1 in writing on 10.5.1985 ? If so, its effect ? OPD

9. Whether the suit is within time ? OPP

10. Relief.

9. As per finding of the trial Court defendant No. 1 has been made liable and a decree for recovery of Rs. 16,47,214/- with costs and future interest at the rate of 18% per annum upon the principal amount has been passed. So far as suit against defendant No. 2 is concerned, the same has been dismissed. It has also been ordered by the trial Court that the cost of 400 bags of wheat deposited by defendant No. 1 during the pendency of the suit at the rate of Rs. 219.71 per quintal is liable to be adjusted against the decretal amount as outstanding on the date of deposit.

10. Being dissatisfied PUNSUP has filed the present appeal with the prayer that defendant No. 2 also should have been held liable and that both the defendants should be held jointly and severally liable for the loss which has been caused to PUNSUP. Defendant No. 1 has also filed the appeal contesting the judgment and decree upon the pleas set up in the written statement which have been

reiterated in the grounds of appeal and has alternatively claimed that defendant No. 2 is also liable with him.

11. It has been argued by learned counsel for PUN-SUP that the trial Court fell into error while holding that defendant No. 2 is not responsible forthe aforesaid shortages as the holderofstock is defendant No. 1 who is responsible and liable for all purposes. In fact supervisory control also envisages responsibility upon the person who is required to supervise the maintenance of the stocks of PUNSUP. It is the admitted case that defendant No. 2 joined his duties at Moga on December 21, 1984 and thereafter the shortages which have been found upon physical verification and on the basis of the audit report the responsibility devolves upon defendant No. 2 as well. Admittedly, the report/complaint dated April 16, 1985 Ex.DW2/A is said to have been made by defendant No. 2 to the District Manager, Faridkot. The shortages in stock were found on physical verification by the raiding party which was conducted on June 21, 1985 to June 26, 1985 and the audit which was carried out subsequently. Further the plea is that defendant No. 2 has been equally found guilty by the Inquiry Officer as is evident from the report of the Inquiry Officer Ex.DW 4/C and that both these officials filed their respective appeals against the impugned orders passed against them and that while disposing of the appeal filed by Tilak Raj the Appellate Committee held that he may deposit 2/3rd of the total number of bags and if he deposits the same he shall be reinstated. So far as appeal of defendant No. 2 is concerned, the same has been dismissed and dismissal of defendant No. 2 was upheld meaning thereby liability to the extent of l/3rd of the shortages of the bags was attributed to defendant No. 2.

12. It shall be appropriate to note certain additional facts i.e. Tilak Raj filed CWP No. 9287 of 1988, for seeking reinstatement in the post on account of having already deposited 2400 bags, that is substantial portion to the extent of 2/3rd of the total shortage of 4513 bags. The Division Bench of this Court while disposing of the petition categorically observed that defendant No. 1 having substantially complied with the order of the Appellant Committee, should be reinstated on the deposit of total 2/3rd of the bags. If out of the balance to be deposited, he deposits 200 bags, he shall be reinstated accordingly. It shall be apposite to notice the judgment of this Court rendered in CWP No. 9287 of 1988, which reads as under :-

"This writ petition shows a very very sad state of affairs in the administration of this department. As an appellate authority or as an administrative authority, they had allowed the appeal and directed reinstatement of the petitioner on certain conditions. However, some over- enthusiastic authority seems to have indulged in all sorts of understandable interpretation of the appellate order by putting further conditions on the reinstatement of the petitioner. We see plainly that conditions in Annexure P8 are that the petitioner shall be allowed to be reinstated on his depositing 200 bags of wheat or paying the value thereof and furnishing two sureties to the satisfaction of the Corporation for recovering the cost of the remaining 400 bags of wheat. After he is reinstated he shall be liable to pay value of 400 bags in five monthly instalments. However, the authorities seem to have construed this order as saying that he shall pay the value of the remaining 400 oags of wheat also before he is reinstated The subsequent opinion of the authority is in the nature of the earlier order and then the appeal itself was dismissed on the ground that he had not paid the value of 400 bags of wheat before his reinstatement. This is a very unreasonable construction of the order and if this was the intention that value of the entire 600 bags shall be paid before reinstatement, there was no need in saying that 200 bags shall be deposited towards the recovery of 600 bags. We are absolutely clear that on furnishing security for the value of 400 bags and payment of the value of 200 bags, the petitioner was entitled to be reinstated, and the subsequent order cancelling the earlier order on the ground that had committed a default is, therefore, unsustainable. The same is accordingly set aside since admittedly he had deposited the value of 200 bags and also furnished security for the remaining 400 bags, he shall be reinstated forthwith. In any case we hold that from the date he furnished security, he was entitled to be reinstated and, therefore, was entitled to be paid salary from that date. It is open to the department to recover the value of 400 bags from the arrears of salary due to the petitioner from the date he furnished the security. After setting off the value of the 400 bags from the arrears of salary, if more amount is due to the respondent, the same shall be recovered from the salary of the petitioner at the rate of Rs. 1000/- per month. The petition is allowed in the above terms with costs of Rs. 1000/-."

13. PUNSUP being dissatisfied with the aforesaid judgment of this Court filed SLP (Civil) No. 5609 of 1989, which was partially allowed by the Apex Court on August 23, 1989 and the order of this Court was modified. The judgment passed by the Apex Court reads as under :-

"Special leave granted.

Heard counsel on both sides and perused the material on record. We are of the opinion that the respondent''s reinstatement ordered by the High Court cannot be disturbed. The High Court was not off the mark of the initial order dated May 7, 1987 made by the appellate Committee. The respondent had a right to have his reinstatement upon depositing 200 bags of wheat out of 600 bags and also satisfying the other conditions enumerated thereunder. Since he had already complied with those conditions, he shall be reinstated, as rightly observed by the High Court.

But, in the facts and circumstances of this case, we cannot approve the High Court''s direction to the respondent to pay back wages from the date he furnished security for 400 bags. Although we agree with the High Court on the interpretation put by it on the order of the Appellate Committee, it cannot be said that the Corporation was actuated by the oblique motive in the view it took on the true meaning of the said order. Besides, the conduct of the respondent which caused loss to the Corporation does not justify such a sympathetic order. We, therefore, set aside it.

In the result, we allow this appeal partially, modify the order of the High Court and direct the appellant to reinstate the respondent within two weeks from today. The respondent shall comply with the other conditions of the Appellate Committee''s order dated May 7, 1987, both on furnishing two sureties and also by depositing the remaining 400 bags of wheat by five monthly instalments from the date of reinstatement.

The appeal is allowed as indicated above, modifying the order of the High Court. In the circumstances, there will be no order as to costs".

14. Thus, it is obvious that defendant No. 1 was required to deposit the bags as per the order of this Court and coupled with the observations of the Supreme Court and as a sequel thereto became entitled to reinstatement.

15. The argument is that defendant No. 2 filed a civil suit challenging his order of dismissal and the order of the Appellate Committee but the suit was dismissed and that the appeal filed in the lower Appellate Court was also dismissed. Both the judgment and decree have been questioned by way of second appeal which has been registered as RSA No. 2232 of 1998 in this Court. Thus, in this view of the matter, defendant No. 2 has to be held liable and responsible to the extent of 1/3rd of the shortages and resultanfly the loss having been suffered by PUNSUP. It is further argued that the appeal of PUNSUP deserves to be allowed and the second appeal of defendant No. 2 should be dismissed and that he should be held liable along with defendant No. 1 and both should be held liable jointly and sever- ally.

16. On the other hand, Mr. J.R. Mittal learned Senior Advocate appearing on behalf of Sikander Singh has argued that he (Sikander Singh) has been unnecessarily roped in whereas he is the one who has put in the complaint for the shortages which occurred at the relevant time. The complaint was made on April 10, 1985 and that he had joined as Supervisor on 21st of December, 1984. It is on this complaint that the raiding party was appointed and the godowns were raided and the shortages were ascertained accordingly and thereafter the shortages were also further quantified by the audit report. It is also admitted case of PUNSUP that shortage of 4513 bags was admitted by defendant No. 1. Shri Tilak Raj and that he had agreed to make up the loss by way of depositing the bags and accordingly he deposited 2400 bags in the first instance and subsequently the bags as per the order passed by the Appellate Committee. The Appellate Committee while modifying the order in respect of defendant No. 1 categorically held him responsible and liable for the shortages but in their best wisdom reduced the liability to the extent of 2/3rd of the said stocks which fact has been categorically admitted by PUNSUP as is evident from the pleadings in the suit. The Appellate Committee did not say anything so far as recovery in respect of l/3rd of the shortages is concerned. It is evident from the order

passed by the Appellate Committee that defendant No. 1 has defalcated the goods and that shortage/loss has been attributed to him. Though the Appellate Committee dismissed the appeal filed by defendant No. 2 but no liability in respect of the shortages has been attributed to defendant No. 2. The trial Court has, therefore, come to a correct conclusion that the holder of the stock is the Inspector who was none else but defendant No. 1 whereas in the supervision, no fault had been found as the report had been made by defendant No. 2 to the District Manager on 10th of April 1984 vide Ex.DW2/A. Thus, as a Supervisor, he has acted according to his duty and no lapse can be said to have been committed in the supervisory control. It is also the admitted case that defendant No. 1 had taken charge of the stock from the previous Inspector on the date of his joining at Moga i.e. 6th of April, 1984. Thus, he had almost about eight months unto himself to commit any kind of defalcation as defendantNo. 2 was not posted at Moga at that time on 21st of December, 1984 and in a span of about three months approximately the complaint was sent in respect of the shortages. The argument is that if he himself was involved in defalcation why should he go and make a complaint and invite a raid by the raiding party and assist the auditors for submitting the audit report which spells out the shortages. It is strange that the man who puts in the complaint is being held guilty. There is not an iota of evidence to connect defendant No. 2 with the shortages anywhere. Even the perusal of the enquiry report spells out that nothing has been attributed for defalcation of the goods. But defendant No. 2 was held to be deficient in exercising his supervisory control and that without his assistance and connivance the stock could not have been removed. Unfortunately the Inquiry Officer lost sight of one important fact that defendantNo. 1 was posted at Moga on 6th of April, 1984 whereas defendant No. 2 was poted as Supervisor at Moga on December 21, 1984 and that if he had connived with defendant No. 1 he would not have filed a complaint on 10th of April, 1985. Even otherwise the trial Court while dealing with the suit for recovery has clearly held while deciding issues No. 7 and 8 that physical control of the stocks was that of defendant No. 1 and that defendant NO. 2 did not fail to exercise proper supervisory control. He was not directly responsible in any manner for the shortages as the stocks admittedly were under the physical control of defendant No. 1 as he was posted at Moga on 6th of April, 1984 and that upto 21.12.1984, defendant No. 2 did not even have the supervisory control. Thus, during this period of 8 months the shortage must have occurred, which was reported by way of complaint dated 10.4.1985. Thus, the allegations of connivance and assistance of defendant No. 2 to defendant No. 1 for misappropriation are not sustainable.

17. It shall be appropriate to mention here that Sikander Singh defendant No. 2 has questioned the impugned order passed by the punishing authority and the Appellate Committee by way of filing a civil suit before the trial Court. The said suit was dismissed by the trial Court upholding the decision of the Appellate Committee and resultantly that of the punishing authority. The said judgment and decree of the trial Court which is dated 19.11.1992 was questioned by way

of appeal before the lower appellate Court but met with the same fate vide judgment and decree dated 23.2.1998 passed by the lower Appellate Court. Being dissatisfied with the judgment and decree of the Courts below Shri Sikander Singh defendantNo. 2 challenged the same by way of filing RSA before this Court which has been registered as RSA No. 2232 of 1998.

18. I consider it appropriate that the said appeal (RSA No. 2232 of 1998) also deserves to be decided vide this judgment as lot of common arguments have been addressed and that various documents, which have been brought on record, have also been examined. The said course has been adopted on the request of learned counsel for the appellant in RFA Nos. 347 and 1780 of 1997 and defendant No. 2 in the present appeal.

19. Learned counsel for defendant No. 2 has argued that the perusal of the enquiry report categorically shows that appellant-defendant No. 2 has not been held liable in any manner specifically for misappropriating the material from the godowns. It is a different matter that he is being held liable for dereliction of duty in supervising the working and functioning of the officials including defendant No. 1. The argument is that if the enquiry officer has not categorically held defendant No. 2 liable for any defalcation and that the loss suffered by PUNSUP has been duly made up by defendant No. 1, the punishment of dismissal from service is not sustainable.

20. It has been further argued that the defence put up by the appellant-defendant No. 2 has not been examined by the trial Court while dismissing the suit whereas this very defence has been examined by the trial Court while dealing with the suit for recovery filed by PUNSUP against defendant No. 2 and the same has been accepted and it has been categorically held by the trial Court in the saidsutt filed by PUNSUP that there is no lack of supervision which is attributable to Sikander Singh defendant No. 2. It is not understandable that the same defence which has been set up by defendant No. 2 had led the courts below to reach two conclusions which are at variance. It is argued that the trial Court while dealing with the suit filed by defendant No. 2 has not examined the defence in a cogent manner and that the appeal deserves to be allowed as nothing has been attributed to the appellant- defendant No. 2.

21. It has been further argued that it is on the complaint of appellant- defendant No. 2 that the raiding party was appointed by the Managing Director of PUNSUP and the premises were raided accordingly. The document i.e. complaint Ex.DW2/ A. has not been noticed by the trial Court and has come to a conclusion that the complainant is also an accused which is contrary to the jurisprudence coupled with the facts which have been brought on record. Admittedly, defendant No. 1 had joined almost 8 months prior to the joining of appellant-defendant No. 2 at the common place of posting i.e. Moga. It is just in four months that in his supervisory authority, the complaint has been put by appellant-defendant No. 2 to the District Manager and thereafter on an audit report the liabilities have been fastened. So far as audit report is concerned, the same has not been relied upon

nor has been referred to for fastening liability upon appellant-defendant No. 2. Admittedly, the handing over and taking over of the stock was done by defendant No. 1 and not by appellant-defendant No. 2, if any shortage which may have occurred prior to joining of defendant No. I were never pointed out by defendant No. 1. Thus, by no stretch of imagination any iota of evidence can be read against appellant-defendant No. 2 by virtue of which he could be subjected to the liability and that it can be accepted that the trial Court while dismissing the suit against appellant-defendant No. 2 came to the correct conclusion. It is this conclusion which has been missed out by the Courts below while dealing with the suit filed by appellant-defendant No. 2. Since no case is made out against appellant-defendant No. 2, resul-tantly, the suit filed by appellant- defendant No. 2 deserves to be decreed and the appeal filed by PUNSUP against defendant No. 2 deserves to be dismissed.

22. Learned counsel for defendant No. 1 Shri Tilak Raj has argued that the trial Court has fallen into error in decreeing the suit filed by PUNSUP. It is evident from the pleadings that shortage of 4513 bags had been admitted by Shri Tilak Raj and that out of which 2400 bags had been deposited and subsequently another 210 bags were deposited. The punishing authority had or- dered the dismissal of defendant No. 1 which was made subject matter of challenge before the Appellate Committee and that the Appellate Committee vide order dated May 7, 1987, Ex.D4, partially accepted the appeal and categorically held that defendant No. 1 is li-able to the extent of 2/3rd of the total number of bags. If the order of the Appellate Committee is read in its totality it would mean that l/3rd of the shortage has been perhaps put on defendant No. 2 Shri Sikander Singh, as the appeal filed by Sikander Singh has been dismissed by the Appellate Committee. The Appellate Committee, passed a conditional order that if 200 bags or value thereof is deposited by defendant No. 1 he shall be entitled to reinstatement subject to furnishing security for 400 bags and the value thereof shall be paid in instalments as spell out in the order passed by the Appellate Committee. Defendant No. 1 had deposited 200 bags and was, therefore, entitled to be reinstated. Somehow or the other, the order passed by the Appellate Committee was misinterpreted and no reinstate-ment order was passed by the concerned authority which was made subject matter of challenge by way of filing writ petition before this Court which was finally allowed by the Division Bench of this Court. The judgment rendered by (his Court was made subject matter of challenge before the Apex Court and that the order passed by the High Court was modified accordingly but the reinstatement was upheld.

23. So far as (he pleadings of PUNSUP are concerned, they do not make out a case of the shortage which is based on audit report as nothing has been said that prior to the handing over of the charge to defendant No. 1, there were no shortages and the stock was intact. There is no evidence which has been brought on record to show that at the time of handing over the charge on 6.4.1984, the stock had been duly verified by defendant No. 1 and was actually and factually handed over to defendant No. 1. The shortages which are now being attributed

to defendant No. 1 on the basis of some audit report have not been proved into evidence against defendant No. 1. It is also not clear that shortage pertaining to wheat numbering 4513 bags is inclusive of the shortage which is being claimed in the pleadings or is in exclusion of the same. If it is in exclusion of the same, the suit could not have been decreed against defendant No. 1 as the liability with regard to 4513 bags has already been met with as is evident from the order passed by the Appellate Committee. Thus, the trial Court has not discussed this aspect at all and has proceeded to fasten the liability upon defendant No. 1 incorrectly. There is not even a single witness who has come in the witness box claiming that the shortage found on account of audit report can be attributed to only defendant No. 1 and none else as no stock register has been brought into evidence for corroborating the fact that as on 6th of April 1984, the stock as claimed by the auditors was intact and the shortage occurred only after 6th of April 1984. In the absence of clear and cogent evidence, no liability can be fastened upon defendant No. 1. It is the settled law that merely on the basis of statement of account or the audit report the liability cannot be fastened. In this regard it shall be appropriate to refer Section 34 of the Indian Evidence Act, which reads as under :-

"34. Entries in books of accounts when relevant: Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability."

Thus, in the absence of any evidence, the liability could not have been fastened upon defendant No. 1 and the appeal filed by defendant No. 1 deserves to be allowed.

24. It has been further argued that the interest amount which has been claimed by PUNSUP upon the alleged principal amount is not at all claimable. There is no agreement or contract or any provision of law which has been relied upon by PUNSUP for claiming interest upon the alleged principal amount. Thus, the trial Court has certainly fallen into error while decreeing the suit granting interest amounting to Rs. 5,67,073.88 and further proceeding to grant interest at the rate of 18% per annum. The interest cannot be awarded as damages. It can only be based on a contract or usage or upon a transaction where no interest is provided but can be granted only after the filing of the suit. In the case at hand, no contract or usage or any agreement has been referred to or relied upon by PUN-SUP for fixing the liability as interest upon the alleged principal amount before the filing of the suit and that the trial Court has fallen into error in accepting the said interest by way of damages and further granting interest upon the alleged principal amount at the rate of 18% in the shape of damages. Even if reference is made to Section 34 CPC, the interest is leviable only when a decree for payment of money is to be passed and that not when damages are being claimed on account of shortages which are being attributed. So far as future rate of interest is concerned, under no circumstance it can be awarded more than 6%

per annum. Thus, on this ground as well, the appeal filed by defendant No. 1 deserves to succeed. Reliance has been placed upon a judgment of the Apex Court rendered in Union of India (UOI) Vs. West Punjab Factories Ltd., , in which it has been held as under :-

"(e) Civil P.C. (1908), Section 34 - Interest for period upto date of suit - When can be awarded.

In the absence of any usage or contract express or implied or of any provision of law to justify the award of interest, interest by way of damages cannot be awarded. No interest could thus be awarded for the period upto the date of the suit."

25. In the absence of any agreement or contract the Court may award interest at the rate of 6% per annum. When no rate of interest is specified but the same cannot be awarded as damages but in any case by virtue of Interest Act, 1839, the Court of equity can allow interest only if the set of circumstances of a case so warrant that the equitable jurisdiction of the Court is attracted. Reference has been made to the judgment of Privy Council in AIR 1938 67 (Privy Council) , (Head notes C and D) in which it has been held as under :-

(c) Interest, prior to suit, when payable stated :

Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest as for instancethe Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in a promissory note or bill of exchange u/s 80, Negotiable Instruments Act.

(d) Interest Act (1839), Section I, Proviso - Proviso applies where Court of equity allows interest.

The proviso to Section 1 applies to a case in which the Court of equity exercises jurisdiction to allow interest. But in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction."

26. Reliance has also been placed upon a judgment rendered by the Apex Court in Indian Insurance and Banking Corporation Ltd. Vs . Mani Paravathu, (1971) 3 SCC 893 . It has been held that the reduction of rate of interest from 9% to 6% by the High Court was not any error committed. However, it was a case of commercial transaction between the parties and that by applying the principle as envisaged u/s 34 of C.P.C. the reduction of rate of interest from 9% to 6% was upheld.

27. It has been argued in the alternative that if at all the transaction relating to shortages is allowed to be converted into terms of money, the interest is not claimable at the rate of 18% prior to the date of filing of the suit nor, if at all the

decree has to be passed, at the rate of 18% per annum. Thus, the appeal deserves to be allowed on this count as well.

28. It has been argued that the shortage of the articles have not been proved but assuming the shortages are taken against defendant No. 1 conversion of the same in terms of value have neither been pleaded nor proved by way of cogent evidence. It has nowhere been proved as to what was the value of one cement bag and so also what was value of unserviceable and serviceable crate and what was the value of Tat, Patri, B-class Bardana and the liability has been fastened in respect of petty cash as well which in fact was never dealt with by defendant No. 1 as it is the job of the Accountants and not the job of the Inspectors. It is the settled law that if any liability has to be fastened in terms of value of any kind of shortages the prevailing value at the time of shortage has to be proved by way of cogent evidence. In the case at hand nothing of the kind has been done as no evidence has been brought on record in support thereof. Thus fixing and fastening the liability upon defendant No. 1 in respect of those articles in terms of value is not sustainable. In this regard, refer- ence has again been placed upon The West Punjab Factories case (supra), which reads as under :-

(c) Contract Act (1872), Section 73 - Damages -Measure of.

The market price at the time of the damage is the measure of damages to be awarded; the contract price is no measure of damages to be awarded."

29. Thus, it is contended that the appeal deserves to be accepted and the suit filed by PUNSUP ought to be dismissed.

30. After hearing the learned counsel for the parties at a great length, I am of the opinion that PUNSUP has not been able to establish its case against the defendants. It has been admitted that Shri Tilak Raj defendant No. 1 after having conceded the shortage of the bags has been directed by the Appellate Committee to deposit 2/3 rd of the said bags and that had been made the condition precedent for reinstatement in service. As a sequel thereto, Tilak Raj has deposited the said bags and has been reinstated accordingly. PUNSUP has not been able to address meaningful arguments for establishing the fact that the claim is in exclusion of the said bags or is in inclusion of the said bags. It is also the admitted case that Tilak Raj had joined the duty at the place of posting on April 6, 1984 and nothing has been brought on record as to whether the stocks etc. were in order on the date of his posting as the reliance, has been placed upon the audit report for fixing the liability. However, there is divergence vis-a-vis the physical verification which has been carried out and the audit report which has been relied upon. Thus, PUNSUP has not been able to establish the clear cut liability against defendant No. 1. It shall not be fair to rely upon the audit report as the contents thereof have not been proved by way of any supportive evidence brought on record by PUNSUP. It is the settled law that liability cannot be fastened only on the statement of account/audit reports as it is not discernible as to at what stage such kind of loss had been suffered and at

whose hands as nothing has been brought on record that on the date of joining by defendant No. 1 the shortages were in existence or came into existence thereafter.

31. So far as defendant No.2 Sikander Singh is concerned, it is the admitted case that he had joined the place of post ing on December 21, 1984 and that he was never in the actual factual control of the stocks as no . taking over in this regard has been attributed to defendant No. 2. So far as admission of shortage of bags is concerned, the same had been admitted by defendant No. 1 and not by defendant No. 2, by ipse dixit the liability to the extent of 1/3rd of the bags cannot be fastened upon defendant No. 2. It is a separate matter that he has been held liable for dereliction of duty vis-a-vis supervisory control but that too has been interpreted differently in view of the judgments rendered by the Courts below. Even otherwise from the facts brought on record, the supervisory control of defendant No. 2 came into force w.e.f. December 21, 1984 and that prior thereto, the articles being in actual factual control of defendant No. 1, the dereliction of supervisory control could not have been attributed to defendant No. 2. It is also the admitted case of the parties that defendant No. 2 submitted a complaint which is dated April 10, 1985 to the immediate supervisor i.e. the District Manager and that the entire action was started on the basis of the said complaint. In this view of the facts, dereliction of duty vis-a~vis supervisory control is not attributable to defendant No. 2.

32. Defendant No. 1 Tilak Raj after having admitted the shortage of the bags, replenished to the extent of 2/3rd as per the order passed on his appeal by the Appellate Committee. The Appellate Committee did not specify in the order while partially accepting the appeal of Tilak Raj that liability qua l/3rd of the bags is that of defendant No. 2 Sikander Singh. However, the appeal filed by Sikander Singh has been dismissed as he has been dismissed from service only on account of dereliction of duty of supervisory control. However, the admitted case is that the control of stocks was that of defendant No, 1 and not that of defendant No. 2. Since I have concluded that dereliction of duty vis-avis supervisory control is not attributable to defendant No. 2, as such the order of dismissal passed against defendant No. 2 is not sustainable.

33. It is also necessary to notice that the claim of PUNSUP in terms of value of the articles has not been substantially pleaded nor has been proved by way of cogent evidence. The shortages of wheat and cement etc. could not be converted into terms of money in the absence of appropriate evidence, as nothing has been brought on record as to what was the value of the articles the shortage of which is being attributed to defendant No. 1. The value which has been spelt out in the plaint has not been supported by any evidence. As such, it shall be absolutely dangerous to rely upon that value which has been claimed in the pleadings and additionally the said pleadings having not been corroborated/proved by way of any evidence on the part of the management/PUNSUP. The pleadings even otherwise are absolutely vague as reliance has been placed upon physical

verification made by the raiding party and thereafter the audit report submitted by the auditor, which are admittedly at variance. It has not been stated anywhere that the shortage which has been referred to in the audit report had occurred only after 6th of April, 1984 when defendant No. I had joined or it had occurred after December 21, 1984 when Sikander Singh had joined the place of posting. In the absence of any such evidence, reliance could not have been placed upon the audit which has been vehemently relied upon by PUNSUP.

34. Since I have expressed my view vis-a-vis conversion of the loss in terms of the value of shortage as depicted by the audit report and the raiding party by way of physical examination, the question of granting interest does not arise. Thus, 1 refrained myself to go into the quantum of interest leviable in this regard.

35. In view of the above discussion, RFA No. 1780 of 1997 filed by PUNSUP fails and is hereby dis- missed and the RFA No. 347 of 1997 filed by Shri Ti-lak Raj defendant No. 1 is allowed and the suit filed by PUNSUP is dismissed. RSA No. 2232 of 1998 tiled by Sikander Singh is also allowed in view of the fact that it has been held that dereliction of duly vis-a-vis supervisory control is not attributable to defendant No. 2 - appellant in RSA No. 2232 of 1998. The judgments and decree dated 19.11.1992 passed by the trial Court and dated 23.2.1998 passed by the first appellate Court, are set aside. As such the order dated 13.6.1986 which has resulted into dismissal from service of defendant No. 2 is declared null and void and the suit filed by Sikander Singh is decreed accordingly. The appellant-plaintiff Sikander Singh shall be reinstated alongwith consequential benefits and that he shall also be entitled to back wages. However, the interest thereon is declined. The office is directed to draw the decree sheet accordingly. No costs.

36. Order accordingly.

