

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 287 of 1990

JUGOLINIJA, a Shipping Company

Versus

Saeed A. Tayyab Elmhurst and another

Date of hearing : 21.03.2016

Plaintiff : Through Mr. Manzar Bashir, Advocate
for the Plaintiff.

Defendants : Through Syed Ali Hyder, Advocate for
the Defendant.

J U D G M E N T

Muhammad Faisal Kamal Alam, J: The present Admiralty Suit has been filed by Jugolinija, a Shipping Company, which according to the pleadings was previously incorporated under the laws of former 'Yugoslavia', through its Local Agent at Karachi, viz. Pak Shaheen (Pvt.) Ltd. The claim of the Plaintiff Company is in respect of freight collection from Defendants who earlier imported consignments of second hand cellulose processing equipment from Italy.

1. The grievance of Plaintiff primarily is that despite delivery of consignments to their Local Agent-Defendant No.2, the latter did not pay a freight amounting to US \$ 8900 (US Dollars Eight Thousand Nine Hundred Only), despite demands and reminders from Plaintiff. Earlier the Plaintiff also lodged a Complaint with the Collector of Customs but with an unsuccessful result, which eventually led to filing of the instant cause with the following prayer;

“It is prayed that this Hon’ble Court may be pleased to.

- A. Decree the suit jointly and severally against the Defendants for an amount of Rs.190,638/- equivalent to US \$ 8,900/-.***
- B. Grant interest / mark up at the rate 14% per annum from the date of filing suit till payment.***
- C. Grant any other or better relief as deemed fit under the circumstances of the case.”***

2. Notices were issued to the Defendants and in response thereto, the Defendants contested the suit by filing their Written Statements. The Defendant No.1 has specifically mentioned in his pleadings that it has adopted the Written Statement filed by Defendant No.2, which, inter alia, disputed the claim of freight collection.

3. The divergent pleadings of the parties, following issues were framed by order dated 26.04.1992.

- “1. Whether this Hon’ble Court has jurisdiction in the matter?***
- 2. Whether the suit is not maintainable for non-joinder of the Shippers?***
- 3. Whether the Defendant No.2 is not a necessary party to the suit?***
- 4. Whether the freight was paid by Defendant No.1 to the Plaintiff?***
- 5. What should the decree be?”***

4. Evidence was led by the parties by producing and examining their witnesses. Altogether there were three witnesses who deposed on behalf of Plaintiff, Defendants No.1 and 2, namely, Syed Ali Haffad Raza was the sole Plaintiff’s witness,

who testified as PW-1, whereas, Mr. Liaquat Hafeez was examined as DW-1 and Muhammad Ilyas deposed on behalf of Defendant No.2 as DW-2.

5. Syed Ali Haider, learned counsel representing the Defendants invited Court's attention to Issue No.1 and clarified that this Issue is to be re-casted and is to be read in the context of preliminary objections raised by Defendant No.2 in its Written Statement, with regard to maintainability of the suit and not jurisdiction of this Court. Learned counsel for Defendant has further argued that in cross-examination of PW-1 he was asked specific question with regard to his authority for filing the instant proceeding and the admission by said PW-1 that he has no Board Resolution in his favour in terms of Order XXIX Rule 1 of CPC, which should have been passed by the Board of Plaintiff, it being a Private Limited Company, and consequently, the judicial precedents of the Hon'ble Supreme Court and of this Court on this very point of law are fully attracted to the instant case, which may be dismissed as being filed by an unauthorized person.

6. Syed Ali Haider, learned counsel for Defendant next argued that even the Plaintiff-JUGOLINIJA, is no more existing and its Local Agent Pak Shaheen (Pvt.) Ltd., has no legal character to maintain the present suit. This very argument is controverted by Mr. Manzar Bashir, learned counsel representing the Plaintiff, who has referred Exhibit "5/2", the Letter dated 21.09.1988 and various other correspondence(s) exchanged between Defendant No.2 and said Pak Shaheen (Pvt.) Ltd., as an Agent of Jugolinija (Plaintiff). At this stage it would be more appropriate to decide the question of maintainability being a pure question of law going to the very root of the case.

7. Mr. Ali Haider, the learned counsel for Defendants contended that in cross-examination PW-1 has clearly acknowledged that there is no resolution authorizing him to institute the present suit or adduce evidence. At this point, it would be advantageous to reproduce the relevant portion of cross-examination of PW-1 herein below_

“I do not have a copy of the resolution authorizing the filing of the suit. I am serving in the Company since 1980. There is no resolution by the Board of Directors authorizing me to pursue this suit or to give evidence in support of the plaint. There is no averment in the plaint that the suit was filed on the authority of resolution by the Principal or by the Shipping Agents Company.”

8. Defendants side made submissions on this point of law by relying upon the following case law_

- (i). PLD 1971 S.C. Page-550
- (ii). PLD 1966 S.C. Page-685
- (iii). YLR 2010 Page-2974
- (iv). CLC 2010 Page-191-DB
- (v). CLC 2010 Page-421
- (vi). CLD 2010 Page-191
- (vii). CLD 2006 Page-440
- (viii). CLD 2008 Page-239

9. For resolving the present Issue most relevant case law is PLD 1971 Supreme Court Page-550-Khan Iftikhar Hussain Khan of Mamdot Versus Messrs Ghulam Nabi Corporation Ltd, (ibid).

Subsequently, the entire plethora of case law on the scope and applicability of Order XXIX, Rule 1 of Code of Civil Procedure was summarized in PLD 1997 Karachi Page-62 (Abul Rahim Versus United Bank Limited) and 2005 CLD Page-1208 [(Razo (Pvt.) Limited Versus Director, Karachi City Region Employees Old Age Benefit Institution and others)] and 2007 Civil Law Cases (CLC) Page-1811 (Trading Corporation of Pakistan Versus Merchant Agency); the last three decisions were handed down by the learned Division Bench of this Court. Paragraph-37 of Abdul Rahim Case (ibid), contains a précis of law laid down through various judicial precedents, which can be further condensed herein below for deciding the present Issue at hand_

(i) any shortcoming in compliance of Order 29 Rule 1 (of CPC, 1908) is curable, for instance, if a formal Board Resolution is not there, then the Articles of Association and/or even internal record [un-rebutted one] like Noting Sheets, can be taken into account to determine about the authority of a person instituting a legal proceeding / suit, **but**,

(ii) if the very suit has been unauthorizedly and incompetently filed, that is, neither any authorization from the Board of Directors exists, nor the Articles of Association provide such authority, then such a defect remains incurable, even by a subsequent ratification by the Board of Directors.

10. In the subsequent Judgment of Razo (Pvt.) Ltd., (supra), it was held that even subsequent ratification by the Board of Directors in favour of a person who had originally filed the Constitutional Petition would be of no legal effect, unless the

powers are specifically mentioned in the Articles of Associations and consequently, the Constitutional Petition filed by a person who at that time was the Managing Director of Petitioner Company, was dismissed on the ground that the same was being unauthorizedly filed.

11. Mr. Manzar Bashir, learned counsel representing the Plaintiff in rebuttal vehemently opposed the submissions of Defendants side and argued that he can easily produce common letter-head showing names of both-Jugolinija, (the Shipping Company) and Pak Shaheen Ltd, as a proof that at all relevant times Pak Shaheen (Pvt.) Ltd., was / is a duly authorized Agent and is competent to sue the Defendants and pursue the instant proceeding. He next argued that deliberately confusion was created during cross-examination about the non-filing of Board Resolution of Pak Shaheen (Pvt.) Ltd., as Agent of Jugolinija. As per Mr. Manzar Bashir, learned counsel for Plaintiff, his client Pak Shaheen (Pvt.) Ltd, being a responsible corporate entity cannot think of violating a provision of law. According to him, since no specific Issue was framed on this very point of law, therefore, the Plaintiff witness could not have been taken by surprise during evidence. In support of his arguments, he has cited a Judgment of this Court reported in 1992 CLC Page-1128 (Messrs Duncan Stratton & Co. Versus Messrs N.S. Construction Co. and 2 others). The decision is authored by a learned Single Judge of this Court and while setting aside the impugned decision of learned trial Court, which had dismissed the suit for want of proper authorization, it was held that since no specific issue was framed, nor the parties had led evidence about the competency of a person to institute the suit, therefore, impugned decision passed by the learned trial Judge was wrong

and the suit was consequently decreed. Learned counsel next cited 1994 SCMR Page-1449 (Muhammad Saeed Versus Muhammad Irfan); this case is with regard to a benami transaction vis-à-vis pre-emption. As per learned counsel for Plaintiff this Judgment supports his contention to the extent that once the plea at the trial was withdrawn then subsequently on the basis of certain statements and record the same cannot be relied upon. I am afraid both these Judgments do not lend any support to the submissions of the Plaintiff counsel for the reasons that after the above decision of 1992 CLC Page-1128, the entire case law was summarized in Abdul Rahim Case (PLD 1997 Karachi Page-62 (ibid), which is a decision pronounced by a learned Division Bench of this Court and which judicial precedent has a binding force. The second Judgment of Hon'ble Supreme Court (Muhammad Saeed Versus Muhammad Irfan) (supra) is clearly distinguishable on the facts and legal principle mentioned therein, for a simple reason that in the instant case the Defendants never withdrew their plea about maintainability of the instant case, but all the more they specifically cross-examined the PW-1 on this point, and the said witness acknowledged the fact about non-availability of any valid authority in his favour.

12. The main anxiety of Plaintiff's counsel that no specific issue was framed about the competency to file the present case, that is to say, that no issue is framed to challenge the authority of PW-1 for filing the instant case, can be resolved by taking guidance from the aforementioned Abdul Rahim Case of this Court, in particular, its Paragraph-37; that even the Court *suo moto* can take cognizance about non-compliance of provision of Order XXIX, Rule 1 of CPC. It was further held in the above

decision, as already mentioned in preceding paragraphs, that if the Articles of Association empowers a Director or any other officer to file and conduct the litigation, then the absence of Board Resolution is a curable defect, but if neither the Articles of Association contained any such authority, nor there is a valid Board Resolution duly passed in a properly convened Board Meeting, then defect is incurable; entailing an adverse consequence.

13. If the Plaintiff had the Board Resolution in favour of PW-1, then the same should have been produced, even at a subsequent stage in evidence, by re-examining the said PW-1, but, that was not done. Secondly, the Plaintiff could have cured this irregularity by producing Articles of Association containing power and authority to institute legal proceedings conferred upon a particular person, or, director, in which case a Board Resolution was not required, which admittedly, was also not done by Plaintiff.

14. The present submissions of Plaintiff is also adversely affected by the principle relating to best evidence, according to which, if a best piece of evidence is not produced by a party or is withheld, then an adverse inference would be drawn against such party, that it deliberately not produced the evidence coupled with some motive. On this point of law following two decisions are of relevance;

- (i). PLJ 2011 Supreme Court Page-260
(Liaquat Ali Versus Government of NWFP)
- (ii). 2010 CLC Page-350
(Manzoor Ahmed Versus Ghulam Nabi)

15. In view of the above, even if Issue No.1 would not have been framed, maintainability of the present suit on the ground

that the person who has filed the proceeding was not authorized either by the Board of Directors of Plaintiff Company or by way of some other written instrument, including Article of Associations or Power of Attorney, can be agitated by the Defendants, or can be taken judicial notice of by this Court.

16. In view of the principle laid down in aforementioned judicial pronouncements as well as evidence of PW-1 on this Issue, I have no alternative, but to dismiss the instant suit being filed by a person who was not authorized / empowered to file the same, but, with no order as to costs.

Dated: 28.03.2016

JUDGE