

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.655 of 1999

Date	Order with Signature of Judge
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Present: **Mr. Justice Nazar Akbar**

Plaintiff : S.G Fibre Limited. (Nemo).
Defendant : Adamjee Insurance Co., Ltd.
Through Mr. Anwar Kamal, Advocate.

Date of hearing : 04.12.2017
Decided on : 04.12.2017

JUDGMENT

NAZAR AKBAR, J. The Plaintiff had filed this suit in 1999 against the defendant for recovery of Rs.65,66,670/- as insurance claim.

2. Brief facts of the case are that the plaintiff is a public limited company, registered under the Companies Ordinance, 1984. The plaintiff had established L/C No.811193/FL dated **22.10.1995** in favour of Herbert A.H Behrens GMBH & Co., Germany for DM 13,385,000/- for the import of machinery, insuring the entire subject matter against the Cover Notes Nos.013113, Agency 03079, dated **19.10.1995** and 013195, Agency 030376 dated **15.1.1996**, issued at Karachi on payment of Rs.1,000,000/- as insurance premium by the defendant/Adamji Insurance Co. Ltd. The insurance company through the said Cover Notes took the entire responsibility to fully compensate the plaintiff for any loss or damage that may be caused or sustained in the transportation of the subject matter right from the place of its origin to the place of unloading at Port Bin Qasim and again from the place of unloading to the place of delivery at the factory premises. The plaintiff on

14.3.1998 received invoice No.4020 from MPC Behrens, GMBH & Co., Germany, the suppliers showing 21 containers, total gross weight 159,759.7 kgs. shipped from Hamburg, Germany to Port Bin Qasim by M.V Contship Champion as specified in Pantainer Bill of Lading No.737693 dated **14.3.1998**. However, only 19 containers were unloaded on **6.4.1998** at Port Bin Qasim and all the 19 containers after examination by the Custom Authority were released on **21.4.1998** with endorsements on the back of the Bill of Entry No.795. The forwarding and shipping agents of plaintiffs after taking the delivery of 19 containers on **21.4.1998** delivered the subject goods at the factory premises of the plaintiff on the same day and informed the plaintiff that all containers were carefully examined by them and there was no seal on **five** containers i.e SCZU-802085-1, MLCU-435457-8, TEXU-519488-6, SCZU-553794-6 and TRIU-586461-5. The plaintiff, therefore, by letter dated **22.4.1998** informed the defendant about the damage in the subject matter. It was also averred in the plaint that on 22nd and 23rd April, 1998 M/s Ghafoor Associates (Pvt) Limited, Karachi independent surveyors appointed by the defendant, visited the factory of the plaintiffs and investigated short supply of 2 packages bearing No.P1/5779/48, G.Wt.980 Kg., DIM 25x173x110 CM and No.P1/5779/67, G. Wt.1175 Kg., DIM 305x85x40 CM and they submitted their survey report to the plaintiff and the defendant by letter dated **24.4.1998**. The plaintiffs after correspondence with their supplier on **16.5.1998** filed their claim in the sum of DM 198,990/- with the defendant insurance company in respect of the short supply requesting therein to settle the claim and the defendant by letter dated **22.10.1998** in utter breach of the terms and conditions covered by the contract of insurance refused to

accept the claim of the plaintiff as not maintainable. The plaintiff, therefore, filed the instant suit and prayed for the following relief:-

- 1) *For a sum of Rs.65,66,670/- (Rupees sixty five lacs sixty six thousand six hundred and seventy only), payable by the defendant to the plaintiff towards the loss claim.*
- 2) *For dividends @ 18% p.a. on the decretal amount from the date of the institution of the suit till the realization of the amount.*
- 3) *Cost of the suit.*
- 4) *Any other relief/reliefs as this Hon'ble Court may deem fit and proper.*

3. Defendant in written statement denied the claim of the plaintiff while maintained that Cover Notes were issued in favour of the plaintiff against the part payment of insurance premium amounting to Rs.1,000,000/- out of the total payable premium of Rs.13,23,403/=. The amount of Rs.1,000,000/- was paid after arrival of the vessel dated **6.4.1998**. The defendant did not deny the appointment of two surveyors namely Ghafoor Associates (Pvt.) Ltd., and Iqbal A. Nanjee & Co. to conduct the survey and assess the loss, if any. However, it was denied that letter dated 24.4.1998 was survey report. It was averred that two surveyors in their Joint Marine Loss Survey Report dated **13.10.1998** had reported that the plaintiff have not been able to establish the possibility of loss during transit and, therefore, plaintiff's suit is liable to be dismissed. The defendant also averred that since the plaintiffs have failed to pay the full premium of Rs.13,23,403/-, the condition of para-29 is not applicable as no valid contract was concluded. Besides the parawise reply, the defendants have also disputed the maintainability of the suit on the ground that the

plaintiff has not filed any document showing the authority of Mr. S.M Ahmed s/o Said Ghani to file the suit.

4. On **24.12.2001** from the pleadings of the parties as many as 22 issues were framed in a simple suit for recovery of insurance claimed by the plaintiff against the insurance company for the loss of insured goods valued at Rs.65,66,670/= covered by insurance document executed by the defendant. Therefore, in exercise of the powers under **Order XIV Rule 5 CPC**, I strike out all the issues which in my humble view appear to have been wrongly framed and propose to decide the controversy between the plaintiff and the defendant on the following issues:-

1. *Whether the suit is maintainable?*
2. *Whether the plaintiff has paid the total amount of premium of Rs.13,23,403/- to the defendant, if not, its effect?*
3. *Whether the shipment of plaintiff from M/S Behren, GMBH and Co. Germany as Pantainer Bill of Lading No.737693 dated 14.3.1998 by MB Contship Champion was damaged during transportation from Hamberg, Germany, to Port Bin Qasim and to the factory of the plaintiff?*
4. *Whether the plaintiff suffered loss of Rs.65,65,670/- in respect of goods covered by insurance extended by the defendants on payment of insurance premium?*
5. *What should the decree be?*

5. On **29.09.2003**, Mr. Jamil Ahmed, Advocate was appointed Commissioner for recording evidence of the parties. In the said order the Court had directed the commissioner that he shall not accept affidavit-in-evidence and shall record examination-in-chief and cross-examination of the witnesses in normal course. The plaintiff had filed a list of witnesses and documents on **26.3.2002**. The plaintiff examined one Mohammad Ahmed and Mr. Iftikhar

Ahmed, a representative of M/S Ghafoor Associates (Pvt.) Ltd., surveyor appointed by M/S Adamjee Insurance Company as PW-1 and PW-2 respectively. Mr. Mohammad Ahmed as PW-1 produced 37 documents as Ex: P-1 to P-36 and PW-2 produced 3 documents as Ex: P-37 to P-39 including Joint Marine Loss Survey Report dated **13.10.1998**. Both the witnesses were cross examined by the defendant's counsel. Learned counsel for the plaintiff closed their side for evidence by statement dated **7.10.2004**. The defendant examined one Mr. Akhtar Ali Baig, Deputy General Manager and Khurram Zaheer as DW-1 and DW-2. Both were cross examined by the learned counsel for the plaintiff and their counsel closed the side of defendant for evidence. The Commissioner for recording evidence filed his report with evidence and by order dated **3.11.2008** it was taken on record. Since then the suit has been repeatedly listed for final arguments. Learned counsel for the plaintiff never turned up to argue since **4.3.2009** when the suit was listed for final arguments for the first time. However, despite repeated chances given to him earlier. I also adjourned the case again and again on the request of the counsel for the plaintiff on **24.11.2017, 27.11.2017, 29.11.2017, 30.11.2017** and **4.12.2017**. On the last three dates brief was held by Mr. Naveed Ahmed, advocate.

6. In view of the above facts, on **04.12.2017** in presence of Mr. Naveed Ahmed, advocate who was again available to hold the brief on behalf of the counsel for the plaintiff, I decided to proceed and heard learned counsel for the defendant by relying on the following observations of Hon'ble Supreme Court in the case of

Messrs MFMY Industries..Vs.. Federation of Pakistan reported in
2015 SCMR 1550:

*The conclusion of the trial or the hearing means that the parties have concluded and completed their evidence. There is no specific provision in the CPC, which confers the right upon the parties to make oral arguments before the trial Court, but per convention, the oral submissions of the parties are also heard, which exercise however, must be concluded within 30 days' time from the conclusion of the trial, as prescribed by law. **If parties, despite the opportunity granted by the court to make oral submissions do not avail the same, the court is not bound to wait indefinitely for them and keep on adjourning the matter.** This is highly deprecated and should be discouraged, rather **the Court should pronounce the judgment without their arguments and this** (such judgment) **shall not be in violation of the rule of hearing.***

7. My findings on the above issues with reasons thereon are as under:-

Issue No.1

8. The issue of maintainability was raised by the defendant in written statement as the plaintiff has not filed any document showing authority of Mr. S.M Ahmed to file the instant suit. Though this issue was raised by the defendant, the initial burden of proof of this issue was on the plaintiff since the authority of the “person” who has filed the suit on behalf of the “juristic person” was in question. The plaintiff's witness Mr. Mohammad Ahmed (PW-1) in his examination in chief has not filed any document showing authorization for Mr. S.M Ahmed to file the instant suit on behalf of a public limited company duly incorporated under the Companies Ordinance, 1984 (Para 1 of plaint). Only certificate of incorporation of the plaintiff company under **Section 40** of the Companies Ordinance, 1984 and a certificate of registration as

importers with the Chief Controller of Imports and Exports were produced as Ex;P/1 and P/2. Learned counsel for the defendants has relied on the following case laws:-

- i) Bashir Dawood vs. Haji Suleman Goawala & Sons Ltd. **(2010 CLC Karachi 191)**;
- ii) Messrs Cargil Incorporated and another vs. Messrs Trading Corporation of Pakistan & another **(2010 CLC Karachi 420)**;
- iii) Abdul Rahim and 2 others vs. Messrs United Bank Ltd. of Pakistan **(PLD 1997 Karachi 62)**;

The first two citations are judgments of this Court in second appeals. In both the cases the suits filed by private companies had been dismissed by the trial Court, amongst other, on the ground that the person who filed the suit was not authorized. The findings of the trial Court were reversed in the first appeal by the Districts and Sessions Judges. However, the orders on first appeals were set aside by the High Court in Second Appeals and the orders of the trial Court whereby suits were dismissed were restored. The relevant observation from the judgment reported in 2010 CLC 191 in para-46 is reproduced below which fully supports the contention of the defendants that the suit filed by a private limited company without authorization was not maintainable.

There also had to be specific authorization to the Managing Director either from the Board or under any Article of Articles of Association to file suit on behalf of the plaintiff-Company. In the present case, suit was filed by the plaintiff through its Managing Director. Now at the time of filing of the suit, did the Managing Director possess the authorization from the Board to do so, admittedly he did not. Now does any Article of the Articles of Association of the plaintiff-Company empowers the Managing Director to act on his own and file suit on behalf of the plaintiff, certainly not. In such circumstances, before a suit could be termed as competently filed, it was necessary that authorization in this regard must have come from plaintiff's Board of Directors. Thus, as held by the Honourable Supreme Court in the case reported in Iftikhar Mamdot v. Ghulam Nabi Corp. PLD 1971 SC 550 the absence of

authorization to file suit becomes fatal to the maintainability of the suit. In the present case, the suit being filed without proper authorization is to be treated as not maintainable and liable to be dismissed on this score alone.

Then in evidence, said Mr. S.M Ahmed son of Said Ghani did not appear in witness box though his name was mentioned in the list of witnesses as Managing Director of the plaintiff-company. The witness (PW-1) for the plaintiff Mr. Mohammad Ahmed was not authorized by the plaintiff-company to appear as witness and lead evidence. PW-1 has not filed any authority to appear in the evidence on behalf of the plaintiff-company. Therefore, even his evidence, too, has a big question mark. In view of these facts, issue No.1 is decided in the negative. The suit is not maintainable.

Issue No.2

9. The plaintiff has claimed that their consignment was damaged and it was ensured with the defendant as per insurance Cover Notes (Ex:P-5 and P-6). The language of Cover Notes is that these Cover Notes are “*subject to the clauses and conditions of the Company’s Marine Cargo Policy*”. The binding conditions and clauses can only be found in the duly issued insurance policy. Therefore, for reliance on Insurance Clause “A” the plaintiff was first required to place the Insurance Policy on record (Para 29 of plaint). The Insurance Policy was not produced in evidence. In fact total insurance premium was Rs.10,65,833/= and it was not fully paid by the plaintiff. The witness of the plaintiff has conceded in cross examination that:-

“I have not paid Rs.65,833/=. It is not correct to suggest that the defendant have not issued the Insurance Policy because we have not paid the balance of Rs.65833/- to them. We had asked the defendant for issuance of Insurance Policy at number of times.”

It means the agreed insurance premium was not paid. The defendant has categorically demanded balance payment of premium through letter dated 4.6.1998 (Ex:P/28). The defendant wrote:-

“Please arrange immediate payment of balance premium to enable us to issue and forward relevant insurance policy to the surveyors”.

The aforesaid letter has been filed by the plaintiff in his evidence. However, it was neither replied by the plaintiff nor balance premium was paid. But for this reason the plaintiff has relied only on Cover Notes and proper insurance policy was neither available nor produced. Therefore, the plaintiff had no insurance policy to be enforced through the Court. The effect of non-payment of agreed insurance premium is that the plaintiffs have not fully secured the consignment and they had not obtained insurance policy.

Issue Nos.3 & 4

10. The document on record which are relevant and relied upon by the plaintiff to impress upon the Court that the surveyor appointed by the defendant had conducted survey are Ex:P/12, P/13 and P/15 all dated **22.4.1998**. Through these documents the story of claim begins. Ex:P/12 is a letter dated **22.4.1998** from Mehran Clearing Agent engaged by the plaintiff themselves and through their letter the plaintiff was informed that *“we (the agent) cleared and delivered all containers including above **five containers having no seal at your factory**”*. This letter has been written on **22.4.1998** when admittedly the consignment has been delivered at the factory on **21.4.1998** and on the basis of letter of Clearing Agent the plaintiff on same day through Ex:P-13 informed

the Deputy Manager of the defendant that *“we have already opened some containers which looks until now in order but **there is one container found damaged**”*. But said letter does not identify which of the container was damaged. The plaintiff on same day i.e on 22.4.1998 wrote a different letter to the shipper. In his letter to the shipper (Ex:P-15), the plaintiff declared that **“only three items were short delivered”** and the container was found **“unsealed”**. The plaintiff also sent reminders dated 23.4.1998 and 24.4.1998 to the shipper even before survey by the surveyors nominated by the defendant. The contents of letter written by the plaintiff to the defendant and the shipper in respect of the same consignment are entirely different for each other, though both are of same date.

11. Learned counsel for the defendant has contended that the Marine Insurance claims are always subject to the reports of survey of consignment conducted by the Surveyor to assess the damage and the survey of damages consignment is always conducted in presence of the insured. The plaintiffs have conceded that surveyors had been appointed but they have suppressed Surveyor Report dated **13.10.1998**. In the entire plaint and even in the evidence the plaintiffs have not filed the survey report nor they have objected to the joint survey reports (Ex:PW-1/39) filed by the surveyor, who appeared as witness of the plaintiff as PW-2. The Ex.PW-1/39 is the survey report filed by witness Iftikhar Ali, who is associate of surveyors M/s. Ghafoor Associates (Pvt.) Limited and there is hardly any question disputing the finding of the surveyor in their report Ex.PW-1/39. Counsel for the defendant has also referred to annexure E-1 attached to the surveyor report. This is a letter from the Qasim International Container Terminal

which confirms that all the containers were intact when discharged from vessel and no complaint of any broken seal was lodged by the clearing forwarding agent to the custom authorities. It means the container was not unsealed as claimed by the plaintiff in their letter addressed to the shipper. The conclusion of the inquiry report was that the insured have been unable to show possibility of loss during transit. Learned counsel has contended that the insurance company/defendants are bound by their surveyor report and it has been held in the case of *Farook Omar vs. National Security Insurance Co. Ltd., Karachi and another (PLD 1974 Karachi 321)*. Since the plaintiff has failed to establish that there was any loss suffered by them, the claim of the plaintiff is that they have suffered loss to the extent of Rs.66,65,670/- in respect of the goods covered by insurance does not arise. In view of the above discussion, Issues No.3 & 4 are also decided in negative.

Issue No.5

12. The above discussion on facts and evidence shows that the plaintiff has miserably failed to discharge his burden on any of the issues, consequently, the suit of the plaintiff was dismissed by short order dated 04.12.2017 with no orders as to cost and the above are the reasons for the same.

J U D G E

Karachi,
Dated: _____

Ayaz Gul/PA*