HIGH COURT OF SINDH, KARACHI

Suit No. 13 of 1972

The Primer Insurance Company of
Pakistan and another

Versus

Karachi Shipyard and Engineering Works and another

For Plaintiffs:	Mr. Mansoor-ul-Arfin Advocate.
For Defendant No.1:	M/s. Ikram Ahmed Ansari and Ayaz Ansari, Advocates.
For Defendant No.2:	Mr. H. A. Rehmani, Advocate along with Mr. Yawar Farooqui, Advocate Ms. Naheed Akhtar, Advocate.
Date of hearing:	28.04.2016
Date of Judgment:	02.05.2016

JUDGMENT

Muhammad Faisal Kamal Alam J. Both the Plaintiffs are Insurance Companies and as per their pleadings, the Plaintiffs in course of their business had insured a vessel, viz. M.V. "SAFINA-E-SIAHAT" (subject ship) owned by Pan-Islamic Steamship Company Limited **{the shipping company}**. According to averments of the plaint, subject ship was insured for a total sum of Rs. 4.8 Millions in the following proportion:

i. 70% by Plaintiff No.1, ***and,***

ii. 30% by Plaintiff No.2.

The Insurance Policy has been exhibited as Ex. 8/24.

2. The Defendant No.1 (Karachi Shipyard & Engineering Works Ltd) is engaged in building and repairing of Ocean going vessels, whereas, Defendant No.2-A.E.G-Telefunken Pakistan Limited, for reference sake be referred to as AEG, was also associated with Defendant No.1 in carrying out the repair work of subject ship, which included over hauling of generator(s).

3. The incident of fire occurred when the subject ship was dry docked at the premises of Defendant No.1, that is, the subject vessel/ship was in a dry dock- a basin like structure which is large enough to admit a ship for repairs. Eventually the above ship was sold as it did not remain sea worthy.

4. The Plaintiffs settled the insurance claim of above named Shipping Company, which had insured the above ship with the Plaintiffs. However, when the present Defendants were called upon to make good the loss, they denied the liability while refusing to accept the claim of the Plaintiffs, which led to filing of the present action against Defendants.

5. The Plaintiffs in the present suit have pleaded that being insurers of the subject ship they had paid jointly a sum of Rs.26,00,000/-[rupees twenty six hundred thousand]. Subsequently, in terms of letter of subrogation dated 16-7-1971, Plaintiffs lodged a claim against the present Defendants for their purported negligent acts, which resulted in extensively damaging the subject ship. The Plaintiffs also invoked the famous doctrine of '*Res Ipsa Loquitur*' (the things speak for

themselves). Following relief is claimed in the present proceedings by the Plaintiffs against Defendants jointly and severally:

> "(a) Rs. 27, 96, 446.30 together with interest thereon at the rate of 10% per annum with monthly rests from the date of the suit till payment to be divided between the Plaintiffs in the ratio mentioned in paragraph (3) hereinabove;
>
> (b) Costs of the suit; and,
>
> (c) Any other/further/additional relief or reliefs, which this Honourable Court may deem fit and proper in the circumstances of the case".

6. The present suit has been contested by the Defendants who have filed their separate written statement. In addition to this, Pakistan Insurance Corporation also filed its written statement in the capacity of third party. From the divergent pleadings of the parties, following consent issues were framed by the court vide order dated 07.08.1974:

> ***" 1. Is the suit as framed not maintainable and do the plaintiffs have no right to sue?***
>
> ***2. Are the Plaintiffs partners in the venture (as per para 2 of the written statement of defendant No.1, if so, is the plaintiffs' claims vitiated by Section 69 of the Partnership Act?***
>
> ***3. Had the co-plaintiff No.2 not validly issued cover in respect of the risk in question?***
>
> ***4. Was the vessel at risk while dry docked with defendant No.1?***
>
> ***5. Whether the findings of survey are sufficient to entail acceptance of the claim by the Plaintiffs?***

6. Did the owner of the vessel had no clear title at the time of fire? If so, to what effect?

7. Was the ship in suit delivered by its owner to defendant No.1 and if so, on what terms and conditions or did the owners remain in control of the ship which it was dry docked with the defendant No.1?

8. How many fire incidents took place on the ship and who was responsible for them?

9. Was the loss actual or exaggerated and was it vitiated by lack of uberima fide? If so, to what effect?

10. Are the defendants or either of them liable for the claims in suit? If so, to what extent?

11. Whether any restoration work was carried out, if so, to what effect?

12. If the defendant No.1 is held liable to pay any damages to the plaintiff is such a decree liable to be passed against the third party because of the insurance policies alleged by the defendant No.1 to have been issued in their favour by the third party?

13. What ought the decree be?"

7. The evidence was led by the parties and in all ten witnesses were examined; seven witnesses adduced their evidence from the Plaintiffs side, whereas, three witnesses testified on behalf of Defendants.

8. Findings on the issues are as follows:

ISSUE NO.1: Affirmative.

ISSUE NO.2: Negative.

ISSUE NO.3: As under.

ISSUE NO.4: Affirmative.

ISSUE NO.5. As under.

ISSUE NO.6. Affirmative.

ISSUE NO.7. Affirmative.

ISSUE NO.8. As under.

ISSUE NO.9. As under.

ISSUE NO.10 Affirmative.

ISSUE NO.11 Negative.

ISSUE NO.12 As under.

ISSUE NO.13 Suit is decreed.

ISSUE NO.1

9. Mr. Ikram Ahmad Ansari along with Mr. Ayaz Ahmed Ansari, the learned counsel representing Defendant No.1 (Karachi Shipyard) argued that if at all any cause of action arose, then the same could have been in favour of the Shipping Company, viz. Pan-Islamic Steamship Company Limited, which is not a party to the instant proceeding, and hence, the suit is not maintainable. Secondly, the present suit is also bad for non-joinder of party. These arguments were rebutted by Mr. Mansoorul Arfin, the learned counsel for Plaintiffs, inter alia, by inviting Court's attention to the Letter of Subrogation dated 16.6.1971 which has been exhibited as 8/23 and available at page No.317 of the evidence file, in which the above Shipping Company while acknowledging the payment of insurance claim by the plaintiffs in the sum of Rs.2.6 million, against a total insurance coverage of Rs.4.8 million, had assigned its rights, interest and claim in respect of the damaged ship, namely, “SAFINA-E-SIAHAT”, to plaintiffs. The authenticity of this Letter of Subrogation is not in dispute. Scope and extent of such type of letter of subrogation has been explained

by the Hon'ble Supreme Court as well as Division Bench of this Court in their decisions reported in PLD 1963 SC 663 (East & West Steamship Company Vs. Queensland Insurance Company) and 1991 CLC page 1270 (Pakistan through Secretary Communication, Islamabad Vs. Habib Insurance Company Limited, Karachi). It has been held, inter alia, that a marine insurance policy is assignable under Section 130(A) of Transfer of Property Act 1882, whereas, in terms of Section 135(A) whereof, an Insurance Company after being subrogated, can sue the tortfeasor in its own name. Consequently, Issue No.1 is answered in affirmative by holding that the present suit is maintainable.

ISSUE NO.2

10. The subject Insurance policy as Ex. 8/24, where under the subject Vessel/Ship was jointly insured by two different Insurance Companies which are present plaintiffs, in the ratio of 70% (by plaintiff No.1) and 30% (by plaintiff No.2), respectively, which was subsequently settled by the plaintiffs by paying out an insurance claim of Rs.2.6 million to the above named insurant, and merely latter was insured by two different insurance companies/plaintiffs, but through a single Insurance Policy, does not mean that some partnership had come into existence. Prohibition contained in Section 69 of the Partnership Act, 1932, that a partner/person of an un-registered firm cannot sue in the name of partnership firm, unless it is a registered one, does not apply in this case, as both the Plaintiffs are admittedly an independent corporate legal entities incorporated under

the then Companies Act, 1913. Consequently, Issue No.2 is answered in Negative.

ISSUE NO.3

11. PW-2 [Adam Rangwala] and PW-4 [Khan Sohail Sultan], the then senior officials of afore named Shipping Company in their deposition has categorically stated on oath that the subject Vessel was insured and the Insurance Policy is already on record as Ex. 8/24, which is for the entire fleet of the said Shipping Company including the subject ship/vessel. This Exhibit 8/24 comprises of a set of documents wherein names of both the present Plaintiffs are mentioned as Assurers [Insurance Companies] together with the proportion of risk they have undertaken, that is, 70% by Plaintiff No.1 and 30% by Plaintiff No.2. In addition to this, the unimpeachable testimony of said PW-2 and PW-4 proves the fact that the subject insurance policy was validly issued by the Plaintiffs. The above evidence was further corroborated by witnesses of Plaintiffs, viz. PW-6 and PW-7 respectively, whose statements about insurance coverage could not be outweighed by the Defendants. These witnesses who were officials of Plaintiffs, had specifically deposed that premium was duly paid by the Shipping Company, inter alia, in respect of the subject ship and when the latter was damaged by the fire incident, its insurance policy was subsisting. Nothing has come on record to show that issuance of the Insurance Policy by Co-Plaintiff No.2 was not valid. Hence, Issue No. 3 is answered accordingly.

ISSUE NO.4

12. Mr. Yawar Farooqi representing the Defendant No.2 [AEG] has raised serious objections about the scope of subject insurance policy and contented that the fire incident in question was not covered as an insurance risk. He further argued that the subject Insurance Policy was only effective when the subject vessel/ship was in the high seas and not when it was dry docked for repairs and maintenance. This submission however, is disputed by Plaintiff side. The evidence has been examined to decide this Issue; the testimony of P.W-6 and PW-7, namely, Fazal-ur-Rehman who was Chief Manager of plaintiff No.1 and Mohammad Ilyas [Manager Claims] of Plaintiff No.2 are of relevance. In their evidence, they have specifically deposed that in terms of Clause 23 of the Insurance Policy {Ex.8/24}, risk of fire was covered. The said P.W-6 has also denied the suggestion that the subject insurance policy was only effective when the subject ship is sailing the high seas. Above witnesses were extensively cross-examined by defendants as well as third party, viz. Pakistan Insurance Corporation, but their testimony could not be shaken. In addition to this, the deposition of P.W-2, namely, Adam Rangwala who was the officer of the above named shipping line (Pan Islamic Steamship Company Limited) as well as the said P.W-4 (Khan Sohail Sultan) who was the then General Manager (of aforesaid shipping company) have corroborated the deposition of above witnesses, inter alia, by categorically stating that when the subject Vessel was dry docked at the premises of defendant No.1, it [the subject vessel] was insured. Additionally, the said witness-(PW-4) has also produced

relevant portion of ledger of his employer (Pan Islamic Steamship Company Limited) and the entries dated 23.12.1970 in respect of payment of Rs.69,170.25 by cheque No.0879 drawn on National Bank of Pakistan in favour of plaintiff No.1, which has been exhibited as Ex.10/1 and payment voucher of same date which has been exhibited as Ex.10/2, to corroborate his deposition by way of documentary evidence that the premium was also paid in respect of the insurance policy when the same had fallen due.

13. On the other hand, Mr. Mansoorul Arfeen has argued that witnesses P.W-6 and P.W. 7 were lengthily cross-examined on this particular fact in issue, that the subject Vessel was insured when it was dry docked at defendant No.1, and no contradiction surfaced in their deposition that can go in favour of Defendants. It was further argued that the above named witnesses were not cross examined on the above referred material part of their testimony and hence, the same goes unchallenged. Additionally, the documentary evidence produced has also negated the stance of Defendants. These documents were maintained by the said shipping company in the ordinary course of its business, and hence, Article 46 of the Qanoon-e-Shahadat Order, 1984, inter alia, which relates to statements made in the ordinary course of business, is attracted to the instant case. In support of his contention , reliance was placed on a decision of Hon’ble Supreme Court reported in 2001 S C M R (Supreme Court Monthly Review) page 1700.

14. The subject insurance policy (Ex.8/24) is available in the case record and if the same is carefully perused, it can be concluded that the

subject Insurance Policy in fact covered the risk in question. The subject insurance policy, as argued by plaintiff Counsel is a time policy and in this regard with his written arguments he has relied upon the research material contained in book of Marine Insurance, wherein the terms "time policy" is mentioned in the following words:-

> "***A 'time' policy is one which expresses the insurance as being for a specified period of time, as, for example, for twelve months commencing at noon Ist. January, 1980. It is usual also to define the time zone, as for instance, G.M.T. (Greenwich Mean Time). This kind of insurance is generally used in the case of hulls, etc. of vessels, though in exceptional cases a ship-owner may prefer to insure his vessel for a particular voyage, under a voyage' policy."***
>
> Templeman on Marine Insurance (5th. Ed.) Its Principles and Practice (by R.J Lambeth) (From Page 2 of the book)
>
> Arnould.
> Law of Maritime Insurance and Average (16th. Ed)
> Vol. 1- page 356 – para(s) 511, 512
>
> ***"511 – A time policy is one in which the period of risk is limited by time alone.***
>
> ***In time policies the risk insured is entirely independent of the voyage of the ship (iter navis), and the policy covers any voyage whatever which the ship may make, and any loss or damage sustained within the space of time limited in the policy.*** **(under lining for emphases).**

The above discussion on the Issue No.4 results in answering the same in Affirmative.

ISSUES NO.5 and 6

15. Lloyds Shipping is a well-recognized international entity and its witness- PW-1 (Qaiser Mirza Rizvi) produced a detailed survey report in respect of fire incident in question. The said report which is marked as Ex. X/1 (available at page 95 of the evidence file), was disputed by the defendants, primarily on the ground that it was prepared by one Mr. M.A.K. Lodhi but was signed by other surveyor J.F Crawford . The said PW-1 explained that since said Mr. Lodhi-the person who conducted the survey, had died in a road accident, therefore, another surveyor signed the report, who also was not available in Pakistan and gone abroad. Even otherwise, the survey was conducted by legal entities; Lloyds through its local agent Mackinnon Mackenzie Pakistan Limited. If one of its employees who later had met with a fatal accident, had prepared the Report which was subsequently signed by another qualified surveyor, did not vitiate the said Report. In my considered view it is a proper case, where Article 46 of the Qanun-e-Shahadat Order, 1984 provides a solution, and therefore, the said report cannot be discarded. Secondly, the defendant side did not dispute the contents of the above Survey Report nor any of its witnesses pointed out any misreporting or some other error in the said survey report, therefore, the same is to be taken into account being issued by an independent surveyor. According to this report, for making the subject vessel again operational, an estimated cost came to Hong Kong Dollar 3.67 million. Question here is not only of this survey report, which could be the basis for settling the insurance claim, but, even the Quotation

given by defendant No.1 was also around Rs.4.2 million, which has been annexed with the covering letter of shipping company dated 4.2.1971(Exh.7/23). Most significant are the pleadings of the parties hereto; defendant No.1 (Karachi Shipyard) in paragraph 8 of its written statement has admitted the corresponding paragraphs of the plaint relating to the extent of damage and cost of repairing the subject ship, which came to Rs.2.8 million [at that relevant time].

16. Onus is on the defendants to prove that aforementioned shipping company did not have a valid title in respect of subject vessel when the fire incident occurred. The voluminous documentary evidence and the deposition of various witnesses from both sides endorsed this fact that the shipping company was actually the owner of the subject vessel, even at the time of fire incidents. In this regard credibility of the testimony of PW-2 and PW-4 could not be impeached by the defendants, besides the fact, the above mentioned shipping company subsequently sold the subject ship to Hardware Manufacturing Corporation Limited. It is only defendant No.2 which questioned the ownership of shipping company vis-à-vis the subject vessel, though somewhat half heartedly, as appeared from its written statement, but eventually failed to prove this fact in evidence. Consequently, the Issue No.5, is answered accordingly, whereas, the Issue No.6 is answered in negative and against the defendants.

ISSUE NO.7

17. In their respective written statement(s) both Defendants have narrated the fire incident, while tacitly acknowledging that employees of

Shipping Company were not present there when the incident occurred. Primarily the Defendants in their pleadings have shifted blame on each other by pleading technical reasons, which fact also show that employees of both the Defendants were doing the job independently, but without being supervised by staff of the Shipping Company. It has been acknowledged by defendant No.1 in paragraph No.4 of its written statement that when the subject ship caught fire it was dry docked in the premises of Defendant No.1, but, in second part of its pleadings and also argued by Mr. Ikram Ahmad Ansari, that the subject ship always remained under the effective possession, control and supervision of its owner (the said Shipping Company), however, this was categorically disputed by the Plaintiffs side.

18. The PW-2 (Adam Rangwala) who was the then employee of the shipping company has specifically deposed that the subject ship was delivered to defendant No.1 for under water repairs and fitting of generator No.4. The said witness in his reply to a question from defendant's side has reiterated that ship was under the control of Karachi Shipyard, that is, defendant No.1. In his deposition, the witness remained consistent in his stance, inter alia, that in the generator room where repair work was going on, no employee of the ship was present. The said witness in reply to a question has further clarified that defendant No.1 did not allow the ship staff to be present on the ship when the repair work was going on. In addition to this the DW-1 (Iftikhar Ali Khan, the then senior supervisor of defendant No.1) did not dispute the suggestion that employees of subject ship could not have entered the premises of defendant No.1 without having been issued gate passes. On this specific issue the said witness (DW-1) did

not dispute when confronted with the gate passes issued by the Management of defendant No.1 to different employees of subject ship on different occasions. These gate passes and list of ship employees/crew are exhibited as Exh.15 to 16/A.

19. After evaluation of the evidence it can be concluded that it was not proved that the crew/staff of the shipping company was supervising the repair work. Rather it has been disproved that the crew of the subject ship was present at the time of fire incident. In this view of the matter, the Issue No.7 is answered in affirmative by holding that the subject vessel/ship was delivered/entrusted to defendant No.1 by its owner Pan-Islamic Steamship Company Limited and when the fire incident occurred on the subject ship, it was in the possession of Defendant No.1. In addition to this factual determination, the rule applicable in the case of Bailor and Bailee is also attracted here, as the said defendant No.1 had in fact was also acting as bailee, as admittedly, the subject ship was dry docked for repairs at its premises. Under these circumstances, the said defendant No.1 had an additional obligation to exercise due care and diligence while undertaking the task of repairing the subject ship.

20. In terms of Section 151 of the Contract Act, 1872, the bailee has to exercise due care and diligence in respect of goods bailed to him and under Section 161, it is the bailee, who is responsible if the bailed goods are not returned, delivered or tendered on the proper time and if this default results in any loss, then it is the liability of bailee. In the Judgment of this Court-***1988 C L C (Civil Law Cases) page 1381,*** the learned Judge besides holding that burden of proof is on bailee to show that he made appropriate

arrangement for the discharge of his statutory duty, has also expounded principle of ***res ipsa loquitur*** (things speaks for themselves). As an analogy, the learned Judge has also referred to Section 116 of the Customs Act, 1969, and held that the warehouse keeper shall be responsible for the custody of goods lodged in his warehouse. This concept of bailment was earlier explained in a Division Bench Judgment from the Indian Jurisdiction reported in ***AIR (All India Report) 1962 Madras page 244 (V 49 C 57)*** *(Sri Narasimhaswami and others Vs. MuthukrishnaIyengar)*. In the above case law reliance was placed on the principle laid down by English Courts, in which a distinction has been drawn between a gratuitous bailee, that is, involuntary bailee and bailee for reward or hire. The status of present Defendant No.1 in the instant suit is of bailee for reward. It has been held, that once a contract of bailment is proved and there is the entrustment of the goods with the bailee, then the loss of the subject matter of the bailment is a ***prima facie*** evidence of the negligence of the bailee. Conversely, in the present case onus is on Defendant No.1 to prove that the latter [defendant No.1] took all appropriate measures while carrying out the repair work and employed reasonable standard of care; but, in the instant case, the defendant No.1 could not discharge its burden of proof about not being negligent in performance of its contractual obligation towards the above named Shipping Company, which is subsequently subrogated by present plaintiffs.

21. In the above Judgment of Madras High Court, a relevant rule has been borrowed from Halsbury's Laws of England Vol. 2, 3rd Edition

Page 117, which in my considered view would be beneficial to reproduce herein under, as the same is applicable to the present case: -

> ***"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. It he succeeds in showing this he is not bound to show how or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that the exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing."***

ISSUES NO.8 and 10

22. Since these issues are interconnected, therefore, the same can be disposed of by a common finding. Primarily these issues relate to cause of the fire incident that directly resulted in causing considerable damage to the subject vessel. On this particular fact exhaustive evidence was led by the parties. PW-2, PW-4 and PW-5 the then senior officers of shipping company were examined thoroughly.

23. In rebuttal by Mr. Ikram Ahmad Ansari, learned Counsel of defendant No.1, submitted that the present proceeding is collusive in nature for the reason that since at that relevant time subject vessel had already

outlived its life, therefore, on one hand the employees of said shipping company and defendant No.2 (A.E.G) in league with each other intentionally caused the fire incident, and on the other hand, plaintiffs hastily paid the insurance claim, which otherwise was not payable. It was further argued by the learned counsel that evidence was recorded after many years of the incident in question and most of the depositions are hearsay, therefore, the evidence that has come on record lacks evidentiary value and cannot be relied upon. On the other hand, Mr. Yawar Farooqi on behalf of Defendant No.2 [AEG] has submitted that one of the most vital piece of evidence is the Report of Fazal who as a fitter was one of the team members of Defendant No.2 and was there on the ship. Per learned counsel the above referred Report which has been exhibited as Ex. 8/7/1 [page 209 of the Evidence File] has gone un-rebutted. While categorically disputing the submissions of learned counsel for Defendant No.1 [Karachi Shipyard] about any collusion between the Plaintiffs and his clients-the Defendant No.2 [AEG], it was further submitted that the workers of said Defendant No.2 [AEG] did forewarn the employees of Defendant No.1 [Karachi Shipyard] about the defective cable which was being used by them [Defendant No.1] for the repair work of the subject ship. Mr. Yawar Farooqi also read the relevant portion of the testimony of above named PW-2, wherein, he has deposed that the fire was extinguished by Defendant No.2 [AEG] workers, as employees of Defendant No.1 [Karachi Shipyard] "ran away". While continuing his submissions the learned counsel referred to Ex. 8/2-a post fire incident correspondence dated 14-1-1971, addressed by Defendant

No.1 to the Shipping Company, wherein, inter alia, the former [Defendant No.1] offered its services for the proposed restoration work of the damaged ship by associating Defendant No.2 also. As per Mr. Yawar Farooqi, if his client-the said Defendant No.2 was negligent or had contributed towards the negligent act in question, then said Defendant No.1 would not have included the Defendant No.2 [AEG] in the proposed execution of repairs assignment of the subject ship. Mr. Yawar Farooqi vehemently argued that due to negligence of Defendant No.1 the unfortunate incident took place, inter alia, by reading the relevant portion of P.W.5 [Chief Officer of the Ship] deposition about defective welding cable used by Defendant No.1 and non-availability of proper and functional fire fighting equipments, which, inter alia, resulted in conflagration and it took too long to extinguish it, as a result whereof, the ship was extensively damaged and did not remain sea worthy.

24. Evidence adduced by the Parties has been examined, particularly of PW-5 (Ahmed Al-Masqati)-the Chief Officer of subject ship who was there on the ship, but in his room when the fire incident in question occurred. Besides this witness, DW-1 (Iftikhar Ali Khan) who was at that time senior supervisor of defendant No.1 and DW-3 (Muhammad Hamid) who was working as Commercial Manager and Company Secretary (A.E.G.) also testified, inter alia, in respect of present Issues at hand. After appraisal of the evidence of the witnesses following conclusion can be drawn:-

i) There were altogether three fire incidents between 31.12.1970 to 01.01.1971 but the third and last incident was disastrous.

ii) It has been deposed by PW-2 that one of the most relevant documents with regard to causation of fire incident is the report of one Fazal Khan who was working on the ship as one of the team members of defendant No.2 and same report has been exhibited as Ex.8/7/1. Authenticity of this report has not been questioned containing details; the fire started from welding cable joint through which repair work of generator No.4 of the subject vessel was being carried out by the employees of defendant No.1 (Karachi Shipyard). According to this Report when the earlier fire was extinguished and staff of defendant No.2 resumed its repair work, the same welding joint again caught fire and the said fitter Fazal and his other colleagues started to put it out, but, workers/employees of the defendant No.1 ran away from the scene. As per this statement the third fire incident was severe and spread quickly.

iii) Staff/workers of both defendants were present and carrying out the repair and maintenance work entrusted to these defendants by the shipping company, whereas, no employee of the Shipping Company was present at the scene.

iv) It was the welding cable that mainly and directly caused the main fire incident and in evidence it has come on record that joints of the cable were uncovered and not insulated. It is also an undeniable fact that the above cable was the property of defendant No.1 (Karachi Shipyard), which took it (the cable) in its possession and the same was never produced

in any enquiry or survey to rebut the adverse allegation of shipping company as well as plaintiffs. The evidence of PW-4 [the then General Manager of Shipping Company] and his Report has been exhibited as **Exh: 8/8 dated 15.01.1971**. No objection as to the contents of this Report was raised nor the said author of the Report who also examined himself as PW-4 was disproved in his cross-examination.

25. Learned counsel Mr. Ayaz Ahmad Ansari at this juncture submitted that since PW-2-Adam Rangwala, himself has mentioned the fact that the employees of Defendant No.1 had done the repair work ***through soldering and not welding***, therefore, no negligence can be attributed to the employees of the Defendant No.1, as there is a vast difference between welding and soldering. Mr. Ayaz Ansari with the help of technical literature has elaborated his defence by arguing that welding is done by fusion of two metals together and using flame at a very high temperature, whereas, in soldering no such treatment is required. Since Heat treatment is not required in soldering process, and since the process used by workers of Defendant No.1 [Karachi Shipyard] was soldering, the said Defendant No.1 was not responsible for causing the fire incident. It is further contended by the learned counsel [Mr. Ayaz Ansari] that no forensic report was prepared or survey conducted, in order to ascertain the actual cause of fire or the proportionality of tortious liability.

26. In rebuttal, Mr. Mansoor-ul-Arfeen, learned counsel representing the plaintiff has argued that first of all PW-2 as also stated by him in evidence, was not a technical person and secondly other witnesses,

PW-4, PW-5 and even DW-1, who is witness of defendant No.1 and were technical persons had testified that **repair work was done through process of welding**, therefore, on this particular point the testimony of PW-2 is outweighed by the deposition of other witnesses, who were technical persons also. Even otherwise, pleadings of the Parties hereto have mentioned that workers of Defendant No.1 were doing the repair work by using welding process. I am afraid that above contentions of the learned counsel representing Defendant No.1 do not improve their case, which has been mentioned in their own pleadings that welding process was employed for repairing subject ship.

27. The above named PW-5 has categorically mentioned in his examination-in-chief that there was no water in the valves to extinguish the fire **as water connection was disconnected at that time** and alternatively with the help of portable extinguishers, those who were present there, including the said PW-5, tried to put out the fire. It was further specifically mentioned in his examination-in-chief that it is the duty and obligation of defendant No.1 to keep the water line operational at all time for meeting any emergency/crisis situation. A suggestion was refuted by PW-5 that any Greek national was there, as part of team of shipping company who was responsible for the incident in question.

28. Even the evidence of DW-3 has partly corroborated the evidence of above named plaintiff's witnesses to the extent of fire incident caused by the defective welding cable used by the employees of defendant No.1 (Karachi Shipyard), while denying that his employer/defendant No.2

had any contributory role in the negligent act of fire incident which caused the extensive damage to the subject vessel. The said DW-3 has relied upon the Statement of above named employee Fazal-Ex.8/7/1. The said witness (Dw-3) of defendant No.2 in his cross-examination has refuted the suggestion that workers of defendant No.2 had used petrol which caught fire and caused a considerable damage to the subject vessel, instead the said witness in his cross-examination had stated that his team members had used solvent oil and not petrol in order to disprove that defendant No.2 was a joint tortfeasor and was equally responsible for causing losses to the shipping company.

29. DW-1 who is the witness of defendant No.1, in his examination-in-chief has acknowledged the fact that welding work was being done by employees of defendant No.1. He has not denied the suggestion that inflammables were to be removed from nearby place where welding is to be done and fire brigade was supposed to be ready to meet any eventuality.

30. Adverting to the issues at hand, the evidence that has come on record together with the documentary evidence, the inescapable conclusion is that the repair and maintenance work of the subject vessel was entrusted to both the Defendants. Secondly, when the last fire incident took place that actually caused the considerable damage to the subject vessel, workers/employees/technicians of both Defendants were present and doing the job. Thirdly, the premises where the incident took place was of defendant No.1, which was/is saddled with greater responsibility and

liability to ensure that all equipments of fire fighting should have been in place and functional, which responsibility and duty of care the defendant No.1 had failed to discharge. Fourthly, the conclusive evidence is that supervisory staff and technicians, particularly of defendant No.1 did not carry out their work in a diligent manner and continued to use a defective welding cable for doing the repair work in the engine room of the subject vessel, which acts are the direct cause of the fire incident due to which the shipping company sustained losses, inter alia, as it has also come in evidence that the shipping company was anxious to operate the subject vessel for the forthcoming Hajj season. Thus the defence that was earlier taken on behalf of Defendant No.1 that the subject Ship was of old model and in order to receive a hefty insurance claim the employees of Defendant No.2 [AEG] in league with staff of the shipping company caused the fire, does not carry weight, so is the case regarding hearsay plea. The nature of oral and documentary evidence of the instant case cannot be termed as hearsay for the reasons contained herein and in terms of Articles 46, 92 and 129 of Qanoon-e-Shahadat Order, 1984.

31. At the same time, from the entire incident the defendant No.2 cannot be absolved; when a party represents itself to be an expert in handling technical assignments, as in the present case, then such party, in the instant case the defendant No.2 is also clothe with an obligation to handle such tasks with due care and diligence. The defendant No.2 has failed to prove in evidence about any precautionary measures which it took for preventing such an incident. There is no correspondence, for instance

from the side of defendant No.2 that it had forewarned defendant No.1 about taking appropriate preventive measures while carrying out the assignment in question. The defendant No.2, even for the argument's sake, if working as a sub-contractor, but at the same time it was witnessing the sub-standard equipment of defendant No.1 (Karachi Shipyard) and the team members of said defendant No.2 (A.E.G) should have forthwith stopped the work which would have prevented the fire incident in question.

32. In my considered view, both Defendants knew or could foresee by applying their usual experience and skills the magnitude of damage that could result from not applying a certain standard of care and diligence, and that damage rather destruction in fact had happened, hence, the present one is a case of composite negligence and principle laid down in a recent decision of Hon'ble Supreme Court reported in 2015 SCMR [Supreme Court Monthly Review] page 1406 {National Logistic Cell versus Irfan Khan and others-the **NLC case**} squarely applies to the instant case. Well known rules of "***foreseeability***", '**causation**" and "***but for***" test are also applicable here.

33. The Honourable Supreme Court in the above NLC judgment has explained the term negligence, to mean, *"(1) want of attention to what ought to be done or looked after; carelessness with regard to one's duty or business; lack of necessary or ordinary care in doing something; (2) an instance of inattention or carelessness; a negligent act; omission, or feature; and (3) a careless indifference, as in appearance or costume, or in literary or artistic style; in later use esp; with suggestion of an agreeable*

*absence of artificiality or restraint" and in Black's Law Dictionary (Ninth Edition), it is defined as "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregardful of others' rights.***"**

34. In its paragraph-19, the composite negligence has been explained by the learned apex court in the following words:-

> *"By composite negligence, it means where the wrong, damage or injury is caused by two or more persons, in such cases each of the wrongdoer is jointly and severally liable to make good the loss to the claimant who suffered at the hands of such tortfeasors. It is the prerogative of the plaintiff to proceed against any or all such wrongdoers."*

35. Facts of the present case and the conclusion drawn from the oral and documentary evidence is that the acts of both defendants resulted in the fire incident, though degree of negligent act(s) **vary**, as already discussed in the foregoing paragraphs.

36. Précis of foreign case law on these concepts of "***foreseeability***", '**causation**" and "***but for***" is that if any reasonable person by applying his ordinary prudence can foresee a loss that can arise from his act(s) then he owes a duty of care to others [claimant] and is liable for the negligent act that has caused damaged to the other person (claimant). Similarly, ***causation*** is the linkage between the negligent act [breach of

duty of care] that has resulted in causing injury and the "but for" test if simply put means, that the injury would not have occurred without the defendant's negligence.

37. It would be advantageous to produce relevant portions from a judgment of Canadian Supreme Court having title Clements versus Clements [2012] 2 R.C.S_

> *"[8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.*
>
> *[9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See Wilsher v. Essex Area Health Authority, [1988] A.C. 1074 (H.L), at p.1090, per Lord Bridge; Snell v. Farrel, [1990] 2 S.C.R. 311.*
>
> *[10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the*

circumstances, to infer that the defendant's negligence probably caused the loss. See Snell and Athey v. Leonati, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: Betts v.s Whittingslowe (1945), 71 C.L.R. 637 (H.C), at p.649; Bennett v.Minister of Community Welfare (1992), 176 C.L.R. 408 (H.C.), at pp 415-16; Flounders v. Millar, [2007] NSWCA 238, 49 M.V.R. 53; Roads and Traffic Authority v. Royal, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.

[12] In some cases, an injury-the loss for which the plaintiff claims compensation-may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. In such cases, the defendants are said to be jointly and severally liable. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation."

38. Similarly, the Rule of forseeability has been explained by Lord Denning M.R. in the following words:-

"It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequences."

> *"There was, it was held, a real risk of fire such as would have been appreciated by a properly qualified and alert chief engineer and this, given the fact that there was no justification for discharging oil into Sydney Harbour in any case, was sufficient to fix liability on the defendants. In other words, the mere fact that the damage suffered was unlikely to occur does not relieve the defendant of liability if his conduct was unreasonable- a proposition very little different from that contained in Re Polemis itself. On the facts of that case, notwithstanding the arbitrator's finding that the spark which caused the explosion was not reasonably foreseeable, there was, surely, a "real risk" that the vapour in the hold might be accidentally ignited and there was, of course, no justification for dropping the plank into the hold."*

[The above is from the Book "Winfield and Jolowicz on Tort, Sixteenth Edition, 2002"].

39. Consequently, the Issue No.8 is answered accordingly, whereas, Issue No.10 is answered in affirmative.

ISSUE NO.9

40. In preceding paragraphs, while giving Finding on Issues No.5 and 6, it has been held, that defendant No.1 has not disputed the magnitude of damage. In addition to that, to answer this Issue, testimony of PW-1 (Mr. Qaiser Mirza Rizvi) is of relevance. The said PW-1 has deposed on behalf of Lloyds, which, inter alia, was/is in the business of ships surveying and his testimony is of significance because he deposed as an independent witness and has produced number of documents, including Exh. 7/5 to 7/14

and Exh: 7/19 to 7/29, primarily relating to the estimate for restoring the subject Vessel after it was damaged by the fire. Most relevant is the document Exh: 7/5, which is available at Page-21 of the Evidence File; a cable dated 06.01.1971, sent to Salvage Association, London through Mackinnon Mackenzie & Co. Ltd., which were Lloyds local agent in Pakistan. **In this document, cause of fire and cost of the fire, both are described.** In first three lines, it has been clearly explained, inter alia, that fire occurred in Generator Room as repair firms worked on electrical generator using petrol (underlining is done for emphasis). Similarly, in Exh.7/6, produced by the same PW-1 approximate costs of material and repairs, which afore mentioned Shipping Company would have incurred, came to Rs.20,65,000/- (Rupees 2.1 Million approximately), in addition to the costs of material, which was required to be imported and at that time and its value was assessed in Deutch Marks (D.M) 5,75,000/-. PW-1 has also produced a letter as **Exh. 7/23** along with the quotation from Defendant No.1 through its missive of 29.01.1971, in which, post fire damage repair estimate was given, which came to Rs.42,05,000/- (Rs.4.2 Million). Before the said quotation, the said defendant No.1, besides addressing various letters, has addressed a letter dated 14.01.1971, which has been exhibited as Exh: 8/2 (available on Page-197 of the Evidence File), wherein, inter alia, it has been mentioned that a detailed quotation will be submitted, but the said Defendant No.1 will charge 10% as Supervision Fee for carrying out post damage repair and other reputable firms such as AEG (present Defendant No.2) and Siemens would be associated. The above quotation (Ex.7/23) has also been referred to by

PW-2 in his deposition, which went unchallenged during his cross-examination. The evidence, which has come on record, clearly shows that a considerable damage was done to the subject ship for which the above cost was communicated to the shipping company- Pan Islamic Steamship, Co. Limited. As already held in preceding paragraphs that extent of damage was admitted by the defendant No.1. The present suit is for recovery of Rs.2.8 Million approximately from Defendants out of which Rs.2.6 Million was paid by Plaintiff to the above mentioned Shipping Company towards settlement of its insurance claim, while rupees seventy five thousand was incurred towards cost of survey to assess the damage as a pre-requisite for settling any insurance claim. Therefore, the present claim of Plaintiff is neither exaggerated nor is vitiated by lack of ***uberrima fides*** (utmost good faith), which is one of the basic principle of insurance contact, Issue No.9 is replied accordingly.

ISSUE NO.11

41. With regard to restoration work, conclusion can be drawn from the pleadings of the parties and the evidence that has come on record, which shows that no restoration work was carried out by defendants and ultimately the subject vessel was sold as scrap. The cumulative effect would be that damage and losses sustained by the shipping company were not made good by the Defendants. Therefore, the Issue No.11 is answered in negative and against the defendants.

ISSUES NO.12 and 13

42. From the above discussion and after minutely examining the evidence, the conclusion is that Defendant No.1 is liable to pay the amount as claimed. As far as the second portion of this issue relating to third party is concerned, there is no requirement to pass a decree against the said third party- Pakistan Insurance Corporation and even though in their written statement the said third party had disputed the claim of defendant No.1 about holding a subsisting insurance policy at that relevant time, but in the event there was a valid insurance policy, then the defendant No.1 can agitated its claim in accordance with law against the said third party. Hence, Issue No.12 is answered accordingly.

43. The forgoing discussion justifies that the decree should be apportioned in the following manner_

(i). The Defendant No.1-Karachi Shipyard and Engineering Work is liable to pay a sum of Rupees Two Million to the Plaintiff,

and

(ii). Defendant No.2 (A.E.G.) is liable to pay Rs.7,96,446/- (rupees seven lacs, ninety six thousand, four hundred and forty six only). The above mentioned decreetal amount in both cases shall carry a component of 10% [ten percent] mark-up from the date of institution of the suit till realization of the amount. However, parties are left to bear their own costs.

Dated 02.5.2016 **JUDGE**

Muhammad Javaid P.A.