

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1569 of 2001

[M/s. Masoomi Enterprises Pakistan (Pvt) Ltd and two others vs. M/s. Ping Tan (Fishery Company) and 6 others]

Dates of hearing : 22.08.2019 and 13.09.2019.

Plaintiffs : M/s. Masoomi Enterprises Pakistan (Pvt) Ltd, through M/s. Abid S. Zuberi and Hidayatullah Mangrio, Advocates.

Defendant No.7 : Syed M.A. Shah (Syed Mazhar Ali Shah), through Syed Ansar Hussain Zaidi, Advocate.

Nemo for Defendants No.1 to 6.

Case law cited by learned counsel for Plaintiffs

- i. 1995 SCMR page-1431
[Sandoz Limited and another vs. Federation of Pakistan and others]-Sandoz case.
- ii. PLD 1969 Supreme Court page-80
[Province of West Pakistan vs. Messrs Mistry Patel & Co. and another]-Patel case.
- iii. 2019 CLD page-1 [Sindh]
[Muhammad Akbar vs. Masood Tariq Baghpati and others]-Baghpati case.
- iv. 1991 SCMR page-1436
[Messrs Khanzada Muhammad Abdul Haq Khan Khattak & Co. vs. WAPDA through Chairman WAPDA and another]-Khanzada case.

Case law relied upon by learned counsel for Defendants.

Other Precedent:

- i. 2003 PCrLJ page-1353
[Agha Wazir Abbas vs. The State]-Agha case.
- ii. 2017 SCMR page-172
[Province of the Punjab through Collector and others vs. Syed Ghazanfar Ali Shah and others]-Ghazanfar case.

- Law under discussion:**
1. Contract Act, 1872 (*Contract Law*)
 2. Qanun-e-Shahadat Order, 1984
(*Evidence Law*)
 3. Tort Law.
 4. Civil Procedure Code, 1908 (**CPC**)

JUDGMENT

Muhammad Faisal Kamal Alam, J: Through the present action at law, monetary claim has been prayed for against the Defendants No. 1, 2 and 3, besides arresting of the two Fishing Trawlers, viz. Defendants No.5 and 6. Plaintiff contains the following Prayer Clause_

“It is, therefore, prayed on behalf of the Plaintiffs above named that this Hon'ble Court may graciously be pleased to pass a judgment and decree against the Defendants No.1 to 3 for: --

a] US \$ 2,60,000/- (US \$ Two Hundred and Sixty Thousand Only) to be paid to the Plaintiffs.

b] To ward damages as aforesaid from the Defendants No.1 to 3 amounting to Rs.30,50,000 US \$ and may be paid to the Plaintiffs No.1, 2 and 3.

c] To issue warrant of arrest of the Defendants No.5 and 6 i.e. detain the two vessels / trawlers Nos. FU YUAN YU 235 and FU YUAN YU 236 and keep the same in custody of this Hon'ble Court

until the payment of the above amount of damages 30,50,000 US \$ and amount of cooperation expenses i.e. 2,60,000 US \$ (total amounting to US \$ 33,10,000) is paid to the Plaintiffs No.2 and 3, and further restrain the Defendant No.4 from issuing the NOC to the vessels / trawler bearing Nos. FU YUAN YU 235 and FU YUAN YU 236 till disposal of the suit. The aforesaid two vessels may be allowed to leave the port only in the event of furnishing security to the extent of the amount claimed in the suit and if no security is furnished, the Defendants No.5 and 6 be sold and the decretal amount be paid to the Plaintiffs out of the sale proceeds of the Defendants No.5 and 6.

d] Cost of the suit be awarded, to the Plaintiffs.

e] Make such other or further orders as may be found fit and proper in the circumstances of the case.”

2. The claim of Plaintiffs as averred in the plaint is that Defendants No.1 (a corporate entity operating under the laws of People’s Republic of China) through Defendant No.3 (Syed Bashir Ahmed Zaidi, who also acted as authorized representative of Defendant No.1) signed four different Agreements with Plaintiff No.1 through Plaintiff No.2, *inter alia*, for providing two Deep Sea Fishing Trawlers. The dates of these Agreements are 18.06.1997, 10.11.1997, 14.01.1998 and 07.08.1998. These Agreements contain terms relating to the frame work for operating the two Deep Sea Fishing Trawlers, viz, Defendants No.5 and 6. One of the main terms of the Agreements were that Plaintiffs would obtain letter of intent from Marine Fisheries Department, Karachi-Defendant No.4. The Agreements also contain modality of payments. It is contended that Plaintiffs fulfilled their part of contractual obligations but contesting Defendants No.1, 2 and 3 not only breached the agreed terms but also committed fraud upon the

Plaintiffs, particularly when it was learnt that the two subject trawlers (*ibid*) were handed over to another local company, instead of Plaintiff No.1. With these precise background facts, Plaintiffs are seeking primarily a relief of monetary claim against primarily afore referred contesting Defendants.

3. Upon issuance of summons, the matter was contested by Defendants No.2 and 3 by filing a comprehensive Written Statement, denying the allegations of Plaintiffs, while pleading that conversely Plaintiffs No.2 and 3 failed to support the business operation for non-availability of funds and requisite license from the Government Authority. Serious question was raised about shareholding of Plaintiffs in Plaintiff No.1 Company, which according to Defendants, the same was transferred to Defendants No.2 and 3; *whereas*, Defendant No.1 was declared *ex parte* by the order dated 28.08.2017.

Official Defendant No.4 opted to file a formal Written Statement, in which role of Defendant No.4 is highlighted, to the extent of issuing licenses for operating of Vessels, No Objections Certificate for fishing voyages, inspection of fish catch. It is stated that licences for the above fishing trawlers were cancelled in September, 2000. Defendant No.6 [Trawler/vessel] questioned the maintainability of the Suit under the Admiralty jurisdiction (at the relevant time).

4. Legal heirs of Defendant No.7 have filed Written Statement but disputing the claim as mentioned in the plaint, as such, but have stated that their grievances against Defendants No.2 and 3, that the latter have played fraud upon legal heirs of Defendant No.7, that is, Defendants No.7(a) to (e), in respect of shareholding of Plaintiff No.1 Company.

5. From the pleadings of the parties, following Issues were framed by the Court vide order dated 17.12.2017_

- “1. Whether the defendant No.1 violated the agreements dated 18.06.1997, joint venture agreements dated 18.06.1997 and 10.11.1997 and Agreement / Deed dated 14.01.1998?**
- 2. Whether a revised agreement was also executed between the plaintiffs and defendant No.1 on 07.08.1998 which was also violated by the defendant No.1?**
- 3. Whether as a result of violations of the aforesaid agreements the plaintiffs suffered huge losses as mentioned in the paragraph No.26 of the plaint and plaintiffs are entitled for the relief prayed in the suit?**
- 4. What should the decree be?”**

6. In the intervening period, three developments took place in this proceeding, which needs to be mentioned; (i) on 20.08.2011, the matter was settled between Plaintiffs and contesting Defendants No.2 and 3 in presence of respective learned Advocates and both these persons / Defendants No.2 and 3 were deleted from the array of Defendants; (ii) vide order dated 21.03.2016 an amount of US Dollar 200,000 (Two Hundred Thousand US Dollars) lying in the Standard Chartered Bank was directed to be transferred to the Nazir of this Court and has been invested in some profit bearing scheme; and (iii) by the Order dated 21.12.2000, the present suit was converted from Admiralty Suit No.18 of 2000 and was registered as an Ordinary Suit. This order was challenged by Plaintiffs in Admiralty Appeal No.08 of 2000, which was dismissed vide Judgment dated 07.11.2001.

7. Evidence was ordered to be recorded on commission and from the record it appears that Plaintiffs have led evidence by examining Plaintiffs No.2 (Syed Shafqat Ali Shah Masoomi (as **PW-1**), Fayyaz Ali Shah Masoomi (PW-2) and Arz Muhammad Siddiqui (PW-3) and despite providing ample opportunities other learned Advocates for Defendants neither cross-examined the Plaintiffs' witnesses nor led their independent evidence. PW-2 and 3 only corroborated the testimony of PW-1, being attesting witnesses in the last Revised Contract of 07.08.1998 (Exhibit P-19).

8. Arguments heard and record considered.

9. M/s. Abid S. Zuberi and Hidayatullah Mangrio, Advocates for Plaintiffs have referred to various documents / exhibits, in support of their arguments that Defendant No.1 is guilty of breach of its contractual obligations and thus the claim against said Defendant No.1 as mentioned in the plaint, is justifiable and be awarded. Reported decisions relied upon by the legal team of Plaintiffs are mentioned in the opening part of this Judgment.

10. Learned Advocates for Plaintiffs have also elaborated the scope of Section 74 of the Contract Law, as judicially interpreted in local and foreign jurisdiction.

11. Although Defendant No.1 has not contested the claim of Plaintiffs even then the Court has to evaluate the same on its own merits and in accordance with law.

12. Findings on the above Issues are as under:-

ISSUE NO.1 Affirmative.

ISSUE NO.2 Affirmative.

ISSUE NO.3 As under.

ISSUE NO.4. Suit Partly decreed.

REASONS

ISSUES NO.1 AND 2.

13. The subject matter of this case is in effect a joint venture between a Chinese Company, viz. Defendant No.1 and Plaintiffs, in Deep Sea Fishing in the exclusive Economic Zone of Pakistan, for which Defendant No.1 was required to provide two 'ASTERN' type trawlers, as contained in the Joint Venture Agreement dated 10.11.1997, produced by PW-1 as Exhibit **P-8**, description whereof are stated herein under_

- i. Name of Vessel-FU YUAN YU **309** (Chinese make) and ;
- ii. Name of Vessel-FU YUAN YU **310** (Chinese make).

The above two fishing trawlers will be referred to as '*the subject trawlers*'.

14. The undisputed record as produced by Plaintiffs in evidence and relied upon by their legal team, explains that in all four Agreements were entered into between Plaintiffs and Defendant No.1 through Defendant No.3, but as stated in the foregoing paragraphs, Plaintiffs and private persons / Defendants No.2 and 3 already settled their dispute. The *first* Agreement is described as 'Ocean Fishery Co-operation Contract' dated 18.06.1997 produced in the evidence as Exhibit **P-6**. The *second* one is a 'Joint Venture Agreement in Deep Sea Trawling in E.E. Zone Pakistan Sea Waters' produced by PW-1 as Exhibit **P-8** (dated 10.11.1997). The third is

the Agreement of Partnership dated 14.01.1998, exhibited as **P/10** (at page-66 of the evidence file) and the last and fourth one is the 'Revised Ocean Fishery Cooperation Contract 1998-99' dated **07.08.1998** produced as Exhibit **P-19**.

15. In terms of Clause (f) of the above last Contract, which may be referred to as '**Revised Contract**', the first Agreement of 18.06.1997 and of Partnership dated 14.01.998 stood cancelled, therefore, now it is to be seen that whether any violations were made in respect of this last Revised Contract and the Joint Venture Agreement of 10.11.1997 by Defendant No.1. In fact the last Revised Contract is the main document because the said Joint Venture Agreement (Exhibit P-8) simply gives the description of the subject Trawlers and conditional confirmation of Defendant No.1 that subject to government approval the above trawlers would proceed to Pakistan.

16. Learned Advocate for Plaintiffs have referred to Clauses (d), (e) and (f) of Revised Contract, which stipulates, *inter alia*, that above Joint Venture concerning the subject Trawlers continued (remained intact); tenure is for a period of one year, effective from 07.08.1998 to 31.08.1999 and will not be extended if the agreed payments are not made by Defendant No.1 to Plaintiffs (referred to in this Revised Contract as Party "**B**" and Party "**A**", respectively). Clause (f) is crucial explaining the monetary component, and it would be advantageous to reproduce the same herein under_

“(f). That the Party “A” must go through all the legal procedures for Party “B”. Party “B” shall pay to Party “A” US\$ 70,000/- (Seven thousand US Dollars) per trawler, per year. And for two trawlers the Party “B” shall pay US\$

1,40,000/- (one hundred forty thousand U.S. Dollars) to the Party "A" from the business of Deep Sea Fishing. The above amount of US\$ 1,40,000/- is fixed in lump sum amount shall be paid by the Party "B" to the Party "A" from the business of Deep Sea Fishing on the license of two Stern Fishing Trawlers of M/s. Masoomi Enterprises Pakistan (Pvt) Ltd. Even if Party "B" sustain the losses but the fixed amount of US\$ 1,40,000/ shall be paid to the Party "A" for one year. The outstanding amount of US\$ 1,20,000 shall be paid by Party "B" to the Party "A" upto 31.08.1999 at any cost."

17. It is acknowledged by Plaintiffs' witness that out of the above amount of US\$ 140,000 (one hundred forty thousand), Plaintiffs have already received US\$ 20,000 (twenty thousand US Dollars). The above named PW-1 deposed that all expenses for issuance of requisite formalities, including Letter of Intent (LOI) and No Objection Certificate (NOC) by the Government Department including Defendant No.4, were borne by Plaintiffs and when claimed from Defendant No.1, the latter refused to reimburse the same. The LOI dated 27.04.1998 issued by Defendant No.4 is exhibited as **P/12**, wherein Plaintiff No.1 (Masoomi Enterprises Pvt. Ltd.) permitted to operate two 'Stern Fishing Trawlers' for a period of three years, subject to certain conditions contained in this correspondence including payment of license fee of Rs.5,00,000/- (rupees five hundred thousand only). The next document in this regard is exhibited **P-13**, which is a Provisional Fishing License, issued by Defendant No.4 in the name of Plaintiff No.1, which is of 30.07.1998. It is mentioned in this document that Plaintiff No.1 has deposited Rs.1,000,000/- (rupees one million only) towards license fee for the two Astern type Trawlers (subject trawlers), which were required to be procured within six months. However, record shows that upon demand, Defendant No.1 refused to reimburse the license fee vide its correspondence dated 11.06.1998 (Exhibit **P-15**), for the

reasons, as mentioned in the said correspondence, that at the relevant time Defendant No.1 already paid the above amount of twenty thousand US Dollars to Plaintiffs.

18. It is argued by learned Advocate for Plaintiffs that it transpired that the two subject trawlers were handed over to some other Pakistani company, namely, AZM Marine System and thus Defendant No.1 violated the terms of subject agreements.

To evidence the above fact, the PW-1 with his testimony has produced NOC issued by Government of Pakistan-Marine Fisheries Department, (Fish Harbor West Wharf)/Defendant No.4, dated 28.09.1998 and 28-11-1998, as exhibits P/26 and P/30. Both these official documents were subsequent to the date of Revised Contract (Exhibit **P-19**); in particular, exhibit P/30 is Sale NOC permitting above AZM Marine System to sell **fish caught by the Subject Trawlers.** *Since* both the above are official documents of Defendant No.4 and not challenged by the latter in the evidence and the same were exhibited without any objection from any of the Defendants, hence, these exhibits bear positive evidential value. Plaintiffs have discharged the onus by proving that after the Revised Contract dated 07-8-1998, the Defendant No.1 instead of fulfilling its contractual obligations for doing the deep sea fishing business with Plaintiffs in particular Plaintiff No.1, which also possessed the official permission at the relevant time (as discussed above), handed over the Subject Trawlers to another local company (above named). Defendant No.1 **thus violated the terms** of both the above Agreements- Joint Venture in

Deep Sea Trawling-Exhibit P/8 and Revised Contract of 7-8-1998, exhibit P/19.

The other documents produced in the evidence (exhibits P/27, 28 were a NOC (no objection certificate) dated 26-2-1998 and LOI (letter of intent) dated 27-4-1998 in favour of above named Company and another entity, viz. M/s Siegfried Farms. These last two documents bear dates prior to the above Revised Contract and hence do not support the case of Plaintiffs.

19. Learned Advocates for Plaintiffs argue that breach of contract on the part of Defendant No.1 can be proven even from the documents of the above named other local company-AZM Marine System, as mentioned in their own correspondence dated 09.09.1998 addressed to Defendant No.4, produced in the evidence as Exhibit P-30 and the Undertaking of one of the representatives of said local company (Exhibit P-31). In both these documents although it is stated that the Subject Trawlers at the relevant time were in use of above local Company, but, still these documents cannot be considered in support of present claim of Plaintiffs, primarily because the authors of these two documents / exhibits were not examined independently, as required under Articles-78 and 81 of the Evidence Law. If the above company (AZM Marine System) was a party to the present *Lis* and the above documents were produced and exhibited without any objection from or cross examination by the said company, then, admissibility of the above documents could have been considered. Thus the above exhibits P-30 and 31 do not corroborate the case of Plaintiffs. In this regard, the reported cases of *Ghazanfar* and *Agha* [2017 SCMR 172 *and*

2003 PCrLJ 1353J handed down by the Hon'ble Supreme Court and learned Division Bench of this Court are relevant.

20. The conclusion of the above is that **both Issues No.1 and 2 are answered in Affirmative.**

ISSUE NO.3.

21. The claim of Plaintiffs is that the first breach took place when Defendant No.1 handed over / sent its two trawlers Nos. FU YUAN YU 235 and FU YUAN YU 236 to another Pakistani Company, viz. 'M/s Siegfried Farms; this assertion of Plaintiffs is not a *bona fide* one, because this issue was already decided in the afore-mentioned Admiralty Appeal No.08 of 2000 by determining that two trawlers did not belong to Defendant No.1, which finding attained finality.

22. Learned Advocates have laid much emphasis on the Penalty Clause contained in the Revised Contract of 07.08.1998 and has referred to the relevant portion of the deposition of PW-1 in which quantification is made for the total claim of US\$ 1,680,000/- (one million six hundred eighty thousand US Dollars). It is argued that the above Penalty Clause (Clause-I) is to be read with Clauses 'f' and 'k' relating to Payment Schedule, in which it is categorically mentioned that even if Defendant No.1 (Party "B") sustained losses, the annual amount of US\$ 70,000/- (seventy thousand US Dollars) per subject trawler, which comes to US\$ 140,000 (one hundred forty thousand US Dollars) should be paid as fixed amount. Similarly, it is argued that second component of Penalty Clause, about US\$ 50,000 (fifty

thousand US Dollars) as well as US\$ 1,000,000 (one million US Dollars) towards damages be also awarded.

23. The gist of the case law relied upon by the learned Advocate for Plaintiffs is that liquidated damages as contained in a penalty clause of an agreement is recoverable only when a party to an agreement / Claimant proves the default on the part of his adversary. Object of such Penalty Clause is explained by the Hon'ble Supreme Court in the *Khanzada case (ibid)*, the relevant portion of the same is reproduced herein under_

“The parties may by an agreement fix a specified amount as liquidated damages to avoid the difficulty that may be found in settling the actual damages that may accrue against the defaulting party on the breach of contract. The manifest intention is to get rid of future calculation and disputes. Where an amount is mentioned in the contract as penalty payable on breach of contract, the parties are entitled to recover actual damages not exceeding the amount mentioned in the contract but in case of liquidated damages, a party is entitled to recover the same from the opposite party in case of breach of contract.”

24. With regard to the second component of the above Revised Contract, it is mentioned in the Penalty Clause itself that for claiming damages of US\$ 50,000/- (fifty thousand US Dollars) and US\$ 1,000,000/- (one million US Dollars), the Plaintiffs will file a proceeding in this Court; besides seeking an order of arrest and attachment of the two subject Vessels from this Court. Similarly, Defendant No.3 (Syed Bashir Ahmed Zaidi) was made liable to pay above damages upto US\$ 1,000,000/- (one million Dollars).

Admittedly, vide afore referred order dated 21.12.2000 and maintained in Admiralty Appeal No.08 of 2000 (Judgment dated 07.11.2001), while converting this *Lis* from an Admiralty Suit No.18 of

2000 to the present Ordinary Suit, the issue of attachment and arrest of trawlers was also decided against the Plaintiffs. **Secondly**, by order dated 20.08.2011, the matter was settled with the private persons / Defendants No.2 and 3 (Syed Anwar Iftikhar Zaidi and Syed Bashir Ahmed Zaidi, respectively) who were deleted from the array of Defendants (as already discussed above). Hence, this claim of US\$ 1,000,000/- (one million US Dollars) cannot be awarded; besides, no convincing evidence is led by the Plaintiffs in respect of their claims of US\$ 50,000/-(fifty thousand US Dollars) and US\$ 1,000,000/- (one million US Dollars). This claim for award of damages is meritless and therefore, discarded. **Thirdly**, the arguments of learned Advocate for Plaintiffs on the applicability of Section 74 of the Contract Law and the cited Judgments are distinguishable for the reasons mentioned in the above discussion and because the existing Penalty Clause in the Revised Contract concerning the second component of damages, cannot be interpreted to represent a pre-estimated loss that could have been suffered by Plaintiffs, as held in the afore referred case law, but the damages arising of losses sustained were made subject to judicial determination (as provided in the above Penalty Clause of the Revised Contract itself), which has now been accordingly done. The conclusion of the above is that both types of damages of US Dollars Fifty Thousand and US Dollars One Million are not recoverable from Defendant No.1.

25. Adverting to the claim of yearly payment of US\$ 1,20,000 (one hundred twenty thousand US Dollars). This payment term is unambiguous and agreed by Plaintiffs and Defendant No.1 in two different Clauses (**k** and **l**) of the said Revised Contract and it is also proved by the witnesses of Plaintiffs in the evidence, *inter alia*, that the Subject Trawlers were handed

over to some other local company and not to Plaintiffs. Since the tenure of last Revised Contract was one year, therefore, the Plaintiffs are entitled to be paid an amount of US\$ 120,000 (one hundred twenty thousand US Dollars) because US\$ 20,000 (twenty thousand US Dollars) has already been paid to Plaintiffs. The second component of claim of US Dollars One Million as mentioned in the paragraph-22 of the Affidavit-in-Evidence / Examination-in-Chief of PW-1, since could not be proved by the witnesses of Plaintiffs by leading any positive evidence in this regard, therefore, this claim of damages of US Dollars One Million cannot be awarded. **Hence, Issue No.3 is answered Accordingly.**

ISSUE NO.4.

26. The above suit is partly decreed only against Defendant No.1, which is liable to pay US Dollar 120,000/- (one hundred and twenty thousand US Dollars) to Plaintiffs. Since, Nazir of this Court had earlier encashed the Bank Guarantee of US\$ 200,000 (two hundred thousand US Dollars) and invested the same in the profit bearing scheme, therefore, Nazir shall pay to Plaintiffs after completing requisite procedure, the above amount of US\$ 120,000/- (one hundred twenty thousand US Dollars) in Pak Rupees at the current conversion rate. For the remaining amount lying with Nazir, he may file a reference in Court, so that remaining / balance amount can be returned to Defendant No.1.

27. Parties to bear their respective costs.

Karachi.

Dated: 21.05.2020.

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JUDGE