

IN THE HIGH COURT OF SINDH AT KARACHI

Admiralty Suit No.02 of 2018

[Hays Trading & Shipping v. M. V. Miski and another]

Dates of hearing : 20.08.2019, 27.08.2019, 03.09.2019,
04.09.2019 and 05.09.2019.

Date of Decision : 23.09.2019.

Plaintiff : Hays Trading & Shipping, through Mr. Abdul Razzaq, Advocate.

Defendants No.1&2 : M. V. "Miski" and Jubba General Trading Co L.L.C., through Mr. Khuram Rashid, Advocate.

Dr. Chaudhry Wasim Iqbal, Official Assignee.

Case law relied upon by Plaintiff's Counsel

1. P L D 1991 Supreme Court page-1021
[*Hong Leong Finance Limited v. m.v. Asian Queen through High Court*] – Hong Leong Case
2. P L D 1986 Karachi page-447
[*Compagnie Continentale (France) S. A. v. Pakistan National Shipping Corporation and 2 others*] – Compagnie Continentale Case
3. P L D 2000 Supreme Court page-57
[*Yukong Ltd. South Korean Company, Seoul, South Korea v. M.T. Eastern Navigator and 2 others*]
4. [1985] 1 All England Reports (HL)

Case law relied upon by Defendant's Counsel

1. 2000 M L D page-1130
[*Government of Pakistan v. Messrs Al-Farooq Roller Flour Mills Ltd.*]
2. 2007 Y L R pae-1854
[*Quality Steel Works Ltd. v. Karachi Electric Supply Corporation*]
3. 1993 S C M R page-441
[*Syed Ahmad Saeed Kirmani v. M/s. Muslim Commercial Bank Ltd., Islamabad*]
4. 2019 M L D page-856
[*Pyramid Logistics (Private) Limited v. "Azia-12" LLC through Director/Principal Officer and 3 others*]
5. 2018 Y L R page-1938
[*Shehwaar and 2 others v. Muhammad Riaz and others*]
6. 2017 C L C page-704
[*Zahoor Ahmed v. Mohammad Siddique*]

7. 2014 C L C page-837
[*Pak Petrochemical Industries Pvt. Ltd. through Chief Executive v. Syed Hamid Ali*]
8. 2012 C L C page-1202
[*Muzafar Ahmed v. Irshad Ahmed Chaudhary and another*]
9. 2017 Y L R page-146
[*Iqbal Rasheed v. Babar Mirza Chughtai and another*]
10. P L D 2013 Sindh page-290
[*Arabin Sea Enterprises Limited v. Abid Amin Bhatti*]
11. 1993 M L D page-1587
[*Dabinovic (Monaco) S.A.M. Authorised Agent of Nafin Naviera-y Financiera LTDA, San Jose (Costa Rica) v. m.v. Pluton I, Yugoslavian Flag through its Captain and 2 others*] – Dabinovic Case
12. 2015 Y L R page-1589
[*Ghulam Farid Memon v. Province of Sindh through Secretary and 13 others*]
13. 2018 M L D page-878
[*Trading Corporation of Pakistan (Pvt.) Ltd. v. S.S.J. Brothers*]
14. P L D 1971 Supreme Court page-550
[*Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) v. Messrs Ghulam Nabi Corporation Ltd., Lahore*] – Khan of Mamdot case

Books and other Research Material

1. Payne’s Carriage of Goods by Sea
2. Southampton on Shipping Law
Institute of Maritime Law

Other precedents

1. 2018 S C M R page-1828
[*Bourbon Maritime (Pvt.) Ltd. v. m.v. Salaj and others*]
2. P L D 1982 Karachi page-749
[*Twaha v. The Master m. v. ‘ASIAN QUEEN’ and 2 others*]
3. 2012 C L C page-749
[*Abdul Majeed Khan v. Tawseen Abdul Haleem and others*] – Abdul Majeed Case.

- Law under discussion:**
1. Admiralty Jurisdiction of the High Courts Ordinance, 1980 (the “**Governing Law**”).
 2. The Merchant Shipping Ordinance, 2001, (“**MSO**”)
 3. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); Evidence Law.
 4. The Contract Act, 1872.
 5. Civil Procedure Code, 1908 (“**CPC**”)

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present action at law has been preferred by Plaintiff against the Defendants with the following prayer clause_

“It is, therefore, prayed in the interest of justice that this Honourable Court may be pleased to pass Judgment and decree in rem jurisdiction in favour of the plaintiff and against the defendants: -

- i. For US Dollar 860,500.00 (Eight Hundred Sixty Thousand Five Hundred US Dollars) along with further amount to be calculated as may be payable resulting for damage, increasing on Demurrage charges and necessary shifting of cargo to Port of Sudan and rectification and yet unknown costs assessed or payable at Karachi, with interest @ 18% per annum till payment is made with costs.*
- ii. Ordering arrest of the subject vessel.*
- iii. Ordering auction of the subject vessel and holding of the funds for as security for payment of Plaintiff's claim/decreed of,*
- iv. Ordering continuation of the arrest till auction of the subject vessel,*
- v. Order release of cargo and shifting of cargo from Karachi Port to the Port of Sudan through other vessel already arranged by the plaintiff.*
- vi. Issue order for compliance to the Karachi Port Trust, Karachi Custom Authorities, Shipping Agent of M.V. Miski in Karachi, owner of the Vessel, Master of the vessel and crew of M.V. Miski for shifting/delivery of cargo to plaintiff.*
- vii. Grant other and better relief which this Honourable Court may deem fit and proper in the circumstances of the case.*
- viii. Award costs. ”*

2. As per the averments of plaint, Plaintiff provides cargo services to customers at the Port of Sudan to and from all over the World and in the present case acted as charterer on behalf of cargo owners viz. Military Industry Corporation, Sudan. Initially, Defendant No.2 agreed to deliver the subject cargo (some military hardware), description whereof is given in the Bill of Lading, which has been produced in the evidence as **Exhibit P.W.-1/7**, through vessel M.V. Basel – III. Subsequently, due to some technical problem faced by Defendant No.2, they agreed to shift the subject cargo to Defendant No.1 – M. V. Miski (the “**Subject Vessel**”) from Abu Dhabi Port (United Arab Emirates) to Port of Sudan (at Sudan). Plaintiff paid entire freight and even an additional freight amount considering the nature of cargo. It is averred that though Defendants are under contractual obligation to provide seaworthy vessel, which the Defendant No.1 was not, due to which subject cargo was also damaged during voyage and eventually the Subject Vessel (Defendant No.1) stranded at Karachi Port and has been ultimately detained by the Port Authorities. Plaintiff also bore the expenses for survey done by SGS Surveyors and other expenditure for safeguarding the interest of Plaintiff.

3. Present *lis* was ordered to be proceeded *ex parte* against the Defendants as the orders of 24.09.2018 and 04.10.2018 also show that Owner of defendant No.1, that is, Defendant No.2 never appeared in the matter. Vide order dated 14.03.2019, the Commissioner was appointed to record evidence, in order to expedite the proceeding. From the Plaintiff side only its local representative was examined but was not cross-examined.

4. Although the Defendants did not contest the claim nor have led evidence, but Mr. Khurram Rashid (Advocate), appearing for Defendants, has argued primarily on point of law regarding maintainability of present *lis* and the evidential value of the documents produced during the evidence.

5. Even though the matter proceeded *ex parte* against the Defendants but it is still the duty of the Court to evaluate the claim of Plaintiff and the evidence led within the parameters of law. Following Points require consideration_

- i. Whether the present suit is filed by an authorized person?*
- ii. Whether the present *lis* falls within the ambit of Governing Law?*
- iii. Whether any relationship exists between the Plaintiff and Defendants?*
- iv. What should the decree be?*

6. Arguments heard and record perused.

7. It is also pertinent to mention here that besides the present *lis*, there are following other connected suits_

- 1. Admiralty Suit No.03 of 2018**
- 2. Admiralty Suit No.07 of 2018**
- 3. Admiralty Suit No.01 of 2019.**
- 4. Admiralty Suit No.06 of 2018** (already decided by the judgment of 06.09.2019).

Points No.(i) and (ii).

8. Learned counsel for Defendants has questioned the authority of the person, who has filed the present suit and has relied upon the famous case of **Khan Mamdot** [P L D 1971 SC page-550] and **Trading Corporation** (*ibid*, 2018 M L D page-878 Karachi). He has stated that neither any power of attorney has been filed by the person who has instituted the present suit, nor there is any Board Resolution on behalf of Plaintiff. He has further denied relationship between Plaintiff (Hays Trading & Shipping) and Defendant by arguing that no contract has been brought on record to show the relationship and thus the Defendants are not liable to compensate Plaintiff on any account. The learned counsel has raised a serious question

that the nature of claim does not fall within the Admiralty Jurisdiction of this Court, which is governed by a special Federal Statute, viz. Admiralty Jurisdiction of High Courts Ordinance, 1980 (the Governing Law).

To fortify his contention on the Admiralty Jurisdiction of this Court, the learned counsel has cited the case of *Dabinovic* (*ibid*, 1993 M L D page-1587).

9. In rebuttal, the learned counsel for Plaintiff has reiterated his arguments that present suit as instituted is maintainable in the light of case law relied upon by the latter and particularly *Compagnie case* [P L D 1986 Karachi page-447], wherein scope of the Governing Law, in particular, Section 3, has been explained.

10. It is argued by Plaintiff's side that the latter (Plaintiff) has merely acted as an agent for Government of Sudan and is not a corporate entity. With regard to filing of the present proceeding / suit by an unauthorized person, the undisputed evidence brought on record shows that one of the officers from Sudan Embassy at Islamabad (Ms. Sahar Shah Bokhari) has been authorized by the Plaintiffs to file present proceeding. The **original Authority Letter** of the Plaintiff has been exhibited as P.W.-1/23, which is of 27.12.2017 and it is on the letter head of Plaintiff. In this regard the contention of Mr. Abdul Razzaq, Advocate, has merits that the aforesaid Authority Letter (Exhibit P.W.-1/13) was signed in Pakistan by the representative of Plaintiff, namely, Ahmed Sidki, because at the relevant time the latter was in Pakistan; this fact is evident from the record produced by the above named Ms. Sahar Shah Bokhari, who testified as P.W.-1. The case record also shows that the above Ahmed Sidki attended proceedings of present *lis* {Order dated 4-5-2018} as it is an admitted position that the Defendant No.1 is berthed at Karachi Port since August 2017. Another document Exhibit P.W.-1/18 dated 12.12.2017 is a Missive from the

Embassy of Republic of Sudan, Islamabad to Ministry of Foreign Affairs, Government of Pakistan, mentioning that the subject cargo aboard the Subject Vessel belongs to Military Industry Cooperation of Sudan, and a request for assistance by Karachi Port Authorities. There is no evidence that Plaintiff is in fact a juristic person and hence a Board Resolution was required and thus the same cannot be held on mere assumption only just because the Plaintiff is a foreign entity and has not explained its legal status. Plaintiff cannot be non-suited on this sole ground. On the contrary the evidence discussed above establishes the nexus between the Government of Sudan and Plaintiff. The two reported decisions relied upon by the learned counsel for the Defendants viz. Trading Corporation and Khan Mamdot cases (*supra*) are not applicable to the facts of present case, because present Plaintiff is not a corporate entity but acted on behalf of Government of Sudan.

11. Adverting to the other objection of Defendant about non-applicability of admiralty jurisdiction conferred upon this Court by the above mentioned Governing Law. It is argued by learned counsel for the Plaintiff that present suit falls within Section 3 of the Governing Law and to fortify his arguments he has relied upon the reported Judgment of this Court in *Compagnie Case (ibid)* and relevant pages from a Book Payne's *Carriage of Goods by Sea, 7th Edition*, highlighting the obligations of master of a ship towards cargo-owners. He also referred to the **Bill of Lading** produced in evidence as Exhibit P.W.-1/7, in which Shipper has been mentioned as M THREE LOGISTIC LLC and consignee is mentioned as MIC SUDAN, that is, Military Industry Corporation, Sudan. The Bill of Lading number is FSI-AUHPZU-0002 dated 29.07.2017, mentioning the subject cargo – Vehicle Truck, BMP-2 Armoured Missile Launcher and Tool, Reconnaissance Vehicle and Fiber Glass Boat. Port of

discharge is mentioned at Port Sudan, Sudan and port of loading is Mina Zayed Abu Dhabi, UAE (United Arab Emirates). The other conclusive evidence is the 'PROTEST LETTER' exhibited as PW-1/11 from the side of Plaintiff and addressed to present Defendant No.2, AL Muqarab Shipping and Fair Sea International FZC, calling upon the above to explain the delay in delivery of cargo and pay penalties. Fair Sea International, as already stated above, filed the connected Suit No. 7 of 2018, against present Defendants, in which the said Fair Sea International FZC has agitated its own grievance against the Defendant. In the said connected Adm. Suit No.07 of 2018, it is stated that the said Fair Sea International FZC is in fact a vessel operator of Defendant No.1 – M.V. Miski under Memorandum of Agreement dated 15.12.2016 with present Defendant No.2 (Jubba General Trading Co L.L.C). Next document is the correspondence dated 16.12.2017, **Exhibit P.W.-1/13, relied upon by Plaintiff. This document obviously is undisputed and is addressed by Defendant No.2 (Jubba General Trading Co L.L.C.) to present Plaintiff (Hays Trading & Shipping) and MIC Sudan**, 'being Cargo Owner'. In this correspondence, the above Bill of Lading is mentioned and it is admitted that the subject cargo is at Karachi Port and the local representative of Defendants will complete the procedure for transferring cargo to another Vessel. In view of this undisputed evidence, the relationship between the parties *inter se* has been established.

The *Dabinovic Case (supra)* relied upon by the learned counsel for the Defendant, relates to a restraining order granted earlier by this Court for arrest of the vessel, which was subsequently vacated through the reported decision, on the grounds that *firstly*, the person who has filed the proceeding / admiralty suit was not authorized; *secondly*, the claim was made in respect of loan advanced to defendant Vessel (of the reported case) and commission on sale of vessel, which this Court has held to be outside

the scope of Section 3 of the Governing Law. *Ex facie*, the facts of the reported case are completely different from the present *lis*, wherein, the Defendant No.1 is the Subject Vessel and Defendant No.2 is admittedly the owners of Vessel, *inter alia*, as the afore-referred connected suits filed by different parties are also against the same Defendant No.2 and the conclusive evidence led in other Suits proves that present Defendant No.2 (Jubba General Trading) is the owner of Defendant No.1. **Secondly**, since the present *lis* is in respect of the cargo at the Subject Vessel/Defendant No.1 and other ancillary issues relating thereto, thus the interpretation of the Governing Law as evolved in *Compagnie case {supra}* is applicable and thus present suit is held to be maintainable. Points No.1 and 2 are answered in affirmative.

Point No. (iii).

12. Basically, the claim of Plaintiff has two parts; the first part relates to expenditure done in UAE (United Arab Emirates) and the second set of claim relates to expenditure incurred (purportedly) by Plaintiff in Pakistan; but at the same time the arguments of learned counsel for Defendant and the case law cited in respect of evaluation of evidence has substance and the present pleadings of Plaintiff and the evidence led have to be considered in the light of the afore-mentioned judgments.

13. Adverting to the main grievance of Plaintiff. The latter has claimed number of reliefs including award of damages. Prayer clause-i, ii, iii, iv and vi, have already been taken care of by way of different orders passed in the present and connected suits. At present only prayer clause-i relating to claim of US \$ 860,500.00 is to be determined.

14. It is argued that the Plaintiff has failed to adduce direct evidence on the purported losses and hence the claim is to be rejected in terms of

Section 73 of the Contract Act, 1872; to augment his arguments, learned counsel for the Defendant has cited the case law mentioned in the opening part of this decision. The crux of the case law cited by the learned counsel for the Defendant is that a party has to show denial of existing right for bringing the suit under Section 42 of the Specific Relief Act, 1877, failing which the suit is to be dismissed; that evidence cannot be led beyond the pleadings; that seeking relief of damages, losses should properly be quantified and vague unspecific pleadings cannot be considered; that the case of plaintiff should stand on its own legs to satisfy the conscience of Court, even if the Defendants are proceeded *ex parte*; that heavy burden lies on Plaintiff to prove damages.

15. Plaintiff has specifically mentioned in the pleadings and reiterated in the affidavit-in-evidence / examination-in-chief of P.W.-1, that the Subject Vessel was not seaworthy and that is why stranded at the Karachi Port, besides, subject cargo was also damaged. Plaintiff has paid additional freight of US \$ 100,000 and paid demurrage charges of US \$ 1050 at the port of Abu Dhabi because the original Vessel (M. V. Basel 3) also malfunctioned and the cargo was to be shifted to the Subject Vessel – Defendant No.1. Plaintiff has produced invoice dated 29.04.2017 and its acknowledgement dated 08.05.2017 as Exhibit P.W.-1/4 and 1/5, issued by Al Muqarab Shipping L.L.C in the name of present Plaintiff with regard to the subject cargo. Invoice is for AED (Dirhams) 238,178.00. Another acknowledgement of payment of AED 7,815 issued by said Al Muqarab Shipping L.L.C, is Exhibit P.W.-1/6. Plaintiff's witness has produced a document at Exhibit PW-1/11, the above referred 'PROTEST LETTER', contents whereof till date have remained unchallenged. Thus, the claim of Plaintiff with regard to payment of freight as mentioned above, regarding which the documentary evidence has been produced, is accepted. Thus the

Defendants are liable to pay an amount of AED 238,178.00 and 7,815 to the Plaintiff.

16. The second category of claim of Plaintiff with regard to expenses incurred in Pakistan is also considered.

17. On a request of Plaintiff, SGS Pakistan Pvt. Limited conducted a survey and the Survey Report has been exhibited as P.W.-1/12 mentioning details about the subject cargo lashed at the Vessel. As per the Report, in one of the Aluminum Boat a dent was found. The said survey company has issued an acknowledgment for receiving Rs.131,239.17.

18. The second category of claim in the shape of expenditure incurred by representatives of Plaintiff after arrival in Pakistan has been considered and documents produced in the evidence in support thereof have been examined. Resultantly, the claim of Plaintiff in respect of air tickets, stay at Avari Hotel Dubai and then Hotel Faran Karachi and traveling between Karachi and Islamabad, is substantiated by positive documentary evidence and hence Plaintiff is entitled for the same. Consequently, the claim of Plaintiff to the extent of AED 5,019 and Pak Rupees 710,866/- is allowed.

19. Documents of the Defendant No.2, which have been exhibited as P.W.-1/13, 1/14 and 1/15, *inter alia*, wherein the present Defendant No.2 has confirmed that they have instructed their local representative for transferring and loading cargo to another Vessel, only proves the stance/plea of Plaintiff about the acts of misfeasance, nonfeasance and breach of contractual obligations on the part of Defendants; even otherwise, testimony of Plaintiff witness about the overall hardship the Plaintiff faced has gone unchallenged, so also the Survey Report of SGS Pakistan exhibited as PW-1/12, *inter alia*, confirming that seaworthiness of

Defendant No1 was effected during voyage. This justify award of damages also.

20. Broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves the actual losses suffered. In the present case, Plaintiff has not produced convincing evidence with regard to its claim of US Dollars One hundred and seventy five thousand (approximately); USD 174,018-00, which fall within the category of special damages. Notwithstanding this aspect of the case, the Superior Courts have held in number of decisions, *Abdul Majeed Khan versus Tawseen Abdul Haleem-2012 CLD {Supreme Court of Pakistan} page 6*, being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. Consequently, in view of the above discussion, Plaintiff is also entitled to be paid Pak Rupees two million towards general damages.

21. The upshot of above is that the Plaintiff is entitled to AED 251,012/- Pak Rupees 710,866/-, damages to the extent of Rupees Two Million, payable by the Defendants jointly and severally.

22. The three reported Judgments, viz. (i) 2018 SCMR page-1828-*Bourbon case*; (ii) PLD 1982 Karachi page-749-*Twaha case*; and (iii) PLD 1991 Supreme Court page-1021-*Hong Leong case*], *inter alia*, about the settlement of different claims, have been carefully examined. As far as wages of Crew and Master of subject Vessel is concerned, the same are covered by Sections 549, 550 and 551 of the Merchant Shipping Ordinance, 2001, as rightly referred to by the learned Advocate for Karachi Port Trust [KPT]. This category of claim is a maritime lien, which has been discussed in detail in the third reported Judgment referred herein-

above (*Hong Leong case*); maritime lien is a charge on the res and travels with it. This type of claim has a precedence over the claim of a mortgagee; whereas, the claim with regard to necessities will be considered after settlement of last two claims. There is a judicial consensus that charges / dues of a Port Authority is ranked at the top of all claims, provided the latter has acted diligently. This has been discussed in detail in the aforementioned reported Judgment of *Bourbon case* (by our Apex Court).

23. The Karachi Port Trust (**KPT**) has already filed its latest claim before the learned Official Assignee through its learned Advocate, Mr. Agha Zafar Ahmed, which has been incorporated in the Reference No.07 of 2019, filed by the Official Assignee in all these connected matters. On 16.09.2019, no one has raised any objection to the claim of KPT and thus Reference No.07 of 2019 was taken on record.

24. The Reference No.01 and 3 of 2019 (from Official Assignee office) manifest, *inter alia*, that KPT has filed its claim about port dues and charges right from the beginning of the proceeding. It is a matter of record that publication charges for sale of Defendant No.1 were also paid by KPT. Consequently, the exception about order of preference of claims as laid down in the Bourbon case (*ibid*) is not attracted to the undisputed facts of present case. KPT has throughout participated in the proceeding vigilantly and its claim has to be given first preference; whereafter, the dues/wages of crew of Defendant No.1, be settled / paid.

Similarly, the Plaintiff of Suit No.1 of 2019 (Mortgagee Bank) has produced record of the case which they instituted at Sharjah Federal Court of First Instance [UAE] against present Defendant No.3, which is now decided in favour of above Mortgagee and will be considered by this Court

in Admiralty Suit No.01 of 2019; besides the claim of Mortgagee Bank as pleaded in above Suit No.01 of 2019.

25. Although the subject decisions are given in separate suits, but for the purposes of settlement of claims, the rule laid down in respect of order of priority in the reported Judgments above, shall be followed by the learned Official Assignee from the sale proceeds of the subject vessel, which in the intervening period was sold without any objection; Reference No. 6 of 2019 (dated 11-9-2019). Therefore, *first* the claim/outstanding dues of Karachi Port Trust (“KPT”) is to be settled; then the wages / claims of crew as determined in already disposed of Admiralty Suit No.06 of 2018; where after claim of Mortgagee Bank subject to decision in Suit No.01 of 2019 and then other claims. It is clarified that the Order dated 27-08-2019 stands merged in the present decision.

26. At this juncture, it is necessary to mention that all the learned Advocates appearing for the Parties in the present and connected suits, have provided an able and fair assistance to the Court, which is highly appreciated.

Point No. iv.

27. The suit is decreed in the above terms with costs.

Judge

Karachi Dated: 23.09.2019.

Riaz / P.S.