

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 133 of 1998

[Mrs. Parveen Mehmood *versus* Thai Airways International]

Dates of hearing : 12.11.2020, 16.12.2020 and
17.12.2020.

Plaintiff : Mrs. Parveen Mehmood,
through Malik Muhammad Riaz,
Advocate.

Defendant : Thai Airways International, through
M/s. Adeel Abid and Muhammad
Junaid Khatri, Advocates.

Case law cited by the Plaintiff's counsel.

- i. **PLD 1976 Karachi 184**
[Pakistan International Airlines Corporation, Karachi vs. Shaikh Muhammad Younus]
- ii. **PLD 1967 Karachi 775**
[Shaikh Muhammad Younus vs. Pakistan International Airlines Corporation]
- iii. **2001 CLC 1431 [Peshawar]**
[Darvesh Ali vs. Munir Khan and others]
- iv. **PLD 1985 Rev. 189 [Sind]**
[Muhammad Umer and others vs. Khaliq Dino and others]
- v. **NLR 1993 UC (Civil) 30**
[Mr. Zafarul Islam Minhas vs. Mrs. Azra Malik, etc.]
- vi. **2006 SCMR 12**
[Sheikh Muhammad Sadiq vs. Elahi Bukhsh]
- vii. **1970 SCMR 623**
[Said Wali vs. Ahmad Saeed and 5 others]
- viii. **PLD 2003 Karachi 523**

[State Life Insurance Corporation of Pakistan through Manager, State Life Insurance and 2 others vs. Arjan Ram and 2 others]

- ix. **2001 CLC 408 [Lahore]**
[State Life Insurance Corporation of Pakistan through Chairman and 3 others vs. Mst. Safia Begum]
- x. **PLD 1974 Supreme Court 174**
[Messrs M.G. Kadir & Co. vs. Abdul Latif]
- xi. **PLD 2004 Karachi 439**
[Dr. Pro. Haroon Ahmed vs. Messrs British Airways and 3 others]
- xii. **1997 CLC 1936 [Karachi]**
[Shahid Mahmood vs. Karachi Electric Supply Corporation Ltd]
- xiii. **1993 CLC 330 [Karachi]**
[Karachi Shipyard and Engineering Works Limited and 5 others vs. Muhammad Shakir Sheikh]
- xiv. **2002 UC 520 [Supreme Court of Pakistan]**
[The Director, T & T Stores and Workshop, Karachi and others vs. Saifuddin and others]
- xv. **1993 SCMR 2357**
[Noor Alam and others vs. Qambar Sultan and others]
- xvi. **1996 MLD 1493 [Karachi]**
[National Wood Industries Limited vs. Barretto Shipping through Hegge & Co. (Pakistan) Limited and 2 others]
- xvii. **ILR 1981 Delhi 749**
[Vij Sales Corporation vs. Lufthansa, Generam Airlines]
- xviii. **AIR 2001 Delhi 25**
[M/s. Federal Chemical Works Ltd., vs. M/s. Nutsco (Nigeria) Ltd]
- xix. **AIR 2005 Delhi 158**
[Ethopian Airlines, New Delhi, vs. M/s. Federal Chemical Works Ltd., New Delhi]
- xx. **AIR 1986 Calcutta 120**
[British Airways, vs. Art Works Export Ltd. and another]
- xxi. **AIR 1984 Delhi 396**

[Rajasthan Handicrafts Emporium, New Delhi and another, Pan American World Airways and others]

- xxii. **AIR 1984 Supreme Court 15**
[M/s. M. G. Brothers Lorry Service vs. M/s. Prasad Textiles]
- xxiii. **Antwerp United Diamond BVBA and another vs. Air Europe (a firm)**

Case law relied upon by Defendant' counsel.

- i. **1986 SCMR 890**
[Messrs Kuwait Airways Corporation vs. Messrs Union Surgical Company]
- ii. **2000 MLD 1454 [Karachi]**
[Shahanshah Hussain vs. Messrs Thai Airways International Limited]
- iii. **PLD 1976 Karachi 184**
[Pakistan International Airlines Corporation, Karachi vs. Shaikh Muhammad Younus]
- iv. **PLD 1983 Karachi 29**
[Messrs Crescent Sugar Mills and Distillery Ltd vs. Messrs American Export Isbrandt Sen Inc. and 2 others]
- v. **PLD 1975 Karachi 819**
[Deutsche Dampschiffahrt-Gesellschaft and another vs. Central Insurance Co. Ltd., Karachi]
- vi. **PLD 1963 (W.P) Karachi 791**
[M. Younus & Co. vs. Hajiani Mariam Bai and others]
- vii. **1991 MLD 1101 [Karachi]**
[Messrs Ashrafi (Private) Ltd. through Managing Director Sharafat Ali Abbasi]
- viii. **Legal Terms & Phrases (Judicially Defined)**
Surridge & Beecheno Library
- ix. **AIR 1939 Lahore 466**
[Joti Parshad vs. Raham Ali]
- x. **2003 CLC 1038 [Karachi]**
[Lyallpur Ice Factory through Partner Muhammad Hussain Chaudhry, Karachi]
- xi. Sidhu and others v. British Airways plc
Abnett (known as Sykes) v. British Airways plc
HOUSE OF LORDS
- xii. Morris v. KLM Royal Dutch Airlines
King v Bristow Helicopters Ltd

(2002) UKHL 7
HOUSE OF LORDS

- xiii. **AIR 1960 Supreme Court 1058 (V 47 C 191)**
[East and West Steamship Co., George-town, Madras vs. S. K. Ramalingam Chettiar]
- xiv. **M/s. Air Indus vs M/s. Asia Tanning Co. on 10 December, 2002**
 In the High Court of Judicature at Madras
 Dated 10/12/2002.

Law under discussion:

- (1) The Carriage by Air (International Convention Act), 1966 [*Governing Law*],
- (2) Limitation Act, 1908. [*Limitation Law*]
- (3) Qanoon-e-Shahadat Order, 1984. [*Evidence Law*]
- (4) Contract Act, 1872.

JUDGMENT

Muhammad Faisal Kamal Alam, J:- Plaintiff has filed this suit against Defendant, *inter alia*, claiming Damages against Defendant, in respect of Cargo/goods of Plaintiff. Plaint contains the following Prayer _

“It is therefore prayed that the Honourable Court may be graciously pleased to pass a Judgment and Decree in favour of the Plaintiff and against the Defendant for a sum of U.S.\$ 6,58,650.00 with up to date mark up from filing of this Suit till the satisfaction of the Decree.”

2. Upon issuance of summons and notices, a Written Statement has been filed by Defendant, which has disputed the claim of Plaintiff.

3. From the pleadings of the parties, following Consent Issues were adopted on 02.11.1998_

- 1. Whether the suit is barred by time?*
- 2. What were the quality, quantity, weight and value of the consignment?*
- 3. Whether the Defendants discharged entire consignment of 43 bales at Melbourne and delivered only 11 bales on instruction of the consignee bank to notified person and whether such delivery was given by the defendant?*
- 4. Whether the Defendants failed to deliver 32 bales and misappropriated the same?*
- 5. Whether alleged loss of 32 bales has resulted from an act, omission and negligence of the Defendant with intent to cause damage or recklessly and knowledge?*
- 6. Whether the Plaintiff failed to make a special declaration of interest and pay additional freight. If so what is its effect?*
- 7. Whether the Plaintiff had paid for the goods and have suffered any loss. If so what amount?*
- 8. Whether the Defendants' maximum liability is limited to the rupee equivalent to US\$ 20.per kg? Or the Defendant has admitted the entire liability by offering 50% of the price of missing 32 bales?*
- 9. Whether the Plaintiff is entitled to any relief. If so what amount?*
- 10. What should the decree be?*

4. Both parties led the evidence. From the Plaintiff's side Mr. Shaikh Mehmood Sultan (husband/Attorney of Plaintiff) deposed,

whereas, Mr. Rashid Siddiqui (Manager Administration) testified on behalf of Defendant.

5. It is necessary to mention that vide order dated 31.05.1999, it was observed that C.M.A. No.8489 of 1998 preferred by the Defendant under Order VII Rule 11 of CPC, for rejection of plaint, will be heard along with the main suit. It is also reflected in the order dated 17.12.2003, that Defendant offered a payment of *ex gratia* amount of U.S. Dollar 59,180.00, which is half of the claim of Plaintiff, but was declined by the latter (Plaintiff).

6. Relevant facts of the present dispute are that Plaintiff is a sole proprietor of 'Kashmiri Carpet Weavers', which as per the averments (of plaint), was in the business of manufacturing and exporting of 'hand knotted carpet'. On receipt of an order from a buyer in Australia, Plaintiff booked the Cargo through Defendant Airline (Carrier), which transported the consignment on their flight operating from Karachi. The consignment of 43 bales of hand knotted Woolen Carpets, which is the **subject matter** of present dispute, was transported through Airway Bill No.217-5584-3686 dated 20.03.1993; destination was Melbourne / Australia and the consignee Bank was ANZ Australia, New Zealand Bank Limited. The party to be notified was Cecina Pty Ltd, 98-104, Moray Street, South Melbourne, Victoria, Australia. It is stated, so also argued by Mr. Malik Muhammad Riaz, the learned Advocate for Plaintiff, that when the entire consignment of 43 bales of carpets reached Melbourne, on the instructions of the consignee Bank, Defendant delivered on or about 18.06.1993, only 11 bales to the above referred notified party against delivery instructions for delivery of 11 bales. The remaining 32 bales remained in custody and trust of Defendant Airline for

delivery on receiving further instructions from the consignee bank but no such instructions were given. However, despite repeated requests, Defendant did not respond to Plaintiff about the delivery of remaining consignment and it was only vide their letter of 30.01.1996, that Plaintiff was informed that matter was investigated by Defendant in Melbourne but failed to inform Plaintiff about remaining consignment of 32 bales. Due to negligent acts (*as alleged*) Plaintiff suffered losses and eventually sent a Legal Notice dated 07.05.1996 through their Advocate to Defendant. Correspondences were exchanged between Plaintiff and Defendant but without any fruitful result.

7. In support of his arguments, learned counsel for Plaintiff has relied upon the case law mentioned in the opening part of this Decision.

8. Arguments heard and record perused.

9. Findings on the above Issues are as follows:

FINDINGS

ISSUE NO.1.	In Affirmative.
ISSUES NO.2 to 8	As under.
ISSUES NO.9 & 10	Suit dismissed.

REASONS

ISSUE NO.1.

10. Basic facts are not denied, that consignment of 43 bales of Carpets was consigned to ANZ Australia and New Zealand Bank Limited for carriage from Karachi to Melbourne by the Defendant under Airway Bill No.217-55843684 dated 20.03.1993 (*Paragraph-2 of Written Statement*). However, it is denied that Defendant delivered to

above named Company-*Cecina Pty Ltd* against delivery instructions of 11 bales and no further delivery of the bales was given to the consignee and or their agent or that 32 bales remained in the custody of Defendant. It is the stance of Defendant as mentioned in its Written Statement that entire consignment of 43 bales were carried by Flight No.DG-508 on 12.05.1993, on arrival at Melbourne, the same was delivered by Defendant and or their agent in its entirety to the consignees and or their agent on 18.06.1993. However, a Preliminary Objection has been raised in Written Statement, which is also the Issue No.1 that whether the present *Lis* is maintainable; in view of Rule 29 of First Schedule to Carriage by Air (International Convention Act), 1966 (the Governing Law). Since this Issue goes to the very root of the case, therefore, it is to be decided first. At the relevant time, to which the present dispute relates to, Rule 29 prescribed a time limit of two years for bringing a claim of damages. For sake of reference the said Rule is reproduced herein under_

“29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”

11. Even under the present scheme of law, viz, Carriage by Air Act, 2012, the said Rule 29 in its original form has been retained.

12. It is argued by Dr. Adeel Abid, the learned counsel for Defendant, that since Governing Law is a special law, hence, in view of Section 29 of Limitation Act (1908), its applicability is excluded.

13. Evidence is considered. Exhibit-P/4 is the reply dated 24.04.1996 of ANZ Bank to Muslim Commercial Bank Limited (MCB)

informing the latter (MCB) that documents requested are enclosed. Exhibit-P/6 produced by the Plaintiff's witness is the document **dated 18.06.1993** of ANZ Bank Australia. As per this document, 11 bales of hand knotted of Woolen Carpet from the above subject consignment was released to **Cecina Pty Ltd.**, for USD (*US Dollars*) 39,701. It means that the transaction in dispute was admittedly done on 18.06.1993 and the undisputed evidence show that it was first time questioned by the Plaintiff through the Letter dated 23.01.1996, Exhibit P/27, that too produced by the Defendant's witness, followed by reminders, which were replied to by Defendant vide correspondence of 30.01.1996, Exhibit P/28. Subsequently, Plaintiff through her counsel M/s. Mansoor Ahmed Khan and Co., sent a Notice which is exhibited as Exhibit-P/7. It was responded to vide a correspondence of 22.05.1996 (Exhibit P/9), by the counsel of present Defendant. In his cross-examination, the sole witness of Plaintiff although denied the suggestion that no correspondence took place between Plaintiff and Defendant, during the period 1993 to 1996, **but**, failed to produce any such document in support of his answer; hence, suggestion in his cross-examination could not be successfully disproved by said Plaintiff's witness.

14. It is also necessary to mention that Plaintiff's counsel has cited case law on award of damages where an opposite party has acknowledged the liability and period of limitation applicable in such case. Since, it is a settled Rule, *inter alia*, in view of Section 29 of the Limitation Law, that where a limitation is prescribed in some special law, the same will be considered to the exclusion of limitation period mentioned in the Limitation Act, 1908, (**Limitation Law**), therefore, for determination this Issue only, those Judgments will be considered cited

by both learned Advocates representing Plaintiff and Defendant, which were given on the above Rule 29 of the Governing Law.

The reported cases relied upon by Plaintiff's counsel, wherein it is held that for breach of statutory rules both a Constitutional Petition or a Civil Suit could be filed, but where there is a breach of contract or internal regulations, the plaintiff can seek damages, where even Specific Performance is barred under Section 21 of the Specific Relief Act, a consequential relief can also be awarded by Court, are not applicable to the facts of present *Lis*.

15. The first Judgment to be considered is **PIA Case (*ibid*, PLD 1976 Karachi 184)**, which is handed down by learned Division Bench of this Court and is relied upon by both Plaintiff and Defendant's Advocates. Basic facts of this reported case are that a consignment of watches was imported by respondent (*of the reported case*) but it was not delivered. Consignee was mentioned as Habib Bank Limited. Appellant-PIA offered a compensation in terms of the then Rule 22(2) of the First Schedule of Carriage by Air Act, 1934, but it was declined by respondent, who filed a suit, which was decreed and the same is reported in PLD 1967 Karachi 775-*Shaikh Muhammad Younus vs. Pakistan International Airlines Corporation*. This Judgment has also been mentioned in the list of case law relied upon by Plaintiff's counsel. The learned Division Bench although came to the conclusion about the finding of learned Trial Court in respect of willful misconduct, but considering Rule 29 of the Schedule of the erstwhile Act, which is also reproduced in the said reported judgment, claim of respondent was held to be time barred and the suit was dismissed. It is necessary to reproduce the relevant portion of the Judgment herein under_

“...In the first place, even on the assumption that the question is of limitation, the submission is contrary to the view of the Judicial Committee in V. P. R. V. Chockalingam Chetty v. Seethal Ache and others. (1). Secondly, learned counsel assumed that the question was only of limitation, but rule 29 of the rules of the schedule to the said Act reads:-

"29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

The word "extinguish" is to be found in section 28 of the Limitation Act, and the period prescribed under this rule for filing a suit is a period of prescription, which expired more than a decade ago; so I do not see how we can possibly entertain learned counsel's request.

23. In the result, I would allow appeal, set aside the judgment of the learned Single Judge and dismiss the suit of the respondent, but without any costs."

16. The second case is of **Dr. Haroon** (*ibid*), **PLD 2004 Karachi 439**, cited by Plaintiff's Advocate. It is an exhaustive Judgment in which damages was granted to plaintiff against defendant Airline. Relevant facts of this reported decision are that Plaintiff in connection with his Medical Treatment in USA had purchased Tickets for himself and his son, but were denied boarding on 14.04.1999 at the checking counter of Emirates Airlines at Quaid-e-Azam International Airport (Karachi). British Airways (*defendant No.1*) denied the liability on the ground that it issued confirmed Tickets to plaintiff (*of the reported case*) from Dubai to London and since plaintiff was denied boarding at Karachi Airport, therefore, British Airways is not liable. It is pertinent to mention here, that issue of Rule 29, that is, the prescribed limitation

period was not attracted in this reported decision, which is very much apparent from the record, as the incident complaint is of **14.04.1999** and the Suit No.530 **is of year 2000**, that is, **within one year**. In the reported decision, *inter alia*, Rule 19 of the present Governing Law was relied upon, which makes the carrier liable for damage occasioned by delay in the carriage of passenger, luggage or goods. Therefore, facts of the reported case are completely different and distinguishable from the facts of present *Lis*, therefore, this precedent does not support the stance of present Plaintiff.

The Judgment of **National Wood** case (*supra*), **(1996 MLD 1493) [Karachi]**, would not support the claim of present Plaintiff, because in the reported case, suit was filed under the Carriage of Goods by Sea Act, 1925, within one year time as prescribed for short landing of Cargo from the date of arrival of ship, and it was correctly held by this Court that claim is within time and the suit was consequently decreed.

17. Précis of the case law relied upon by Defendant's counsel is as under_

The first decision of **Kuwait Airways** (*ibid*) is carefully examined and its relevant facts are necessary to be discussed here. The respondent (of the reported case) filed a suit against the above appellant-Kuwait Airways, because according to respondent (plaintiff)-a Firm located in Sialkot, consigned surgical goods in 18 packages to the appellant for dispatch by airfreight to a consignee in Dallas, Washington USA. The Airway Bill dated 30.09.1981 was received and the Airfreight of Rs.11,414/- paid. On 01.11.1989, the appellant's agents in writing informed the respondent about the fate of the parcels and

also intimated the respondent on the telephone that the parcels in question had been delivered to the consignee. It was on 09.09.1993 that the consignee's bank informed the plaintiff/respondent that the buyer did not accept the papers regarding the consignment of 18 parcels. Respondent ultimately instituted the civil suit on **29.09.1984** against appellants and its two agents, claiming price of goods in US Dollars so also interest. Primarily the stance of respondent as mentioned in the Hon'ble Supreme Court Judgment is, that since appellant-Kuwait Airways utterly failed to discharge its obligation as carrier, hence the suit was filed. It is also necessary to mention here that the said suit was resisted by the appellant on numerous grounds but the entire decision was given on the preliminary objections relating to limitation. It was contended that the suit is time barred under the Governing Law, although the Trial Court rejected the plea of appellant and held that suit is within time, which decision was maintained in the Revision Proceeding as well. In Revision Proceeding, the reason to reject the plea of appellant with regard to Rule 29 (*supra*) has been reproduced in the reported decision, which was "*the expression 'ought to have arrived' was construed to mean final refusal of the bailee to make delivery'.*

After an exhaustive discussion, the Hon'ble Supreme Court held that_

"In the case in hand there was no extension, either explicit or implied. On the contrary, the plaintiff on his own showing had been informed as early as 01.11.1981 that the packages had reached the destination/consignee. There was

thereafter no modification, alteration or change in the position on the part of the appellant or its agents.”

Apex Court was of the view that since respondent was clearly informed on 01.11.1981 of the arrival of the goods at the destination, which date or information was not subsequently altered, therefore, the prescribed period of two years as mentioned in Rule 29 (*ibid*) will start from the above date. It is also held that since it is a prescribed limitation, therefore, right to claim damages got extinguished after lapse of two years. It would be relevant to reproduce the finding of the Hon'ble Supreme Court herein under_

“Taking an overall view of the facts of the case it is clearly established that the plaintiff was unequivocally informed on 01.11.1981 of the arrival of the Goods at the destination. On the part of the appellant there was no change in this statement of facts even upto the stage of hearing of appeal in this Court, where both the parties were allowed to file such documents as they considered necessary and in response they did file the documents to supplement their respective claims. Further, established is the fact that the consignee was informed of the arrival of goods at the destination and he refused to take delivery. He had reasons for that. The contention of the learned counsel for plaintiff-respondent that the plaintiff had certain rights over the goods, which right got interrupted only when the right of consignee started is true and borne out by rules 12 and 13 but to contend on its basis that starting point of limitation prescribed by rule 29 got extended till the refusal was communicated by the carrier is not correct. The date when “the aircraft ought to have arrived” being not in dispute in this case, the time started to run from 01.11.1981 and two years came to an end on 01.11.1983. The right to claim damages got

extinguished thereafter. The suit instituted on 29.09.1984 was time-barred. This appeal is, therefore, allowed with costs, the judgment of the two Courts is set aside and the suit of the plaintiff-respondent is dismissed as timed-barred.”

18. The second Judgment relied upon by Defendant’s counsel is coincidently of the same respondent-Thai Airways, **2000 MLD 1454-Karachi**. In this reported case, this Court has discussed the afore-referred Rule 29 of the Governing Law and the Limitation Law and has drawn a distinction between the two. The plaint filed by the plaintiff (*of the reported case*) against the respondent carrier, was rejected. It is necessary to reproduce the relevant paragraph of the decision_

“The time limit provided for filing of a suit claiming damages in a matter arising out of Act, 1966 is rule 29 and not the provisions of the Limitation Act, 1908. It is settled law that Limitation Act only extinguishes the remedy and not the right. On his own admission, plaintiff reached his final destination Tokyo on 28.07.1986. It is irrelevant how he reached Tokyo. He has not given the date when he ought to have arrived at Tokyo. Therefore, he was required to file this suit on or before 27.07.1988 which was not done. If provisions of rule 29 of the Act, 1966 are examined it extinguishes the right itself. From whatever angle it is seen the suit appears to be patently barred. Even for the sake of arguments, which will not be legally correct, the time if reckoned from the letter dated 10.04.1987 (Annexure-L), this suit was filed on 01.06.1989, two months after lapse of the two years period prescribed which again is hit by rule 29. No satisfactory or plausible explanation was offered for such delay.”

It is also held in this case that the right to compensation is coextensive with extinguishment of right.

19. In view of the above reported decisions of Hon'ble Supreme Court and of this Court, defining the scope and applicability of above Rule 29, it is not necessary to discuss foreign decisions cited by both learned Advocates for Plaintiff and Defendant. Similarly, it is not necessary to discuss other Judgments relating to the damages, period of limitation vis-à-vis acknowledgment of liability, which could have been only considered once the finding on Issue No.1 is in Negative/in favour of Plaintiff.

20. The arguments on behalf of Plaintiff, that since Defendant has offered US Dollars 59,180, being half of the claim, to Plaintiff is an acknowledgment of liability and hence the cited Judgments are applicable and period of limitation will run from that date, has no force. It is mentioned in the above order of this Court itself, that it was an *ex gratia* offer by Defendant to Plaintiff and *ex gratia* offer cannot be equated with an acknowledgment of liability.

21. The conduct of Plaintiff is somewhat questionable. The disputed delivery (of consignment) is of 18.06.1993 and for the first time it was brought up through the above Letter of 23.01.1996. When Plaintiff acquired knowledge that the entire consignment of Carpets has not been delivered to the consignee (*as claimed by plaintiff*) then why for almost three years; thirty four months and eleven days to be precise, Plaintiff kept quiet and did not raise any objection with Defendant and filed her claim within the prescribed time. In the present case, the delay in filing the claim is not of few days but it is of eleven months regarding which the Plaintiff had not led any positive evidence to justify that why the above delay beyond prescribed period should be condoned, or, the said delay in filing this *Lis*, is not hit by Rule 29 (*ibid*). Hence, Issue No.1 is answered in Affirmative.

ISSUES NO.2 TO 8.

22. In view of the above discussion, Issues No.2 to 8 are replied accordingly, that the claim of Plaintiff is barred by time. Application under Order VII Rule 11 of CPC, for rejection of plaint, is also disposed of accordingly.

ISSUES NO.9 AND 10.

23. In view of the above discussion, the present suit of Plaintiff is dismissed. However, parties are left to bear their respective costs.

JUDGE

Karachi,
Dated: 02.08.2021.

M. Javid. P.A.