

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1305 of 1998

PRESENT:**Mr. Justice Arshad Hussain Khan****JUDGMENT**

Plaintiff: Crescent Greenwood Limited,
through Mr. Ishrat Zahid Alavi, Advocate.

Defendants: Sea Land Service Inc. a Shipping Company & another,
through Mr. Siddique Shahzad, Advocate.

Date of Hg: 22.09.2016

Date of judgment: 29.09.2016

ARSHAD HUSSAIN KHAN, J., The present suit was filed by the Plaintiffs against the Defendant for Recovery of Rs.4,618,896/- with the following prayers :-

- a) *A sum of Rs.4,618,896/= with interest at 15% per annum with the quarterly rests from the date of the suit till payment.*
- b) *Cost of the suit.*
- c) *Any other further additions relief or reliefs which this Hon`ble Court may deem fit and propose in and circumstance of the case.*

2. The case of the plaintiff as averred in the plaint is that the plaintiff placed order for the import of one consignment of 365 cartons of sewing threads, to be shipped from the Port of Charleston, S.C. USA to Karachi. The said 365 cartons of sewing threads were accepted by the defendants No.1 and 2 (foreign shipping company and its local agent) on board their vessel "S.L. INTEGRITY" under a clean Bill of Lading No.796078111, Container No.IEAU-400021-3. The said consignment was shipped in full, in good order and condition for which the defendants issued their clean Bill of Lading. The said consignment was shipped on the 'S.L. INTEGRITY'. However, an obvious transshipment was taken place of the said consignment through vessel 'S.L. INTEGRITY' onto vessel 'M.V.

SEA PEARL'. This transshipment was taken place without the permission, knowledge and authority of the importers. Infact the said information was conveyed to the plaintiff when the Vessel 'M.V. Sea Pearl' was due to arrive at Karachi. The said ship arrived at Karachi Port and discharged the consignment, however, when the Plaintiff through their agents went to clear the goods the Defendants failed to deliver the consignment. The Karachi Port Trust confirmed that the consignment of the petitioner was not landed and issued their Short Landing Report dated 13.10.1997. The Plaintiff, in respect of the above said short landing of the cargo, approached the defendants and made various requests; orally as well as through telegraphic notice and legal notice dated 16.9.1998 and 28.9.1998 respectively, for settlement of its claim but the defendants failed to settle claim of the plaintiff. It is also averred in the plaint that the defendant No.2, as local agent of the owners and/or charters of the Vessel, had filed a Bond under the Customs Act, 1969 holding themselves personally liable for all claims arising out voyage of the vessel due to any damage and misappropriation of shortage or short landing of the cargo. Furthermore, the Defendants under the applicable laws were duty bound to properly and carefully load, stow, keep, carry, discharge and deliver the goods in the same good order and condition as received by the vessel for shipment. Since, the Defendants have failed to deliver the consignment, loaded on the vessel under the Bill of Lading, to the plaintiff due to the negligence, fault and/or failure on the part of the defendants in performing their statutory, contractual duties and obligation, hence the defendants are liable to make goods loss as claimed.

3. Upon notice of this case, the defendants No.1 and 2 filed their written statement wherein while denying the allegations leveled in the plaint they have averred that the defendant No.2 has wrongly been

impleaded in the suit as there is no privity of contract exists between plaintiff and the defendant No.2, and as such the instant suit is liable to be dismissed being false and misconceived. It is also averred that two shipments consisting of 365 cartons and 462 cartons of sewing threads were offered by the shippers M/s. Coats North America at the Port of Charleston SC USA for carriage to Karachi on board the vessel 'M.V. INTEGRITY' as per terms and conditions set forth in the Bill of Lading Nos. SEAU 796078111 and SEAU 796078112 both dated 21.4.1997. Furthermore, the shippers had loaded two shipments into the container under two Letters of Credit and prepared two sets of shipping documents; (i) Bill of Lading No. 796078111 (for 365 cartons) and (ii) Bill of Lading No. 796078112 (827 cartons were mentioned instead of 462 due to typographical errors). The consignments were shipped on shipper's Load Stowage and Count and on C/Y C/Y (container yard to container yard) basis. The aforesaid consignments of 462 and 365 cartons were stuffed, packed and sealed by shippers at their warehouse without participation or presence of any of the representative on behalf of vessel or its agent. Further averred that before arrival of vessel at Karachi Port notified parties/consignees were informed about arrival of vessel and were requested to take C/Y C/Y delivery of their cargo. It is also averred that on arrival of the vessel at Karachi Port the container-in-question was discharged with its seal intact. As the consignees failed and neglected to take C/Y C/Y delivery the container was de-stuffed and 827 cartons outturned from the container. Further averred that in the circumstances, the defendants are neither liable nor responsible for any alleged non-delivery of the 365 cartons or for short shipment or any error committed by the shippers.

4. Out of the pleadings of the parties the following issues were settled by the Court on 11.10.1999:-

1. *What were the contents quality, quantity, weight and value of the container in question?*
2. *Whether an error was made by the shippers in mentioning the quantity of the cartons in the container?*
3. *Whether the container in question was discharged with its seal intact? If so, what is its effect?*
4. *Whether the shortlanding certificate of KPT is an evidence of shortlanding in the circumstances of the case?*
5. *Whether any loss has occurred due to any fault or negligence of the defendants?*
6. *Whether the plaintiffs are entitled to any relief from the defendant?*

5. On 29.8.2000, this Court appointed Commission to record the evidence of the parties in the matter. The learned commissioner after completing the Commission submitted his report on 15.01.2010, which was taken on record on 18.11.2010.

6. The plaintiff in support of its case has examined two witnesses namely; (i) Mr. Imran Javed son of Javed Umer as **PW-1** and (ii) Mr. Shakeel Wahid son of Wahid Ali as **PW-2**. Whereas the defendant in support of its case has examined one witness namely; Mohammad Bilal son of Abdul Sattar as **DW-1**.

7. The plaintiff filed its evidence of witnesses through their affidavits-in-evidence as **Exh. P/1** (of PW-1) and **Exh. P/15** (of PW-2) and produced following documents:-

Sr.#	Description	Exhibit
01	Bill of Lading No.SEAU-796078111 dated 21.04.1997.	P/3
02	Commercial Invoice No.175/511 dated 21.04.1997	P/4
04	L.C. No. 907/97018 dated 07.04.1997	P/5
05	Short landing Report dated 13.10.1997 issued by the Traffic Manager KPT	P/6
06	Performa Invoice No.EX-14/97-Revised dated	P/7

	10.03.1997.	
07	Bill of Entry for Board dated 03.06.1997.	P/8
08	Letter to the Principal Officer M/s. Sea Land Shipping Agency by the plaintiff dated 16.9.1998 through Express Telegram.	P/9
09	Receipt of Express Telegram.	P/10
10	Legal Notice sent to M/s. Sea Land Shipping Agency dated 28.09.1998 by the plaintiff.	P/11
11	Acknowledgement receipt of the letter dated 28.09.1998.	P/12
12	Reply to legal notice on behalf of M/s. Sea Land Shipping Agency dated 16.10.1998	P/13
13	Authority letter dated Nil in favour of Mr. Imran Javed.	P/14

The witnesses of the Plaintiff were subsequently cross-examined by the counsel of the defendant thereafter the side of plaintiff's evidence was closed.

8. The defendant also led evidence of its witness (DW-1), through his affidavit-in-evidence as **Exh. D/1** and produced the following documents:

Sr.#	Description	Exhibit
01	Power of Attorney in favour of witness Muhammad Bilal .	D/2
02	Letter of Credit No.1-970190 dated 01.04.1997	D/3
03	Copies of Performa Invoices dated 31.05.1997 and 30.06.1997.	D/4 & D/4-1
04	Copies of two bills of lading No.SEAU 796078111 and SEAU 796078112 both dated 21.04.1997	D/5 & D/5-1
05	Letter dated 24.04.1997	D/6
06	Facsimile letter dated 03.03.1999 addressed to M/s. Sea Land	D/7
07	Letter dated 26.08.1998	D/8
08	Photocopy of Telex	D/9
09	Photocopy of Tally Sheet	D/10
10	Photocopy of Letter dated 26.08.1998	D/11
11	Photocopy of Survey Report No.1427 dated	D/12

	03.06.1997 alongwith six discharged sheets.	
12	Photocopy of legal notice addressed to M/s. Zahid & Tariq advocates .	D/13
13	Photocopies of two Invoices both dated 21.04.1997.	D/14 & D/14-1
14	Photocopy of Letter dated 01.10.1998.	D/15

The said witness of the Defendant was subsequently cross-examined by the counsel of the Plaintiff and thereafter the side of the Defendant's evidence was closed.

9. I have heard Mr. Ishrat Alavi, learned Advocate for the Plaintiff and Mr. Siddiqu Shehzad, learned Advocate for Defendant, and with their assistance also perused the material/evidence available on record.

10. The learned counsel for the plaintiff during the course of arguments besides reiterating the contents of the plaint and the affidavit-in-evidence of the plaintiff's witnesses has urged that the Plaintiff placed order, a total No. 1192 cartons (827+365), of Sewing threads to be shipped from the port of Charleston S.C. USA, to Karachi. In this regard, two sets of documents were prepared which include two Proforma Invoices, two Commercial Invoices, two Letter of Credits and two Bill of Ladings. It has also urged that the shippers had loaded two shipments into the containers under two Letters of Credit and Bill of ladings; (i) Bill of Lading No. 796078111 (for 365 cartons) and (ii) Bill of Lading No. 796078112 (827 cartons). The consignments were shipped on C/Y C/Y (container yard to container yard) basis. Further urged that upon reaching the vessel, carrying goods of the Plaintiff, at the Karachi port, the Plaintiff received goods viz., 827 cartons of sewing thread under Bill of Lading No. 796078112. However, the Defendants failed to deliver the goods of 365 cartons of sewing threads under Bill of lading 796078111. In this regard, the KPT also issued a short landing report. Further urged that the Defendants were duty bound to

properly and carefully load, stow, keep, carry, discharge and deliver the goods in the same good order and condition as received by the vessel for shipment, however, the Defendants have failed to deliver the consignment, loaded on the vessel under the Bill of Lading No. 796078111, to the plaintiff and hence failed to discharge their statutory, contractual duties and obligations and thus the defendants are liable to make goods loss as claimed. It has also urged that this fact was brought to the knowledge of the Defendant, however, the Defendants have failed to either deliver the 365 Cartons of sewing threads or settle the claim of the plaintiffs in this regard, hence having no other option, approached this court for the redressal of its grievances.

11. In rebuttal, the learned counsel for the Defendant besides reiterating contents of the written statement and affidavit-in-evidence filed on behalf of the Defendant has also argued that the plaintiffs have failed to prove their case in the evidence. Further urged that the consignments were shipped on shipper's Load Stowage and Count and on C/Y C/Y (container yard to container yard) basis. Therefore, the consignments were stuffed, packed and sealed by shippers at their warehouse without participation or presence of any of the representative on behalf of owner of the vessel or its agent, therefore, short landing, if any, can not be attributed towards the Defendants. It is also averred that on arrival of the vessel at Karachi Port the container-in-question was discharged with its seal intact. It is also urged that the vessel arrived at Karachi port on 31.05.1997 whereas the short landing report was issued on 13.10.1997 after the delay of almost 5 months, and further under the law short landing report cannot be assumed as valid evidence to justify stance of the Plaintiff and as such plaintiff's claim is not

sustain bale in law. In support of his stance in the case, the learned counsel also relied upon following case law:

- (i) 1985 CLC 1720
- (ii) PLD 1990 Karachi 156
- (iii) PLD 1992 SC 291
- (iv) 1994 CLC 1498
- (v) 1993 MLD 1841
- (vi) 1975 Karachi 647
- (vii) 1985 CLC 1720

12. I have given due consideration to the arguments advanced by the learned counsel for the parties, minutely perused the material/evidence available on record, the applicable laws and the case law on the subject.

13. Before giving any finding in respect of issues framed by this court on 11.10.1999, I would like to address the issue regarding maintainability of present suit said to have been filed by an unauthorized person and consequently requirement of Order XXIX, Rule 1 of CPC was not complied with, rather it [the said provision] was violated. This Issue though has not been framed/settled by this court while framing the issues on 11.10.1999, but taking into account various judicial pronouncements, it would be more appropriate to address this issue first as a preliminary issue, since it has been raised by the defendant in its written statement, affidavit in evidence, as well as the learned counsel for defendant has argued this issue. Besides, this issue relates to the very maintainability of the suit. In this regard reliance can be placed on the case of *Abdul Rahim v. UBL (PLD 1997 Karachi 62)* wherein the learned Division Bench of this Court, inter alia, held that an objection with regard to institution of suit can be raised either in the pleadings, or, where an additional issue is framed, or, any evidence or additional evidence is led in respect thereof, or can even be taken up by the court itself.

In view of the above my finding on the preliminary issue is as follows:

14. The defendant in para No. 13 of its written statement has stated as follows:-

“13. That the contents of paragraph 15 of the plaint are denied for want of knowledge and the plaintiffs are put to strict proof thereof. It is submitted that the suit has not been filed duly or by authorized person and it liable to be dismissed on this ground alone.”

The para No. 13 of the affidavit in evidence filed on behalf of the defendant states as under:

“13. I submit that the suit has not been filed duly or authorized persons and is liable to be dismissed on this ground alone”

15. The learned counsel for the defendant during his arguments, at the outset, has urged that the suit is incompetent as the same has been filed by an authorized person; there is nothing on record which could reflect that the person who had filed the suit on behalf of the plaintiff was in any way authorized under the law by the plaintiff, hence on this ground alone the suit is liable to be dismissed being not maintainable in law. The learned counsel in support of his arguments has placed reliance on the following case law:

(1) **2010 CLC 191***Bashir v. Haji Suleman Goawala & Sons Ltd.*

In this case, while dealing with the issue of maintainability of suit being incompetently filed, this court has held that there also had to be specific authorization to the Managing Director either from the Board or under any Article of Articles of Association to file suit on behalf of the plaintiff-Company. In the absence of authorization to file suit becomes fatal to the maintainability of the suit. The suit being filed without proper authorization is to be treated as not maintainable and liable to be dismissed on this score alone.

(2) **2010 CLC 420***Cargil Incorporated v. Trading corporation of Pakistan*

In this case, it is held by this court that resolution of the Board must be passed before institution of proceedings and not after the proceedings had been instituted, As in Razo (Pvt.) Limited case the Division Bench of this Court has held that such proceedings instituted prior to passing of such resolution cannot be ratified or "clothed with legality" by subsequent resolution. Therefore, it is held that in the eyes of law the plaint was incompetently filed. In law it is to be presumed that the plaint was never filed.

16. The record reveals that the plaintiff neither in its any of the documents nor in the affidavit in evidence nor through evidence, controverted the said plea of the defendant. On the contrary, the witness of the Plaintiff (PW.1) in his cross-examination has very candidly admitted the fact that neither board resolution nor power of attorney of the signatory has been filed either with the plaint or with the affidavit in evidence. For the sake of ready reference the relevant portion of the cross-examination in respect thereof is reproduced as under:-

“ It is correct that the plaint has been signed and verified by Mr. Nadeem Akram. It is correct that Company Board Resolution and Power of Attorney of the signatory of plaint has not been filed either alongwith the suit or with my affidavit-in-evidence.”

The record also reveals that the defendant's statement under para 13, of written statement as well as the affidavit-in-evidence[**Exh. D-1**], **which is a material part of latter's [defendant]** testimony have not been subjected to cross examination, hence, the same shall be deemed to have been admitted. It is by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination, shall be deemed to have been admitted. Reliance can be placed on the following case:

(i) *Mst. Farooq Bibi v. Abdul Khaliq and others*(1999 CLC 1358) (1361), A Supreme Court (AJ & K) wherein it has been held that:

"It is a settled principle of law that a piece of evidence or statement of witness which goes against the interest of particular party and that party does not question the correctness of that assertion or the deposition of the witness it shall be deemed to have been admitted".

(ii) *Central Bank of India v. Syed Muhammad Abdul Jalil Shah and others*(1999 CLC 671)(690)wherein it was held that:

"If a fact is asserted in Examination in Chief and is not impeached by way of cross-examination, that assertion is deemed to have been admitted by defaulting party".

(iii) *Muhammad Akhtar v. Mst. Manna and 3 others*(2001 SCMR 1700) (1706) wherein it was held that:

"Where a fact asserted by one party remains unchallenged, the same amount to admission on the part of the other party".

17. The controversy regarding initiating any legal proceedings before the competent court of law by a person not authorized through a drafted resolution in his favour by the Board of Directors of the company, cropped up before the Hon'ble Supreme Court of Pakistan in the case titled as 'Khan Iftikhar Hussain Khan of Mamdot v. Messrs Ghulam Nabi Corporation Ltd. Lahore' (PLD 1971 Supreme Court 550), wherein it was held that the suit on behalf of company by a person (Director and incharge of company) would not be competent, unless he is so authorized through resolution passed by the Board of Directors of the company, in a duly convened meeting, after giving notice to all directors. The same view was reiterated by this court in the case titled as 'Messrs Razo (Pvt.) Ltd.v. Director Karachi City Region Employees Old Age Benefit Institution and others' (2005 CLD 1208) wherein it was held that a person not duly authorized/empowered by means of the resolution of Board of Directors of Company, passed in properly convened meeting of the Board, would not be competent to institute legal proceedings in the court, on behalf of the company.

18. From the above, it is manifest that any proceedings on behalf of the corporation or company cannot be filed by a person unless duly authorized by the Board of Directors of the company through a proper drafted resolution passed in meeting of Board of Directors, duly convened for the purpose.

19. In essence, the law require that a person filing legal proceedings on behalf of the company, must be authorized by the board of directors in a duly convened meeting, according to article of association of the company,

failing which the proceedings before any court would be nullity. By now, it is settled principle of law that when the law require the doing of any thing in a particular manner, then it must be done in that manner only and all other manner of doing such an act cannot be resorted. In this respect, reliance may be placed on the case titled as 'Hakim Ali Vs Muhammad Saleem and others'(1992 SCMR 46).

20. In the present case, from the evidence as discussed above, it has been established that the person who filed the present suit did not possess the authorization from the board to act and file suit on behalf of the plaintiff. Thus, in the circumstances, and in view of judicial precedents on the point set by the Hon'ble Supreme Court as well as this court in its judgments as referred to above, I am of the opinion that the present suit is incompetently filed hence, is not maintainable under the law, accordingly dismissed, with no order as to costs.

21. In view of my above finding on the preliminary issue, no other finding is required to be made in respect of other issues.

Judge

Karachi;

Dated: 29.09.2016