

IN THE HIGH COURT OF SINDH AT KARACHI

II-Appeal No. 67 of 2019

Appellant : M/s. Baltic Shipping (PVT) Ltd,  
Through Mr. Ghulam Rasool Korai, advocate.

Respondent : Respondent No.1 Mushtaq Ahmed in person.

Date of hearing : 18<sup>th</sup> February 2020.

Date of Judgment :

**J U D G M E N T**

**Salahuddin Panhwar, J:** Through instant appeal, Appellant has challenged the concurrent findings recorded by learned 1<sup>st</sup> Senior Civil Judge, Karachi South in suit and III-Additional District Judge Karachi South in the second appeal.

2. Precisely, relevant facts are that the respondent No.1 **[plaintiff in suit]** runs trading company under the name and style of A.F. Trader duly registered hence he is a regular tax payer and having G.R.I No. 2260944, thus purchased fresh onions weighing 22950 K.Gs gross weight 23000 K.Gs from Sabzi Mandi (vegetable market) against the consideration amount of USD 2200 \$ as an advance; that on 28<sup>th</sup> May, 2011 packing list of the said fresh onions was prepared by the respondent No.1 and got weighed them from New Hazara Weigh Bridge situated at Universal Petroleum Service near New Sabzi Mandi Karachi dated 30.05.2011 at 22.28 pm; that the respondent No.1 paid above amount USD 2200 \$ through Form-E, (for Export) in the Al-Falah Bank, Cloth market Branch, Karachi in order to consign the said fresh onion to Brilliant Market Private Limited situated No.10, Changi South Street No.3 # 04-05 Tang Logistic Center Singapore-486147 through appellant **[defendant No.1 in suit]**, and paid Rs.56,000/- as freight charges to the appellant; that the goods were certified by the phytosanitary certificate vide Book No.4165, Serial No.004

dated 01.06.2011 and in addition to this Karachi International Container Terminal Limited having office at administration building berth No.26-30 Dockyard Road West Wharf Karachi issued an invoice bearing final No.2394623 drafted KI/2605461 dated 01.06.2011. The appellant issued duly sealed and signed a loading program to the respondent No.1 having cut-off date & time 1<sup>st</sup> June 2011 at 23:59 regarding consigning the said fresh onion weighing 22950 Kgs, through vessel m/v HANJIN ROME voyage No. 0900 to Singapore. The respondent No.1 assured the appellant (defendant in suit) to start the voyage within twenty hours thorough Karachi Port Trust as per custom law; that the respondent No.1 being experienced trader inquired from the appellant (defendant in suit) who kept him on false promises and hopes one after another for the said consignment the destination whereof was Singapore; that at last the respondent No.1 after passing of 9/10 days inquired from the consignee i.e. M/s. Brilliant Marketing PTE Limited, regarding receiving the said good but he was replied regarding not receiving/collecting of any goods through appellant; that in the month of June, the heat temperature in Karachi was 43 centigrade therefore the onions which have been packed for about 9/10 days and nights in the containers at the Port Qasim, left water thus the said onions were rotten; that after 9<sup>th</sup> June 2011 the onions were consigned to Singapore where the M/S. Brilliant Marketing Private Company refused from acknowledging/receiving/collecting the said rotten onions as a result of which the respondent No.1 sustained heavy losses including mental injuries; that appellant after passing 9/10 days and night issued a Bill of Lading alongwith attached list dated 9<sup>th</sup> June,2011 to the Shipper i.e. respondent No.1 regarding waiving and escaping from the responsibility of keeping the containers of onions at the Bin Qasim Port for 9/10 days and nights and causing heavy monetary loss to the respondent No.1. Thus, the respondent No.1 has prayed as under:-

- a) To pass decree to the tune of Rs.2 millions in favour of the respondent No.1 against the appellant on account of mental injuries and torture caused at the hands of appellant/defendant jointly and severally.
- b) Any other relief which court may deem fit and proper in the circumstances of the case be awarded.

c) Cost of the suit.

2. Heard learned counsel for the appellant and respondent No.1 in person.

3. At the outset, learned counsel for the appellant while referring bill of lading contends that this was not responsibility of the appellant to take care of onions which were lying in the godown and thereafter at the Port; that appellant has completed his all requisite formalities, hence, delay is not occasioned on his part; that respondent failed to issue notice of damages as well as he also failed to establish that onions were damaged. In support of his contentions he relied upon case law reported as Eastern Federal Union Insurance Company vs. American President Lines Limited [PLD 1992 Supreme Court 291].

4. The respondent no.1 opposed the appeal and stated that the concurrent findings of two courts below in his favour need no interference.

5. At the outset, it needs to be clarified that scope of the *Second Appeal* is limited one and normally the concurrent findings, so recorded, would not be open to interference unless it is, *prima facie*, established that decision of lower courts is contrary to law or that same is contrary to law or usage, having the force of law. Reference may be made to the case of Naseer Ahmed Siddique v. Aftab Alam & another PLD 2011 SC 323 wherein it is held as:-

“17. Where trial Court has, exercised its discretion in one way and that discretion has been judicially exercised on sound principles and the decree is affirmed by the appellate Court, the High Court in second appeal will not interfere with that discretion, unless same is contrary to law or usage having the force of law’

In another case of Akhtar Aziz v. Shabnam Begum 2019 SCMR 524, it is held as:-

14. ... Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower *fora*. This is not an absolute rule. The Courts cannot shut their

eyes where the lower *fora* have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon **misreading, non-reading or misinterpretation of the evidence on record**, the High Court can in second appeal reappraise the evidence and disturb the findings which are based on an incorrect interpretation of the relevant law....

6. So as to see exceptions for interfering in concurrent findings, it would be conducive to refer relevant paragraph Nos. 7 and 8 of the appellate Court's judgment, which are that:-

"7. On the other hand learned trial court while passing the impugning judgment observed that in the whole cross examination defendant No.1 has not challenged the specific plea of the plaintiff that in view of loading program dated 30.05.2011, the defendant was duty bound to sail the vessel within 24 hours' time. Learned trial court further observed that the in the whole cross examination of the plaintiff he was not alleged that the onions got rotten due to the heat wave in the month of June. Learned trial court further observed that it is the matter of record that the fresh onions of the respondent No.1/plaintiff were certified by phytosanitary certificate dated 01.06.2011 issued by the department of Plant Protection Government of Pakistan, Ministry of Food & Agriculture. It is further observed by the learned trial court that the consignment remained at Karachi Port for 9/10 days in violation of the program issued by the appellant on 30.05.2011. On the other hand learned trial court further observed that the appellant during his cross examination before it, admitted that his pleadings were silent in respect of cause of delay in arrival of ship destination and further that such delay could be caused due to several circumstances including whether.

8. As regard to the contention raised by the learned counsel for appellant that the learned trial court had failed to establish that the container was stuffed exclusively by the shipper and was set to contain and weigh on the basis of shipper load, stowed and count due to which the appellant stands clearly absolved from any liability regarding damage to the cargo. It is reappraised from the facts and record that the contention of the respondent No.1/plaintiff is not in respect of his damage cause to the amount or stuffing of the container rather the phytosanitary certificate issued by the Ministry of Food and Agriculture remained unchallenged by the appellant. However the core issue which caused damage to the respondent No.1 is delay in departure of cargo from Karachi Port in violation of its own cutoff schedule which is admitted on the part of appellant. It is further contended that according

to clause 6(3)(E) notice of the loss or damage had to be issued at the place of delivery or at the time of removal of the goods, it is observed that the rotting of the onions or the issuance of loading program had not been denied by the appellant. It is reappraised that the said loading program clearly reveals cutoff date and time 01.06.2011. On the other hand the appellant had not denied the fact that the vessel left the Karachi Port on 09.06.2011. The same is also verified by the bill of lading. Although it is mentioned on the bill of lading bearing No.KHISIN110111 that carrier is not responsible for damage to cargo due to rot, decay, quality and deterioration and / or any other loss and / or damage how so ever caused but the same is silent about any stipulation if the company does not abide by its own shipping schedule. Moreover; none of the stipulation with regard to the insurance of the cargo is present, either on the booking or bill of lading of the said cargo. Neither the said issue has been framed before trial court therefore the same could not be raised at appellate stage."

7. The findings of the trial court on issue No.2 in Civil Suit No. 1045 of 2011 are that:-

#### **"ISSUE NO.II**

This is crucial issue on which the fate of whole case depends upon. It is plea of the plaintiff that after Issuance of loading program dated 30<sup>th</sup> May, 2011 to the shipper A.F. Trader/ Plaintiff, **it was duty upon the defendant No.1 viz. Baltic Shipping Private Limited to start voyage of the cargo containing vegetables (onions) within 24 hours as cut-off date & time was mentioned as 01<sup>st</sup> June, 2011 at 23:59 for the voyage on 02<sup>nd</sup> June, 2011 in a vessel m/v HANJIN ROME.** It is specific plea of the plaintiff on which his cause of action is based that the defendant No.1 ought to have shipped the consignment within 24 hours in view of the loading program dated 30<sup>th</sup> May, 2011 which provides cut-off date and time as 01<sup>st</sup> June, 2011 at 23:59, however, owing to delay of 9/10 days cargo was carried on 09.06.2011 resultantly the water from the onions dried at the Port due to hot summer season. In this regard, plaintiff deposed through affidavit in evidence at Para No.5, as under:-

" I say that defendant No.1 issued duly sealed and signed a loading program invoice /receipt to me having cutoff date and time 01<sup>st</sup> June 2011 at' 23:59 regarding consigning the said fresh onion weighing 22950 Kgs through Vessel m/v HANJIN ROME voyage # 0900 to Singapore as the

above goods. I say that the defendant assured to me in respect of above consignment for Singapore within twenty four hours through Karachi Port Trust as per custom law because takeoff time of Shipping was confirmed on dated 01.06.2011 and I have also received schedule letter. This is a matter of record to note that I being a (an) experience trader inquired from the defendant who remained keeping me on false promise and hopes on after another for the said consignment the destination whereof was Singapore."

During course of cross examination, **the learned counsel for the defendant has not denied the loading program issued by defendant No.1** however plea was taken that same was given to the KPT / Karachi international Container Terminal by the plaintiff through defendant. **In whole cross examination defendant No.1 has not challenged the specific plea of the plaintiff that in view of loading program dated 30<sup>th</sup> May, 2011 defendant was duty bound to sail the vessel within 24 hours time.** Similarly the whole cross examination made to the plaintiff is silent to the allegations of the plaintiff that owing to heat weave in the month of June, the onions became dried at the port due to failure of the defendant No.1 to ship consignment within 24 hours. It is matter of the record that the plea of the plaintiff that the fresh onions which were certified by the phytosanitary certificate dated 01.06.2011 issued by department of plant protection Government of Pakistan, Ministry of Food & Agriculture remained at Karachi Port for 9/10 days, **in violation of loading program issued by Baltic Shipping Private Limited on 30<sup>th</sup> May, 2011.** It is settled law that specific portion piece of evidence is **not challenge in cross examination such piece of evidence is accepted as true by other side.** Since it was the crucial point of fact which has not been challenged meaning thereby such fact would be deemed to be admitted. In this regard reliance is placed upon PLD 2004 Karachi 543, 2005 CLC 83 Karachi. In view of above position **it is held that owing to inordinate delay of 9/10 days in violation of loading program issued by defendant No.1 the consignment containing perishable items viz. onion became dried/rotten.** Though it was duty of the defendant No.1 to carry out the goods for voyage in international water in given time lines of 24 hours therefore it is held that defendant No.1 failed to discharge is burden to carry out the consignment consisting upon perishable goods within prescribed time

lines. Had the 9/10 days were not wasted at the Karachi Port by defendant thereafter he may have escape his liabilities by taking plea of immunity under bill of lading if any. Therefore, the case law relied upon by the learned counsel for the defendant is distinguishable and hardly attraoted (attracted) with the facts and circumstances of present case as only plea of the plaintiff is that owing to violation of loading program and cut-off date provided therein the goods to be shipped at Singapore dried out owing to hot summer season. In rebuttal the authorized representative of the Baltic Shipping Private limited appeared. In cross examination he admitted that his pleadings are silent in respect of cause of delay in arrival of ship at destination because it depends upon several circumstances including weather. He admitted that para No.8 of written statement it is mentioned that the consignment was perished on account of hot weather at Karachi. This issue is replied accordingly.”

8. *Prima facie*, there is no denial to liability of the appellant to have followed the *loading program*. The appellant, *even*, can't deny consequences of his negligence merely by referring that *loading program* was given by the plaintiff/respondent no.1 because *loading program* once accepted by shipping company would burden it *alone* to ensure *timely* consignment thereof. It needs not be reiterated that the contract becomes binding when *offer* is made and *accepted* either *expressly* or *impliedly*. Such binding nature, *even*, does not require signing if same, *otherwise*, is established. The guidance is taken from the case of Muhammad Sattar & Ors v. Tariq Javaid and others [2017 SCMR 98] wherein it is held as:-

“10. The Courts in Pakistan, while interpreting the various provisions applicable, more particularly, sections 8 and 9 of the Contract Act, 1872, have repeatedly and consistently held that the contracts in general do not require to be reduced into writing (except where otherwise specifically provided by law) **and the offer and acceptance can also be implied from the conduct of the parties** in terms of sections 8 and 9 *ibid* and the **absence of formal signatures** does not effect the validity or enforceability of the Contract Act, 1872.

13. The aforesaid would make it clear that it is now a well settled proposition of law that for a valid contract, the same can be oral or it may be through exchange of communication between the parties. Once an offer is communicated, the acceptance thereof can be expressed or implied. Such acceptance of the offer would include accepting the

consideration accompanying the offer or acting upon the said bargain. There is no requirement of a formal signature of both or either of the parties. All that is required is an offer and acceptance and consideration between the parties.

9. It is also matter of record that there is *phytosanitary certificate* which has also not been alleged as *fabricated* hence the appellant / defendant no.1 was rightly held as responsible for timely consignment hence was rightly burdened to face the consequences of failure in discharging the burden. The findings of the learned lower court (s), hence, do not appear to have been result of any misreading or misinterpretation of law and evidences; appellant has failed to point out any illegality or irregularity in those findings. The law relied upon by the learned counsel *even* is not helpful for the appellant, hence, instant appeal is dismissed.

J U D G E