ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
Admiralty Suit No. 11 of 2018 along with
Admiralty Suit No. 13 of 2018 and along with
Suit No. 1092 of 2023

Dated:	Order with signature of Judge(s)

Admiralty Suit No.11 of 2018

1. For hearing of CMA No. 82 of 2019
2. For hearing of CMA No. 83 of 2019
3. For hearing of CMA No. 04 of 2019
4. For hearing of CMA No. 35 of 2019
5. For hearing of CMA No. 106 of 2018
6. For hearing of CMA No. 128 of 2018
7. For hearing of CMA No. 34 of 2020
8. For hearing of CMA No. 217 of 2022
9. For hearing of CMA No. 680 of 2022
10. For Ex-Parte Orders against Defendant No. 3 to 5.

Admiralty Suit No.13 of 2018

1. For hearing of CMA No. 148 of 2018
2. For hearing of CMA No. 125 of 2018
3. For hearing of CMA No. 126 of 2018
4. For hearing of CMA NO. 618 of 2022
5. For orders on CMA No. 682 of 2022
6. For orders on CMA No. 2001 of 2023
7. For Ex-Parte Orders against Defendant No. 2 to 5.

Suit No. 1092 of 2023

For hearing of CMA No. 9813 of 2023.

Date of Hearing	:	17 August 2023, 22 August 2023, 4 September 2023, 5 September 2023, 8 August 2023, 7 December 2023
Resoc International Trading (Private) Limited	:	the Plaintiff in Admiralty Suit No. 11 of 2018 and the Defendant No. 1 in in Admiralty Suit No. 13 of 2018 and who were not represented in each of those Suits and the Plaintiff in Suit No. 1092 of 2023 who were represented through **Mr. Najeeb Jamali, Advocate**
Ark Global DWC-LLC	:	the Defendant No. 1 in Admiralty Suit No. 11 of 2018 and the Defendant No. 3 in in Admiralty Suit No. 13 of 2018 and who were not represented
Mena Energy DMCC	:	The Defendant No. 4 in in Admiralty Suit No. 13 of 2018 and who were not represented

Quayside Services Enterprises	:	The Defendant No. 3 in in Admiralty Suit No. 11 of 2018 and who were not represented
The Master M.T. Ocean Princess-I	:	The Defendant No. 4 in Admiralty Suit No 11 of 2018 and the Defendant No. 5 in Suit No. 1092 of 2023 and who were represented by **Mr. Omair Nisar, Advocate**
Port Qasim Authority	:	the Defendant No. 5 in Admiralty Suit No. 11 of 2018 and the Defendant No. 6 in Suit No. 1092 of 2023 who were represented through **Mr. Zafar Adnan, Advocate**
Star Shipping Inc.	:	the Plaintiff No. 1 in Admiralty Suit No. 13 of 2018 and were represented by **Mr. Omair Nisar, Advocate**
M/s Prime Tankers LLC	:	the Plaintiff No. 2 in Admiralty Suit No. 13 of 2018 and were represented by **Mr. Omair Nisar, Advocate**
Syenergy Petrochem FZE	:	the Plaintiff No. 3 in Admiralty Suit No. 13 of 2018 and were represented by **Mr. Omair Nisar, Advocate**
Resoc International Trading DMCC	:	the Defendant No. 2 Admiralty Suit No. 13 of 2018 and who were not represented
Beneathco DMCC	:	the Defendant No. 5 Admiralty Suit No. 13 of 2018 and who were not represented
Federation of Pakistan	:	Nemo
Federal Board of Revenue	:	the Defendant No. 2 in Suit No. 1092 of 2023 and who were represented by **Mr. Khalil Dogar, Advocate**
The Collector of Customs Appraisement	:	the Defendant No. 3 in Suit No. 1092 of 2023 and who were represented by **Mr. Khalil Dogar, Advocate**
The Collector of Customs Enforcement	:	the Defendant No. 4 in Suit No. 1092 of 2023 and who were represented by **Dr. Huma Sodher, Advocate**

O R D E R

MOHAMMAD ABDUR RAHMAN, J. By this order I will be deciding CMA No. 9813 of 2023 being an application under Order XXXIX Rule (1) and (2) read with Section 151 of the Code of Civil Procedure, 1908 which has been maintained by Resoc International Trading (Private) Limited (hereinafter referred to as "Resoc Ltd.") in Suit No. 1092 of 2023 and who are seeking to restrain the release or the removing of Cargo of 992.434 MT of Bitumen Grade 60/70 and which they contend was imported into Pakistan on the M.T. Ocean Princess-I under a Bill of Lading bearing No. ZAH/BIK/KHI/001-A and on which they are nominated as the Consignee. In the course of the hearing of this application various objections were taken to the maintainability of Suit No. 1092 of 2023 and which will also be considered in this order.

2. The facts leading up to the hearing of this Application are protracted to say the least. Resoc Ltd. had by a Sale Purchase Agreement dated 12 June 2018 purchased 3000 MT of Bitumen Grade 60/70 from Ark Global DWC-LLC for an amount of US $ 1,290,000 and which were imported into Pakistan on a vessel known as the M.T. Ocean Princess-I. Shipment of that cargo was made on the basis of a Bill of Lading bearing No. ZAH/BIK/KHI/001. It is also contended that by a separate Bill of Lading bearing No. ZAH/BIK/KHI/001-A a further 992.434 MT of Bitumen Grade 60/70 was also imported into Pakistan on the same voyage of the same vessel M.T. Ocean Princess-I.

3. The entire consolidated shipment of 3,992.434 MT of Bitumen Grade 60/70 reached Port Qasim and was being discharged when, after the discharge of 1533.64 MT of Bitumen Grade 60/70, it was considered that the cargo had become contaminated and which was, midway through

the discharge, rejected by Resco Ltd. The purported contamination of the Cargo caused Resoc Ltd. to institute Admiralty Suit No. 11 of 2018 as against the sellers of the cargo seeking damages of US $ 1,290,000 for breach of contract representing the value paid on the shipment pursuant to the Sale Purchase Agreement dated 12 June 2018 of 3000 MT of Bitumen Grade 60/70 from Ark Global DWC-LLC. No claim was made in Admiralty Suit No. 11 of 2018 regarding the 992.434 MT of Bitumen Grade 60/70. To secure their claim, Resco Ltd. maintained an application for the arrest of the M.T. Ocean Princess-I and on which application orders were passed for the arrest of that vessel.

4. Star Shipping Inc., who was the owner of the vessel MT Ocean Princess-I, Prime Tankers LLC, who is the agent/manager of the vessel MT Ocean Princess-I, and Synergy Petrochem, who were the Charterers of the vessel MT Ocean Princess-I, (hereinafter collectively referred to as the “Owners of the Vessel MT Ocean Princess-I) also maintained a claim bearing Admiralty Suit No. 13 of 2018 as against Resoc Ltd., its associated concern Resoc International Trading DMCC and the original sellers of the of 3,992.434 MT of Bitumen Grade 60/70 for damages on account the losses suffered by them on account of the purported contamination of the cargo.

5. The application for arrest of the M.T. Ocean Princess-I was heard by my learned brother Junaid Ghaffar, J. and who by an order 13 November 2018 passed in Admiralty Suit No. 11 of 2018 conditionally recalled the arrest orders of the M.T. Ocean Princess-I as against the deposit by the Master of the M.T. Ocean Princess-I of solvent surety amounting to US $ 630,810 or its equivalent to the satisfaction of the Nazir of this Court. Admiralty Appeal No. 5 of 2018 was preferred as against this Order and in which Appeal an order was passed on 14 March 2019, partially modifying the order dated 13 November 2018 by reducing the

amount of the solvent surety from US $ 630,810 to “US $ 500,000 or an equivalent amount” through a bank guarantee and which was to be deposited within 15 days.

6. An issue arose as to the balance cargo that was available on the vessel i.e. as to whether the Vessel could sail with the Cargo and if not then how the Cargo was to be dealt with. The Owners of the Vessel MT Ocean Princess-I pressed this Court for a clarification and on 12 January 2022, the Court passed the following order:

> “ … *Mr. Umair Mujahid seeks clarification of order dated 13.11. 2018 that they may be allowed to said with cargo. There is absolutely no necessity to clarify an unnecessary question raised by Mr. Umair. Plaintiffs have already refused the subject cargo and in response thereto defendant was directed to execute the solvent surety as plaintiff was claiming value of cargo, not cargo. Hence it does not require any clarification.”*

Thereafter the Owners of the Vessel MT Ocean Princess-I made an attempt to sell the Cargo and which has resulted in Resoc Ltd. now instituting Suit No. 1092 of 2023 and in which interim orders have been passed on the application in hand restraining the movement of th

7. Through, Suit No. 1092 of 2023 Resoc Ltd. claim that they had purchased 992.434 MT of Bitumen Grade 60/70, which was carried by the M.T. Ocean Princess-I, and in respect of which a non-negotiable bill of lading has been issued in their favour and which according to them *prima facie,* establishes them as the owner of the 992.434 MT of Bitumen Grade 60/70 held against that Bill of Lading. It is further contended that Resoc Ltd. had file a “Goods Declaration” and has paid all duties and taxes in respect of that shipment and which further establishes their title to that cargo. They, along with declaratory and injunctive relief to that property, have sought damages of the value of the cargo to be paid in the alternative to the declaratory and injunctive relief claimed therein.

8. Mr. Najeeb Jamali who appeared on behalf of Resoc Ltd. contends that out of the total cargo of 3992.434 MT of Bitumen Grade 60/70, admittedly 1533 MT of Bitumen Grade 60/70 was discharged and 2458.78 MT of Bitumen Grade 60/70 is still lying on board the M.T. Ocean Princess-I and which is their property. They further contend that while Admiralty Suit No. 11 of 2018 had been maintained in respect of 3000 MT of Bitumen Grade 60/70 pursuant to the Bill of Lading bearing No. ZAH/BIK/KHI/001, they are also nominated as the consignee on the Bill of Lading bearing No. ZAH/BIK/KHI/001-A in respect of 992.434 MT of Bitumen Grade 60/70 and which prima facie establishes them as the owners of that portion of the Cargo and which they contend cannot be considered as part of the 1533 MT of Bitumen Grade 60/70 that was discharged and which consequentially remains on board the M.T. Ocean Princess-I. They contend that as the 992.434 MT of Bitumen Grade 60/70 is their property it can only be released to them and no one else and hence pray that Resoc Ltd. is entitled to interim injunctive relief to prevent the release of the cargo to any person other than to Resoc Ltd. He relied on the decision of the Supreme Court reported as ***M/s SAZCO (Pvt) Limited vs. Askari Commercial Bank***[1] and a decision of this Court reported as ***Cress LPG (Pvt.) Limited v. M. T. Maria III***,[2] to support his contention that the nominated consignee on a Bill of Lading should be considered to be the owner of the cargo identified on the Bill of Lading.

9. Mr. Omair Nisar, who has appeared on behalf of the owners of the Vessel M.T. Ocean Princess-I in Suit No. 1092 of 2023 and who are Plaintiffs in Admiralty Suit No. 13 of 2018 has opposed the grant of the application maintained by the Resoc Ltd. He contends that while a Bill of Lading could be evidence of title, it was not always conclusive and in certain circumstances it may well not be treated as a document of title.

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[1] 2021 CLD 157
[2] 2018 CLD 972

After relying on certain academic literature he thereafter adopted two lines of argument.

(a) The first line of argument is as to the maintainability of Suit No. 1092 of 2023 and which he argues is barred:

(i) under Article 30 and 31 of the First Schedule read with Section 3 of the Limitation Act, 1908; or

(ii) under Section 11 of the Code of Civil Procedure, 1908; or

(iii) under Order II Rule 2 of the Code of Civil Procedure, 1908

Mr. Omair Nisar has contended that issues regarding the maintainability of a suit can be raised by a court unilaterally and do not need to be premised in any application. In this regard he placed reliance on a decision of the Supreme Court of Pakistan reported as ***Noor Din vs. Additional District Judge, Lahore***,[3] two decisions of the Lahore High Court, Lahore reported as ***Gulistan Textile Mills vs. Askari Bank Ltd. and others,***[4] and ***Muhammad Isa vs. Mst. Bhagan Bibi***[5] and one decision of the Peshawar High Court reported as ***Shahzada vs. Khairullah and others***[6] and in each of which decisions it has been held that if a court at any stage comes to a conclusion that a suit is not maintainable, then the suit is liable to rejected under the provisions of Order 7 Rule 11 of the Code of Civil Procedure, 1908 and for which the Court does not require any application to precede such an order.

[3] 2014 SCMR 513
[4] PLD 2013 Lahore 716
[5] 2017 CLC Note 40
[6] 2012 CLC 773

(i) Article 31 of the First Schedule read with Section 3 of the Limitation Act, 1908

As to the period within which Suit No. 1092 of 2023, Mr. Omair Nisar has contended that Resco Ltd. has claimed damages for compensation in Suit No. 1092 of 2023. He maintains that while there are conflicting views of various courts as to interpretation of Article 31 of the First Schedule of the Limitation Act, 1908, which seem to be based on whether the goods are not delivered all together or as to whether there is a shortfall in the delivery, he contends that various emails are on record which clarify Resoc Ltd. refusing to accept delivery inter alia of the 992.434 MT of Bitumen Grade 60/70 and from which date, the time for instating a claim under that Article of the Limitation Act, time must be calculated. He contends that he on behalf of the owners of the M.T. Ocean Princess-I, issued a notice dated 3 October 2018 wherein he claimed a lien over the Cargo and which he also contends would be enough for Reosc Ltd. to have been put on notice of an adverse claim as to the ownership of the 992.434 MT of Bitumen Grade 60/70 and from which date the time, for instituting a claim under Article 31 of First Schedule read with Section 3 of the Limitation Act, 1908, must be calculated. On the various interpretations of that Article he contended that one interpretation that exists is that the period for when the suit would be barred would run from the date when the goods were to be delivered, while the second interpretation is that the period would be from the date when they delivery of the goods was refused. He contended that whichever interpretation is taken, the suit would be barred under Article 31 of the First Schedule read with Section 3 of the Limitation Act, 1908. He relied on the decisions reported as ***Messrs National Insurance Corporation vs. Trustees of the Port of Karachi***[7] and ***Pakistan***

[7] 1992 CLC 128

Railway vs. Shahid Farooq[8] to forward his contentions in this regard.

(ii) Section 11 of the Code of Civil Procedure, 1908

Regarding the maintainability of Suit No. 1092 of 2023, Mr. Omair Nisar contended that various inconsistent pleas raised by Resoc Ltd. in Admiralty Suit No. 11 of 2018 and in Suit No. 1092 of 2023 clearly rendered Suit No. 1092 of 2023 as being barred under the principles of constructive res judicata. He did not rely on any case law in support of this contention.

(iii) Order II Rule 2 of the Code of Civil Procedure, 1908

On the application of Order II Rule 2 of the Code of Civil Procedure, 1908, Mr. Omair Nisar has contended that having instituted Admiralty Suit No. 11 of 2018, the cause of action, to claim declaratory relief as to the title to the 992.434 MT of Bitumen Grade 60/70, existed at that time and which having not been claimed in that Suit, could not now be claimed in Suit No. 1092 of 2023 as such relief would be barred under the principles of Order II Rule 2 of the Code of Civil Procedure, 1908 and the Doctrine of Election. In this regard he relied on a decision of the Supreme Court of Pakistan reported as ***Mir Mujib -ur Rehman Muhammad Hassani vs. Returning Officer, PB-41 Washuk and others***[9] which clarifies the principles under which the Doctrine of Election can be invoked and states that once a party has availed one of a number of concurrent remedies available to him, the remaining concurrent remedies could thereafter not be availed by him. He also relied on a decision of the Supreme Court of Pakistan reported as ***Mian***

[8] 2006 MLD 1965
[9] PLD 2020 SC 718

Muhammad Iqbal vs. Mir Mukhtar Hussain [10] and a judgment of the Lahore High Court, Lahore reported as ***Irfan Ullah Khan vs. Province of the Punjab***[11] wherein it was held that it was incumbent on a plaintiff to maintain all claims that existed at the time of the filing of a suit in that *lis* and that a subsequent suit maintained on a claim that existed at the time of the institution of the first suit would be barred.

(b) the Second Line of Argument presented by Mr. Omair Nisar was based on estoppel. He contended that if one is to peruse the pleadings of Resoc Ltd. in Admiralty Suit No. 11 of 2018 and compare them with the pleadings made by Resoc Ltd. in Suit No. 1092 of 2023, there are contradictory statements made regarding the title of Resoc Ltd. to the 992.434 MT of Bitumen Grade 60/70 that were carried on the Vessel M.T. Ocean Princess-I inasmuch as in Admiralty Suit No. 11 of 2018 title was disavowed by Resoc Ltd. while in Suit No. 1092 of 2023 conversely title was claimed. He maintained that under Order VI Rule 1 of the Code of Civil Procedure, 1908, Resoc Ltd. could not maintain contradictory pleas in these separate proceedings and which should by itself be a basis to dismiss the application maintained by Resoc Ltd. He contended that under Section 37 and 54 of the Sales of Goods Act, 1932 once Resoc Ltd. had rejected delivery of the 992.434 MT of Bitumen Grade 60/70 the owners of the Vessel M.T. Ocean Princess-I had every right to sell that cargo and which right they had exercised under cover of his notice dated 3 October 2018 and through subsequent applications before this Court and which had incited the filing of Suit No. 1092 of 2023 to frustrate such sale and prevent the Vessel from sailing and on account of which CMA No. 9813 of 2023 has been maintained. In this regard he relied on a decision of the

[10] 1996 SCMR 1047
[11] 2020 CLC 594

Supreme Court of Pakistan reported as ***Muhammad Ghaffar vs. Arif Muhammad;***[12] to state that parties to a *lis* were bound by their pleadings and another decision of the Supreme Court of Pakistan reported as ***Ahmad Khan vs. Rasul Shah and others***[13] to state that an admission in pleadings of facts would act as an estoppel to prevent the person who made the admission from deviating from those pleadings.

10. Mr. Najeeb Jamali in response to the contentions of Mr. Omair Nisar has contended that the owners of the Vessel M.T. Ocean Princess-I had in their pleadings in Admiralty Suit No. 11 of 2018 and also in Admiralty Suit No. 13 of 2018 admitted that Resoc Ltd. were the owners of 992.434 MT of Bitumen Grade 60/70 that were on board the Vessel M.T. Ocean Princess-I and argued that once such an admission had been made the owners of the Vessel M.T. Ocean Princess-I, they could not now contend that Resoc Ltd. was not the owner of the 992.434 MT of Bitumen Grade 60/70.

11. Regarding the issue of limitation he contended that Resoc Ltd. had maintained the Suit for Declaration and Injunction and for which Article 120 of the First Schedule of the Limitation Act, 1908 and not Article 30 or 31 would be attracted. He contended that even if this Court came to the conclusion that the primary claim in Suit No. 1092 of 2023 was that of damages and not for declaration and injunction then, as there was no written agreement as between the parties identifying a specific delivery date the as held by the High Court of Dacca High Court in the decision reported as ***New Zealand Insurance Co. v M A Rouf***[14] time should start from the date of the departure of the vessel. In that decision it was clarified that :

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[12] 2023 SCMR 344
[13] PLD 1975 SC 311
[14], PLD 1962 Dacca 31

> " … *In case of non-delivery of or short delivery of goods by the carrier and the ship, time shall commence to run from the date when the goods should have been delivered, which implies the last date upto which the discharge of the undelivered goods can be expected. No discharge of the cargo can be expected after the departure of the ship from the port of discharge. Therefore, in the case of non-delivery or short delivery, time shall commence to run from the date of departure of the ship from the port of discharge".*

He contended that applying this decision, as the Vessel M.T. Ocean Princess-I has as of yet not left Port Qasim, the period of limitation has not yet started. Either way he contended that such an issue would tantamount to a mixed question of law and fact and which could not be addressed at this stage without recoding evidence.

12. Regarding the bar under Order II Rule 2 of the Code of Civil Procedure, 1908, Mr. Najeeb Jamali, contended that Admiralty Suit No. 11 of 2018 was not in respect of the 992.434 MT of Bitumen Grade 60/70, but was confined to 3000 MT of Bitumen Grade 60/70 and which had been maintained for the recovery of damages of the 3000 MT of Bitumen Grade 60/70 and not for release of any portion of the cargo. He contends that Suit No. 1092 of 2023 was a claim regarding the declaration of ownership and possession of the 992.434 MT of Bitumen Grade 60/70. He contended that a "litmus test" that was applied by Courts to ascertain as to whether the bar under Order II Rule 2 of the Code of Civil Procedure, 1908 was to see whether the prayers, cause of action and evidence is the same and if not then the second was suit is maintainable and relied on the decision reported as ***Iqbal Umer v Karachi Gymkhana***[15] he also relied on the decisions reported as ***Hoosen Brothers Limited v. S. Abdullah,***[16] ***M/s. S G Polypropylene (Pvt) Ltd v. Allied Bank Limited***[17] and ***Mubashir Hassan v Ghulam Sarfaraz***[18] in support of his contentions to interpret the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 which he contended were not attracted in such a case. He also

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[15], 2017 CLC Note 173
[16] PLD 1971 Karachi 729
[17] 2022 CLD 1494
[18] 2012 CLC 640

raised a second contention premised on a decision of the High Court of Dacca in the decision reported as ***Abdur Rahman Abdul Gani vs Mackinon Mackenzie & Co.,***[19] wherein it was held that after the delivery of goods has been made pursuant to a bill of lading, if for whatever reason the goods remain in the custody of the carrier, the carriers obligation metamorphises into an "involuntary warehouseman" or a "bailee", even if the goods still continue to remain in his custody even by reason of some fault of the consignee. On this basis he maintained that as the owners of the Vessel M.T. Ocean Princess-I attempted to sell the 992.434 MT of Bitumen Grade 60/70, such an act gave Resoc Ltd. a new cause of action to maintain Suit No. 1092 of 2023 and therefore the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 could not be pressed to reject Suit No. 1092 of 2023.

13. Regarding the final objection as to the maintainability of Suit No. 1092 of 2023 on the principles of constructive res judicata, Mr. Najeeb Jamali contended that this objection on the basis of the "findings of the order dated 13 November 2018" could not be maintained as that order was an order on an interlocutory application and no finding on merit premised on evidence has been made even in Admiralty Suit No. 11 of 2018. He further contended that the subject matter of that suit is in respect of a different cargo and in addition the parties, issues and prayers in Suit No. 1092 of 2023 are completely different than those raised in Admiralty Suit No. 11 of 2018. He concluded his arguments contending that a case for an injunction on the basis of the Resoc Ltd. prima facie title to the 992.434 MT of Bitumen Grade 60/70 had been made out and which was liable to be granted.

14. I have heard parties who have contested the application in Suit No. 1092 of 2023 and have perused the record. There are three objections

[19] PLD 1959 Dacca 961

that have been raised by Mr. Omair Nisar as to the maintainability of Suit No. 1092 of 2023, the first of which is that Suit No. 1092 of 2023 is barred under Section 3 read with either Article 30 or 31 of the First Schedule of the Limitation Act, 1908 as having been instituted after the time stipulated in the conditions mentioned in those Articles had expired. The jurisprudence that has developed on this issue is not the easiest to apply. On the facts of this case I have, prima facie, come to the conclusion that there was no date of delivery of the cargo that can with clarity be stated to have been agreed on as between the parties to this *lis* for the delivery of the cargo under either of the Bills of Lading. That being the case I found myself, on the facts of this case, inclined to follow the interpretation of Article 30 and Article 31 of the First Schedule of the Limitation Act, 1908 as held by B.Z. Kaikaus, J. in the decision reported as ***Federation of Paksitan vs, Muhammad Iqbal*** [20] wherein it was decided that:

> " … *With respect to limitation the first question is whether Article 30 or 31 of the Limitation Act is applicable. Article 30 governs a suit against a carrier for compensation for losing or injuring the goods while Article 31 applies to a suit for compensation for non-delivery. It should be apparent that the applicability of any of these Articles would depend on the cause of action, or the infringement of right which is the basis of the claim. If the basis of the suit be the act of carrier in losing the goods, Article 30 would apply and if the basis of the suit be the right of the plaintiff to delivery of goods which right has been infringed Article 31 will govern. However, when the goods have in fact been lost the question arises whether the suit would still be governed by Article 31. It is argued sometimes that as there is a specific Article applicable to a case of loss the Article applicable can only be 30. There is no warrant for such a proposition and I will presently demonstrate that it leads to an absurdity. If, though the goods have been lost the plaintiff still bases his claim on non-delivery there is no reason why Article 31 should not apply. The cause of action which the plaintiff has on account of non-delivery, is not destroyed by the loss of goods. The carrier had entered into a contract with the plaintiff for the delivery of goods and though the carrier has lost the goods, the plaintiff can still sue for the performance of that contract. It will be open to the defendant to show that he took such care of the goods as he was in law bound to take and, therefore, is discharged of liability. If we were to hold that in case of loss of goods by the carrier, Article 31 cannot apply, the result would be that without being in any way to blame the plaintiff may in some cases lose his right altogether. Suppose goods are delivered to a shipping company under an agreement that the company will deliver them, at a particular place fifteen months after the contract. The very next day the goods are lost to the company. The plaintiff knows nothing about the loss and is not in a position to know it. He files a suit for delivery after the expiry of fifteen months. Is he to be told that the goods were lost more than a year before suit and the only Article applicable being 30 his suit is time-barred? I have cited this example to show that the view that in case of loss Article 30 only can apply is untenable. However, really it is a question of substantive law whether a suit for non-delivery lies even in case of loss. For if it does lie, and there is no reason why it*

[20] PLD 1953 Lahore 460

should not, the plaintiff cannot be forced to file a suit in respect of loss. If he bases a claim on non-delivery the Article applicable must be 31.

At the same time, it is to be remembered that though, in case of loss of goods, the plaintiff may still sue for non-delivery, he is not bound to do so. He may, if it suits him, sue for loss or he may sue in the alternative on both causes of action. If the claim is based on both the alternatives, then we will apply both Articles 30 and 31. In so far as the claim is based on non-delivery, Article 31 will apply and in so far as it is based on loss, Article 30 will apply. The plaintiff need not in so many words take alternative pleas. In fact generally the plaint will state the facts and make a claim for compensation. We are concerned with the substance of the pleading and though the plaintiff does not specifically take alternative pleas we will in case of loss consider both the causes of action. If the suit be within time on either of the two bases of claim, if the facts needed for that basis be all stated and that basis be not definitely excluded by the wording of the plaint, the suit shall be within time qua that basis. But in such a case the right of the plaintiff is only to be judged with respect to that claim which is within time. That claim may be barred by some provision of substantive law and the mere existence of limitation may not avail the plaintiff.

The plaint in the present case is based on loss rather than on non-delivery. In paragraph 3 of the plaint it is distinctly stated that the railway are liable because goods have been lost by their negligence. However, there is nothing in the plaint to exclude a plea of non-delivery and as there is nothing to show that the right to delivery is barred by some other provision of law, I will consider both grounds of claim. Therefore, I will determine whether the suit is within time under either Article.

I will first consider Article 31. Learned Assistant Advocate- General argues that under this Article limitation is to be reckoned from the time when in the ordinary course goods should have reached Gujranwala Railway Station. The terminus a quo in Article 31 is the time when goods ought to have been delivered. That obviously refers to when it was according to the contract of parties the duty of the railway to deliver them. In cases governed by Article 31 the terminus a quo would depend, in the first instance, on the terms of the contract. If the time of delivery is fixed that would (in the absence of an extension) pro vide a terminus a quo. ***If no time is fixed then according to section 46 of the Contract Act, the contract has to be performed within a reasonable time and that will have to be determined with reference to the particular circumstances of each case****.*

But that is not all. Under section 63 of the Contract Act the promisee may extend time and if there is either an express grant of extension or the inference from conduct of parties and circumstances is that the promisee extended time, the breach of agreement can take place only when the extended time expires. Of course, as held in Mutthaya Maniagaran v. Lekku Raddiar and others (I L R 37 Mad. 412), time can, under section 63, be extended only with the consent of the promisor. The gist of the matter is that we have to find out by the application of the law of contract as to when a breach of the contract to deliver has been committed and that is the starting point under Article 31. We cannot even entirely exclude the case of a second breach as when the first breach is condoned and a fresh valid agreement by express words or such conduct as is capable in law of founding an agreement, comes into being. Time would in such a case run from the second breach."

I am left with nothing more than a sense of admiration for the clarity of this Judgement and which I have no hesitation in applying to the finding in this matter. If I am to accept Mr. Omair Nisar interpretation, and consider that

Article 30 or 31 and not Article 120 of the First Schedule of the Limitation Act, 1908 would apply to the determine the conditions and the time frame for institution of Suit No. 1092 of 2023, in the absence of a specific date, the determination of the time frame would to my mind have to be ascertained as against the threshold of what would be a reasonable amount of time for delivery of the cargo and which, while could be premised on the documents relied upon by Mr. Omair Nisar, being a mixed question of fact and law would even then necessarily require evidence to be led. I am therefore not inclined to accept Mr. Omair Nisar contentions that the Plaint of Suit No. 1092 of 2023 was liable to be rejected as being barred under Section 3 of the Limitation Act, 1908 at this stage and which contention can of course be raised as an issue at the time of the final hearing of the *lis*.

15. The second ground that has been raised by Mr. Omair Nisar as to the maintainability of Suit No. 1092 of 2023 is that it was barred under the principles of Construct Res Judicata as clarified in Explanation IV to Section 11 of the Code of Civil Procedure, 1908 and which read as under:

> *" … 11. No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court…*
>
> *Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit…"*

The principles of Constructive Res Judicata have been reaffirmed by the Supreme Court of Pakistan in the decision reported as ***Fecto Belarus Tractors Ltd. vs Government of Pakistan*** [21] wherein while following it's

[21] PLD 2005 SC 605

earlier decision in ***Province of Punjab vs. Ibrahim and Sons***[22] it was held that:

> *" … 26. In this context it is to be noted that this Court in the case of Province, of Punjab v. Ibrahim and Sons (2000 SCMR 1172), while examining the question of constructive res judicata in accordance with section 11, C.P.C had laid down the following five principles:--*
>
> *(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.*
>
> *(2) The former suit must have been a suit between the same parties or between parties under whom they or anyone of them claim.*
>
> *(3) The parties as aforesaid must have litigated under the same title in the former suit.*
> *(4) The Court which decided the former suit must have been a Court competent- to try the subsequent suit in which such issue is subsequently raised.*
>
> *(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit."*

To invoke the principles of Constructive Res Judicata it is therefore necessary to examine as to whether the issues involved in Suit No. 1092 of 2023 were "*directly and substantially in issue either actually or constructively"* in Admiralty Suit No. 11 of 2023. If one is to examine Admiralty Suit No. 11 of 2023, there is, as has correctly been contended by Mr. Najeeb Jamali, no mention of the cargo of 992.434 MT of Bitumen Grade 60/70, let alone a claim to be made on it. However, if one is to look at the matter in some depth, that *lis* premises itself on the rejection of the undischarged cargo 1533.64 MT of Bitumen Grade 60/70 ***as having been contaminated*** and a claim for damages in respect of only the 3000 MT of Bitument Grade 60/70 ***on what can only be considered to be logical that the "entire Cargo" of 3992.434 MT of Bitumen Grade 60/70 on board the vessel had been contaminated***. As the claim for damages is made on the entire 3000 MT of Bitument Grade 60/70 Keeping in mind that the entire cargo under both the Bills of Lading ***was not stored separately on board the Vessel***, clearly if the 3000 MT of Bitument Grade 60/70 has been rejected on account of contamination, then the 992.434 MT of Bitument Grade 60/70, if on board, must also be rejected

[22] 2000 SCMR 1172

on the same ground and that being the case the issue of Resoc Ltd. having rejected the entire cargo and consequentially their title to the 992.434 MT of Bitument Grade 60/70 clearly an issue in Suit No. 1092 of 2023 and "constructively" is an issue in Admiralty Suit No.11 of 2018. However, as has correctly been pointed out by Mr. Najeeb Jamali, there has as of yet not been any final decision on merits on this issue in Admiralty Suit No. 11 of 2018 and that being the case clearly at present the provisions of Section 11 of the Code of Civil Procedure, 1908 could not be pressed to reject the plaint of Suit No. 1092 of 2023. The argument raised by Mr. Omair Nisar that Suit No. 1092 of 2023 was barred under the principles of Constructive Res Judicata, at this stage, cannot be maintained. Needless to say, if the issue is settled and decided in Admiralty Suit No 11 of 2018 it can, if deemed appropriate, be raised again.

16. The interpretation of the principles of Order II Rule 2 of the Code of Civil Procedure, 1908 and its interaction with the Doctrine of Election and the principles of Constructive Res Judicata have also been examined by the Supreme Court of Pakistan in an order dismissing leave to appeal in the decision reported as ***Jubilee General Insurance Co. Ltd. vs. Ravi Steel Company, Lahore***[23] wherein while considering the interaction between the Doctrine of Election, the principles for applying the provisions of Order II Rule 2 of Code of Civil Procedure, 1908 and the principles for applying the provisions of constructive res judicata it was held that:

> " … *12. Even otherwise, it is by now well entrenched in our jurisprudence that where multiple remedies are available against any order judgement and or decision then it is the prerogative of the suitor to elect and pursue one out of the several hierarchy or channel of remedies. A suiter having availed and exhausted one of the several hierarchy or channel of remedy, doctrine of constructive res judicata, as discussed above debars him to adopt one after another hierarchy, course or channel of remedies. In case in hand Petitioner having challenged unsuccessfully the order of Insurance Tribunal up to this Court, then unsuccessfully availed second channel of remedy by challenging the Order of Insurance Tribunal through objection petition before the executing Court under section 47 C.P.C., which order too has attained finality and now*

[23] PLD 2020 SC 234

> *invoked third hierarchy of remedy by way of application under section 12(2) C.P.C. In somewhat similar circumstances, in the case of Trading Corporation of Pakistan (Supra). It was held in para-8 at page-833 as follows:*
>
> > *"The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, Rule 2 C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e- Shahadat Order 1984 and principles of res judicata as articulated in section 11, C.P.C. and its explanations. Doctrine of election apply both to the original proceedings/ action as well as to defenses and so also to challenge the outcome on culmination of such original proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgment/decree etc. emanating from proceedings of civil nature, which could be challenged/ defended under Order IX, rule 13 (if proceedings are ex parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96 C.P.C. (appeal against the order/ judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex -parte order/ judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequent to venture into other concurrently or coexisting available remedies."*

Keeping in mind that the order quoted above is an order for refusal of leave and is not to be treated as binding, reliance may also be placed on the decision of the Supreme Court of Pakistan reported as ***Trading Corporation of Pakistan vs. Devan Sugar Mills Limited***[24] where while examining the application of the principles of res judicata to an application moved under section 47 of the Code of Civil Procedure, 1908 after a parallel application under sub-section (2) of Section 12 of the Code of Civil Procedure, 1908 had been dismissed it was held that:

> *" … We have examined the contents of the application under section 12(2) C.P.C. which was filed on 7.12.2011, heard and decided by the executing Court on 7.8.2012 and maintained by High Court on 9.8.2016 and the one filed under section 47 C.P.C. on 14.10.2016. We have noted that facts and ground in both set of the proceedings are substantially same. The moment suitor intends to commence any legal action to enforce any right and judgment before higher forum, all aimed at seeking substantially similar if not identical relief of*

[24] PLD 2018 SC 828

> *annulment or setting aside of ex-parte order/judgment. Court generally gives such suitor choice to elect one of the many remedies concurrently invoked against one and same ex-parte order/judgment, as multiple and simultaneous proceedings may be hit by principle of res-subjudice (section 10, C.P.C.) and or where one of the proceeding is taken to its logical conclusion then other pending proceeding for the similar relief may be hit by principles of res-judicata. Giving choice to elect remedy from amongst several coexistent and or concurrent remedies does not frustrate or deny right of a person to choose any remedy, which best suits under the given circumstances but to prevent recourse to multiple or successive redressal of a singular wrong or impugned action before the competent forum/court of original and or appellate jurisdiction, such rule of prudence has been evolved by courts of law to curb multiplicity of proceedings. As long as a party does not avail of the remedy before a Court of competent jurisdiction all such remedies remain open to be invoked. Once the election is made then the party generally, cannot be allowed to hop over and shop for one after another coexistent remedies. In an illustrative case this court in the case of Mst.Fehmida Begum v. Muhammad Khalid and others (1992 SCMR 1908) encapsulated the doctrine of election as follows:*
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> > *"However, it is one thing to concede a power to the statutory forum to recall an order obtained from it by fraud, but another to hold that such power of adjudication or jurisdiction is exclusive so as to hold that a suit filed in a civil Court of general jurisdiction is barred. I am therefore in agreement with my brother that a stranger to the proceedings, in a case of this nature has two remedies open to him. He can either go to the special forum with an application to recall or review the order, or file a separate suit. Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy, unless as held in Mir Salah-ud-Din v. Qazi Zaheer-ud-Din PLD 1988 SC 221, the order passed by the hierarchy of forums under the Sindh Rented Premises Ordinance, leaves scope for approaching the Civil Court*
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> *9. In the case of Behar State Co-operative Marketing Union Ltd. v. Uma Shankar Sharan and another [(1992) 4 Supreme Court Cases 196] Indian Supreme Court confronted with somewhat identical situation as to availability of plurality of remedies under a statute in paragraph No.6 at page 199 concluded as follows:*
>
> > *"6. Validity of plural remedies, if available under the law, cannot be doubted. If any standard book on the subject is examined, it will be found that the debate is directed to the application of the principle of election, where two or more remedies are available to a person. Even if the two remedies happen to be inconsistent, they continue for the person concerned to choose from, until he elects one of them, commencing an action accordingly."*

Mr. Omair Nisar has argued that Resoc Ltd. having "elected" to institute a claim in respect of the 3000 MT of Bitument Grade 60/70 in the **Admiralty Jurisdiction** of this Court could have at that stage maintained their claim for declaration as to the title to the 992.434 MT of Bitument Grade 60/70 in that same *lis*. He contends that having that remedy available to him and which could have been raised in this Courts Admiralty jurisdiction he could not now under Section 9 of the Code of Civil Procedure, 1908 institute a suit in this Courts original jurisdiction. On this basis he contends that Suit No. 1092 of 2023 is clearly barred under the Doctrine of Election read with Order II Rule 2 of the Code of Civil Procedure, 1908. I am inclined to

agree with the argument forwarded by Mr. Omair Nisar. At the time when the purported contamination of the cargo was detected, keeping in mind that the entire 3992.434 MT of Bitument Grade 60/70 was being discharged, clearly either the 992.434 MT of Bitument Grade 60/70 had been discharged or continued to be on board the Vessel. At that time Resoc Ltd. had an option to either claim title to the 992.434 MT of Bitument Grade 60/70 or to reject it as having also been contaminated. The option that it took was to remain silent and not avail its remedy in Admiralty Suit No. 11 of 2023 and which cause in respect of their title to the 992.434 MT of Bitument Grade 60/70 could have been maintained in this Courts Admiralty Jurisdiction. Have elected not to claim on that cause, I cannot see how such a claim can now be maintained in Suit No. 1092 of 2023 and which to my mind is clearly barred under the Doctrine of Election. That being the case on this ground alone Suit No. 1092 of 2023 is liable to be rejected.

17. While very tempted, I am refraining myself from commenting on either the pleadings in Admiralty Suit No. 11 of 2018 or the pleadings in Admiralty Suit No. 13 of 2018 and the arguments raised thereon by either counsel during the hearing of CMA No. 9813 of 2023 and also on the issue of the owners of the Vessel MT Ocean Princess-I having a lien over the cargo under the provisions of Sale of Goods Act, 1932 or as to whether Resoc Ltd. could have, used the MT Ocean Princess-I as “free parking” for their cargo. Needless to say all these issues will have to be considered at a relevant time and to comment on the same may prejudice either party claim.

18. There can be no question raised as to the jurisdiction of this court, without an application being maintained, to reject a plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 if it comes to the conclusion that the *lis* is barred under any law. Reliance to this proposition was

correctly placed by Mr. Omair Nisar on the decision of the Supreme Court of Pakistan reported as ***Noor Din vs. Additional District Judge, Lahore***,[25] and two decisions of the Lahore High Court, Lahore reported as ***Gulistan Textile Mills vs. Askari Bank Ltd. and others,***[26] and ***Muhammad Isa vs. Mst. Bhagan Bibi***[27] and one decision of the Peshawar High Court reported as ***Shahzada vs. Khairullah and others***[28] and which in the case of the decisions of the Supreme Court of Pakistan I am bound to follow. For the foregoing reasons in the presence of Admiralty Suit No. 11 of 2018, Resoc Ltd. having elected to maintain that *lis*, Suit No. 1092 of 2023 and the claim maintained therein was barred under the Doctrine of Election read with Order II Rule 2 of the Code of Civil Procedure, 1908 and the principles enunciated by the Supreme Court of Pakistan in that regard as clarified hereinabove. Suit No. 1092 of 2023 is therefore rejected, along with all listed applications therein, with no order as costs. However keeping in mind the context of the litigation as between the parties, I suspend the operation of this order for a period of 10 days to allow for an appeal to be maintained if deemed appropriate.

JUDGE

Karachi dated 23 December 2023

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[25] 2014 SCMR 513
[26] PLD 2013 Lahore 716
[27] 2017 CLC Note 40
[28] 2012 CLC 773