IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.645 of 2003

Volga International Ltd. v. Shaheen Air Cargo

Plaintiff	:	Nemo
Defendant	:	Nemo
Dates of Hearing	:	20.04.2023, 10.05.2023, 30.05.2023,
Date of Decision	:	28.08.2023

J U D G M E N T

Jawad Akbar Sarwana, J.: Plaintiff, a limited liability company, has filed this suit against Defendant Shaheen Air Cargo (Pvt.) Ltd. for recovery of US$74,000 plus markup, costs, etc. Plaintiff has prayed for the following reliefs:

A) Decree the suit of the Plaintiff against the Defendant

B) Direct the Defendant to pay 74,000/- US$ or equal amount in Pak rupee and interest markup at the Bank rate till realizing of the amount

C) Cost of the suit.

D) Any other relief as this Hon'ble Court may deem fit in the circumstances of the case.

2. The brief facts of the case are that on 23.05.2003, Plaintiff filed a suit for recovery against Defendant arising out of an Agreement Deed dated 14.05.1998 executed between Plaintiff and Defendant regarding matters following the Defendant provisioning two AN-26 Aircrafts from Khazar Airlines of Turkmenistan. The purpose of the Agreement Deed appeared to be that as and when the two AN-26 Aircrafts would arrive in Pakistan, Plaintiff would be responsible to Defendant for various services associated with the operation and maintenance of the two AN-26 Aircrafts as set out under Articles 1 (Payments), Article 2 (Duties of Volga), Article 3 (Unserviceability of Aircraft) and Article 4 (Periodic Inspection of Aircraft) of the Agreement. According to the terms and conditions of payment under Article 1 of the Agreement Deed, Plaintiff would pay an Advance Guarantee Deposit to Khazar Airlines for Defendant leasing two AN-26 Aircrafts. In consideration of provisioning of Plaintiff's services as stated in the Agreement Deed, Defendant would pay Plaintiff at the rate of US$260 per block hours as Aircraft Crew Maintenance and Insurance ("ACMI") and other payments, including but not limited to payments to the Plaintiff at the rate of US$35 per block

hour for performing duties mentioned in Articles 2, 3 and 4 of the Agreement Deed.

3. On 08.07.1998, Defendant and Khazar Airlines entered into a direct agreement with each other, i.e. a separate Contract dated 08.07.1998 for leasing two AN-26 Aircrafts (hereinafter referred to as “Second Contract”). Article 6 of the Second Contract entrusted Plaintiff to be the Paymaster for all payments due and payable to Khazar Airlines under the Second Contract. Additionally, Article 6.2 described Plaintiff as an agent of Defendant and attached the Agreement Deed dated 14.05.1998 as Schedule I to the Second Contract. Article 5.2 of the Second Contract required that Defendant deposit with Khazar Airlines a Guarantee Payment of US$35,000 within ten (10) days from the date of signing of the Contract and not later than the date of transferring of the two AN-26 Aircrafts to Defendant.

4. According to Article 1.1, of the Agreement Deed, it was Plaintiff’s obligation to pay an Advance Guarantee Deposit for leasing of two AN-26 Aircraft to Khazar/Turkmenistan. Thus, upon signing of the Second Contract, Plaintiff had to arrange remittance of funds to Khazar Airlines towards the Advance Guarantee Deposit of US$35,000. On 28.05.1998, the Government of Pakistan had detonated a nuclear device in Pakistan. Following this event the State Bank of Pakistan imposed foreign exchange restrictions as well as froze USD accounts in Pakistan. As a result, Plaintiff could not remit the Advance Guarantee Deposit directly to Khazar/Turkmenistan. In the circumstances, on 20.07.1998, Plaintiff arranged and prepared a Demand Draft of Rs.2,300,000 drawn on Allied Bank of Pakistan payable to Defendant and deposited the said Demand Draft with Defendant for onward transmission to Khazar Airlines. At the time, Defendant did not appear to object to this clear change in the mode of payment agreed with Plaintiff. The Defendant (and not Plaintiff) making a direct payment to Khazar Airlines was contrary to Article 1.1 of the Agreement Deed and Article 5.2 of the Second Contract. It appears that Defendant accepted the situation and proceeded to remit the funds to Khazar Airlines. According to Defendant, the Advance Guarantee Deposit of US$35,000, and the Advance Rental of US$35,000 totaling US$70,000 remitted to Khazar Airlines comprised of Rs.2.3 million contributed by Plaintiff and Rs.1.2 million by Defendant, totalling a sum of Rs.3.50 million (equivalent to US$70,000).

5. Inspite of the above-mentioned remittances of US$70,000 by Defendant to Khazar Airlines, the delivery of the two AN-26 Aircrafts was considerably delayed. According to documents available on record, on

08.12.1998, Plaintiff fed up with the situation, notified Defendant to excuse the company from further performance of the contract and requested for return of the amount of Rs.2,300,000 to Plaintiff. On the same date, Defendant accepted Plaintiff's notice and informed Plaintiff that their request for refund would be treated as 15 days advance notice of cancellation under Article 5 of the Agreement Deed. Further, Defendant confirmed that the amount of Rs.2,300,000 would be returned to Plaintiff as and when such remittance was received from Turkmenistan Airlines. Accordingly, the Agreement Deed dated 14.05.1998 stood cancelled as of 23.12.1998.

6. Thereafter on 10.03.1999, Khazar Airlines finally delivered two AN-26 Aircrafts in Pakistan to Defendant. At the time, by virtue of the mutual cancellation of the Agreement Deed, Plaintiff was no longer acting as an agent of Defendant. After a 33-day stay of the two AN-26 Aircrafts in Pakistan, on 13.04.1999, Defendant returned the two AN-26 Aircrafts to Khazar Airlines on the grounds that the aircraft failed to meet Defendant's specifications.

7. Meanwhile, Plaintiff continued to claim from Defendant the return of the Advance Guarantee Deposit in the amount of Rs.2,300,000. Finally, on 30.05.2001, Defendant acknowledged their debt to Plaintiff in a letter addressed to The President, Chamber of Commerce and Industries ("CC&I"). According to Defendant, Khazar Airlines had agreed to reimburse the Advance Guarantee to Defendant provided that Defendant paid Khazar Airlines a sum of US$40,750 for the 33-day stay of the two AN-26 Aircrafts in Pakistan. Thereafter, the balance of US$29,250 would be refunded to Defendant. The Defendant assured the President CC&I that the sum of US$29,250 would be paid to Plaintiff. To this end, Defendant sought the help of President CC&I in recovering the amount of US$29,250 from Khazar Airlines.

8. Defendant filed their Written Statement on 11.05.2004. They contended that Plaintiff failed to fulfil its contractual obligation. They submitted Plaintiff did not perform any of its obligations under Articles 2. 3 and 4 of the Agreement Deed. Further, under Article 1 of the Agreement Deed, Plaintiff was required to remit funds directly to Khazar Airlines, including remitting the Advance Guarantee Deposit for the lease of the two AN-26 Aircrafts. Yet. instead of remitting funds to Khazar Airlines, Plaintiff deposited the money with Defendant, who eventually had to remit the same to Khazar Airlines. Defendant argued that Plaintiff did not perform their part of the bargain. They did not owe anything to Plaintiff as they had not fulfilled their obligation under the Agreement Deed. Finally the suit was barred by time and liable to be dismissed on this score too.

9. The Court settled the following issues on 07.03.2005:

1. Whether the suit is time barred?

2. Whether pursuant to agreement executed between the plaintiff and defendant, the plaintiff arranged agreement between Khuzar Airlines and Shaheen Airlines. If so, its effect.

3. Whether the plaintiff entered into any agreement with Khursheed Asif for a sum of Rs.23,00,000/- against security of cheques. If so, its effect.

4. Whether the plaintiff fulfilled all the formalities and obtain permission from the Government of Pakistan to receive aircraft in Pakistan?

5. Whether the plaintiff is entitled for return of the amount on account of the said aircraft which was not delivered?

6. Whether the plaintiff is entitled for any amount. If so, what amount?

7. What should the judgment and decree be?

10. On 31.10.2005, the Court appointed a Commissioner for Recording of Evidence. Asif Ali Khan, CEO of Plaintiff, filed his Affidavit in Evidence as “PW-1” and was cross-examined on 29.04.2006. The Plaintiff’s witness produced only photocopies of documents on the ground that the originals were filed in Court along with an application for permission to allow late filing. No originals are found in the main suit file. The Plaintiff filed photocopies only. The learned Federal Counsel objected to producing photocopies of documents before the Commissioner. Defendant filed their Affidavit in Evidence through “DW-1” Muhammad Ehteshamuddin Akhtar on 18.11.2006. He was cross-examined on 30.11.2006. During cross-examination, Defendant’s witness accepted two documents produced by Plaintiff’s witness, i.e., Plaintiff’s notice of cancellation of Agreement Deed dated 08.12.1998 (Ex. No.“O/16”) and Defendant’s acceptance of cancellation date 08.12.1998 (Ex. No.“O/17”). The Defendant’s witness produced the following documents, which were admitted by both parties, including specifically their contents:

* Exhibit No.“D-1/3” – Original Contract Agreement dated 08.07.1998 for leasing 2 AN-26 Aircraft between Khazar and Shaheen Air Cargo (Pvt.) Ltd.;

* Exhibit No.“D-1/4” – Copy of Agreement Deed dated 14.05.1998 for leasing 2 AN-26 Aircraft between Plaintiff and Shaheen Air Cargo (Pvt.) Ltd.;

* Exhibit No.“D-1/5” – Copy of Plaintiff’s notice dated 08.12.1998 to cancel Agreement Deed (= Plaintiff’s Exhibit “O/16”)

* Exhibit No.“D-1/6” – Copy of Defendant’s letter dated 08.12.1998 accepting cancellation of Agreement Deed (= Plaintiff’s Exhibit “O/17”)

* Exhibit No.“D-1/8” – Plaintiff’s acknowledgement of debt dated 30.05.2001;

11. Commissioner’s Report was taken on record by the Court on 26.02.2007, whereafter the matter was listed for final arguments. The suit was listed for final arguments in Court about 20 times. No one has appeared for anyone in this matter on the last 13 occasions of final arguments. The matter was listed before this bench for final arguments on 20.04.2023, 10.05.2023 and 30.05.2023. On the last two dates of hearing the bench issued notices to both parties, including their Counsels, by bailiff and electronic mode (Whatsapp, SMS/Text and Email); yet, none appeared and no intimation was received from anyone.

12. I have read the pleadings, material/evidence available on the record and considered the applicable law, and my findings on the above issues are as follows:

(i.) Negative.

(ii.) Negative.

(iii.) Negative.

(iv.) Affirmative.

(v.) Affirmative.

(vi.) Affirmative.

(vii.) Suit is decreed.

REASONS

Issue No. (i)

13. Plaintiff has filed suit against Defendant for recovery of US$74,000 (equivalent to Rs.4,218,000). The lis was instituted on 23.05.2003. Plaintiff’s claim as pleaded consists of Plaintiff depositing a sum of US$50,000 (equivalent to Rs.2.300,000; US$1 = Rs.46) with Khazar Airlines. Defendant challenged the maintainability of the suit in its Written Statement; hence the Court has framed an issue on the same.

14. To determine the bar of limitation, a selection of important facts to keep in mind are listed below.

- Plaintiff and Defendant executed Agreement Deed on 14.05.1998 (Ex. No.“D-1/4”).
- Plaintiff deposited a sum of Rs,2,300,000 with Defendant on 20.07.1998.
- Parties cancelled the Agreement on 08.12.1998 (Ex. Nos.“D-1/5 and “D-1/6”).
- Defendant acknowledged in writing its liability of Rs.2,300,000 vide a letter dated 30.05.2001 addressed to President, CC&I (Ex. “D-1/7”).
- Plaintiff filed suit on 23.05.2003.

15. The subject matter of the suit may attract either Articles 61 and/or 116 of the Limitation Act 1908. Under Article 61, for money payable to Plaintiff for money paid for the Defendant, the period is three years from the date when money is paid. Whereas under Article 116, for compensation for the breach of any contract, express or implied, and not specially provided for in the Limitation Act, the period is three years from when the contract is broken or when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases. Thus, generally speaking, the bar of limitation is three years. In the present case, the Plaintiff’s suit was filed on 23.05.2003. Hence, almost all the critical dates mentioned above in bullet points except the last bullet point are all dates in 1998. It would appear that as the suit was filed in 2003 if the three years period is to be calculated from 1998, then the suit became barred by time in 2001.

16. In the facts at hand, the most critical document to determine whether the suit may be saved from time bar is the Defendant’s letter dated 30.05.2001 addressed to President, CC&I (Ex. No.“D-1/7”). If the said letter constitutes an acknowledgement in writing under the Limitation Act, 1908, then the suit is within time. If not, then the suit is barred by time.

17. The relevant section dealing with the effect of an acknowledgement in writing on the bar of limitation in Section 19 of the Limitation Act, 1908, which reads as follows:

> “**Section 19.. Effect of acknowledgment in writing**. (1) Where, before the expiration of the period prescribed for a suit or application respect of any property or right, an

> acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time which the acknowledgment was so signed.
>
> (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Evidence Act. 1872 (I of 1872) oral evidence of its contents shall not be received.
>
> **Explanation I.** For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other Page 10 of 47 than the person entitled to the property or right.
>
> **Explanation II.** For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.
>
> **Explanation III.** . . . ."

18. In the Defendant's letter dated 30.05.2001 (Ex. No."D-1/7"), the Defendant acknowledged its debt/liability of Rs.2,300,000 and proposed that a sum of US$29,250 may be payable to Plaintiff provided payment of US$29,250 is received by Defendant from Khazar Airlines. The questions which arise on examination of Ex. No. "D-1/7" is whether an acknowledgement of debt given by a debtor prior to the expiry of the period of limitation extends the period of limitation. Whether a Debtor's acknowledgement in writing addressed to a third person constitute a valid acknowledgement under Section 19? Whether an acknowledgement in writing based on a settlement with a third party of a creditor's claim valid under Section 19? And, whether an acknowledgement in writing of a lesser amount than one claimed by the creditor enforceable under Section 19?

19. Several of the above-mentioned issues were addressed in the case of *Dawood Corporation v. Mst Jaisan Jasminia and 8 Others*, 1988 MLD 987. The learned Single Judge, dealing with similar facts to the ones in issue in the facts at hand, summarised Counsel's challenge and rebuttals as follows:

> "16. The next argument of Mr.Farooqi is that the claim of the respondent was not maintainable as the same had become time-barred. In this respect the learned counsel has made the following contentions. Firstly, that the cause of action accrued to the deceased respondent either in 1955 or in 1966 when the aforesaid contracts were performed, but the plaint was presented by him in the Court on 26-3-1971 and

> the period of limitation admittedly being three years, the suit was time-barred. In this respect it may be pointed out that, although, according to the respondent, the appellants had acknowledged their liability on 30-8-1968 through their letter of the same date, Ex.P/5, and consequently the same had extended the period of limitation by a further period of three years from the aforesaid date, but the argument of Mr. Farooqi in this respect is that, Ex.P/5 in the first instance, does not constitute acknowledgement as contemplated by section 19 of the Limitation Act because if at all any acknowledgment of liability was made by the appellants in this letter, the same was not an unconditional acknowledgment to pay the amount in question. . .
>
> 17. The above arguments have been vehemently opposed by Mr. Chundrigar, as according to him, it was not the letter dated 30-8-1963 (Exh.P.5) alone, on the basis of which the issue of limitation turned in favour of the respondent, but the letter dated 14-5-1969 written on behalf of the appellants to the Controller, Exchange Control Department, State Bank of Pakistan, Exh.P.4 must also be taken into consideration and when both the letters are read together, the same clearly establish an acknowledgment of liability by the appellants within the 4neaning of section 19 of the Limitation Act. . . .”

20. The learned Single Judge in *Dawood Corporation* case (supra) responded to the Counsels' above arguments as follows:

> “[W]e are not impressed by any of the contentions raised by Mr. Farooqi in this respect. Explanation (1) to section 19 il provides that:
>
> > "For the purpose of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or it appears that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or coupled with a claim to set off, or is addressed to a person other than the person entitled to the property or right."
>
> A plain reading of the words underlined by us above in the explanation clearly indicates that an acknowledgment of debt can be addressed to a person other than the creditor himself and consequently, the argument of Mr.Chundrigar that the letter addressed by the appellants to the Controller, Exchange Control Department, State Bank of Pakistan dated 14-5-1969, Exh.P.4, should be regarded as acknowledgment does not appear to be without force. In this letter which was written by A.Sattar Muhammad it has been stated as follows:-
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> > "With reference to above, we beg to inform you that State Bank of Pakistan vide sanction No.Exp-CL-1879 to 1881, dated 16-5-1966 allowed us to remit S 55,239-9-5d

> for making payment of commission on account of our exports of Textiles to Indonesia. Although this amount is payable yet the payment has not been made owing to the dispute as regards the payment of further commission on additional exports. This sum of $.55,239-9-5 with accrued interest presently amounting to Swiss p Franc 6.61,656,42 is lying in Bank in Zurich."
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> This letter when read in the light of the above explanation, in our view, clearly constitutes acknowledgment as contemplated by section 19 of the Limitation Ad as in this letter the appellants have in clear and unambiguous terms acknowledged their liability to the respondent in respect of S 55,239-9-5.“

21. Defendant has acknowledged its debt payable to Plaintiff in writing in the present case. Albeit it is predicated on a settlement figure, as per the ***Dawood Corporation*** case, it is still a valid acknowledgement. Further, even though Defendant’s letter is not addressed to Plaintiff, that is still good for constituting an acknowledgement in wiring relying on the ***Dawood Corporation*** case. Thus, in the facts and circumstances of the case, the Defendant’s acknowledgement in writing dated 30.05.2001 extended the period of limitation to 29.05.2004 under Section 19 of the Limitation Act, 1908 read with the ***Dawood Corporation*** case (supra). Therefore, the Plaintiff’s suit filed on 23.05.2005 is within time.

22. There is another aspect of issue no.(i) that merits consideration. The acknowledgement in writing mentioned in Defendant’s letter dated 30.05.2001 (Ex. No.“D-1/7”) of US$29,250 is less than Plaintiff’s claim of US$70,000 prayed for in the Plaint. In the case of ***Bans Gopal v.Mewa Ram & Others***, AIR 1930 Allahabad 461 (MANU/UP/0171/1929), the learned single Judge of the Allahabad High Court held that when there is a definite acknowledgement of debt and if this is to be used to save limitation, it could be done only with respect to the sum acknowledged, and not with respect to any sum that may be proved to be due on that date. Therefore, although Plaintiff has filed a claim of US$70,000 against Defendant, as the acknowledgement in writing of liability made out by Defendant is US$29,250, then such acknowledgement in writing will save limitation only with regard to US$29,250 only and not to the entire debt as claimed by Plaintiff in the suit.

23. In view of the above Issue no. (i) is decided in the negative and in favour of Plaintiff to the extent that Plaintiff’s claim of US$29,250 only is not barred by time.

Issue No. (ii)

24. According to the terms and conditions of the Agreement Deed executed between Plaintiff and Defendant dated 14.03.1998, Plaintiff's responsibilities to Defendant were set out under Article 1 (Payment), Article 2 (Duties of Volga), Article 3 (Unserviceability of Aircraft), and Article 4 (Periodic Inspection of Aircraft). The agreement did not mention that Plaintiff had to arrange an agreement between Khazdar Airlines and Shaheen Airlines.

25. No evidence was deposed in support of Issue No.2.

26. It was no one's case that pursuant to the Agreement Deed executed between Plaintiff and Defendant dated 14.05.1998, Plaintiff had to arrange or even that Plaintiff helped arrange the Contract Agreement dated 08.07.1998 between Khazar Airlines and Shaheen Airlines. Plaintiff alleged in its Affidavit in Evidence that Defendant had bypassed Plaintiff and approached Khazar Airlines directly. Whereas Defendant submitted that Plaintiff could not arrange the aircraft, hence they had to execute the agreement directly with Khazar Airlines.

27. In view of the above, Issue No.(ii) is decided in the negative with no consequence on Plaintiff.

Issue No. (iii)

28. Plaintiff Witness, CEO of the Plaintiff Company, alleged in his Affidavit in Evidence that Plaintiff entered into a Loan Agreement dated 20.07.1998 with one Ms. Khurshid Khan wife of Asif Ali Khan to obtain a loan to the tune of US$50,000 converted to Rs.2,300,000 to finance the payment of Rs.2,300,000 to be paid to Defendant. To this end, Plaintiff Witness produced a photocopy of the said loan agreement (Ex. "O//7") and a photocopy of this Court's Interim Order dated 08.04.1999 passed in J.M. 35 of 1998 (Ex. "O/17"). The Plaintiff did not produce the said annexures as per Articles 17 and 77 of the Qanun-e-Shahdat Order, 1984. Accordingly, the said documents were inadmissible, and no reliance may be placed upon them.

29. Before parting with this issue, it may not be out of place to mention here, and as stated during the discussion of Issue No. (i) Defendant has admitted and acknowledged that a sum of Rs.2,300,000 was received from Plaintiff by Defendant.

30. Given the above Issue No. (iii) is decided in the negative and against Plaintiff.

Issue No. (iv)

31. According to the documents produced and relied upon by Defendant, i.e. the Agreement Deed between Plaintiff and Defendant (Ex. No."D-1/4") and the Contract Agreement between Defendant and Khazar Airlines (EX. No."D-1/3"), Plaintiff was under no obligation to fulfil any formalities or obtain any permission from the Government of Pakistan to receive any aircraft in Pakistan. No such formalities or permissions are specified in Ex. Nos. "D-1/4" and "D-1/3". Even otherwise, no evidence was led by Defendant to support any such issue and/or claim of any non-compliance on the part of Plaintiff of any formalities or obtaining of any permissions from the Government of Pakistan in relation to receiving any aircrafts in Pakistan from Khazar Airlines/Turkmenistan. Therefore, as there was neither any requirement for fulfilment of any formalities by Plaintiff nor any requirement to obtain permission from the Government of Pakistan to receive aircraft in Pakistan, Issue No.(iv) is decided in the affirmative and in favour of Plaintiff.

Issue No. (v)

32. On 14.05.1998, Plaintiff and Defendant entered into an Agreement Deed on providing two AN-26 Aircrafts from Khazar Airlines of Turkmenistan (Ex. No."D-1/4"). According to Article 1.1 of the said Agreement, Plaintiff had to pay an Advance Guaranteed Deposit for leasing of two AN-26 Aircrafts to Khazar Airlines/Turkmenistan. On 08.07.1998, Defendant and Khizer Airlines entered into a Contract (Ex. No."D-1/3") which required Defendant through Plaintiff to arrange for an Advance Guarantee Payment of US$35,000 with Khizer Airlines/Turkmenistan (Article 5.2). Following the detonation of a nuclear device in Pakistan, the State Bank of Pakistan imposed foreign exchange restrictions as well as froze USD accounts in Pakistan. As a result, Plaintiff could not remit the Advance Guarantee Deposit directly to Khazar Airlines/Turkmenistan. Instead, Plaintiff arranged for funds and deposited a sum of Rs.2,300,000 with Defendant, which was equivalent to US$50,000 at the material time (July 1998) for onward remittance by Defendant to Khazar Airlines. The funds deposited by Plaintiff were not meant for Defendant. The purpose of the deposit by Plaintiff was to ensure compliance with Defendant's contractual obligations under Ex. No."DW-1/3". Although Plaintiff's Witness claimed in his testimony that Plaintiff did not perform any part of its duties mentioned in the Agreement Deed (which was

eventually cancelled by Plaintiff on 08.12.1998), yet, according to the documents produced by Defendant, Plaintiff's deposit with Defendant was utilised by Defendant to fulfil its contractual obligations with Khazar Airlines. Therefore, Defendant's witness oral evidence was contrary to his documentary evidence. In such a situation, Article 102 of the Qanun e Shahadat Order, 1984 states as follows:

> "**102. Evidence of terms of contracts, grants and other disposition of property reduced to form of document:** When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> Exception 1: . . .
>
> Exception 2: . . .
>
> Explanation 1: This Article applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.
>
> Explanation 2: Where there are more originals than one, one original only need be proved.
>
> Explanation 3: The statement, in any document whatever, of a fact other than the facts referred to in this Article, shall not preclude the admission of oral evidence as to the same fact. . . ."

33. The aforementioned Article 102 codifies the common law doctrine of "Parol Evidence Rule" which is a rule that preserves the integrity of a written document. The rule prohibits the parties from amending the meaning of the written document through the use of previous oral declarations that are not stated in the document itself. Similarly, if a party had discussed or negotiated terms of a contract, the reduction of those discussions and negotiated terms into a written document means that they had intended to integrate those oral terms into that written document which must be considered to be the receptacle of the entire agreement as between the parties. The rule has found itself to have been adopted in legal colloquial parlance in our courts by the expression "the document speaks for itself". The Supreme Court of Pakistan has succinctly clarified the rule and the exception to the rule in *Muhammad Shafi and other vs. Allah Dad Khan*, PLD 1986 SC 519, wherein it was held that:

> ". . .Before I advert to the factual aspect of the case it would be proper to resolve the legal controversy. In support of his first contention as to the inadmissibility of the oral evidence Mr. A. R. Sheikh relied on a passage in the Principles and Digest of the Law of Evidence by M. Monir at page 887 which runs as under:
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> "The Privy Council has distinctly held that in construing a document oral evidence of the intention of the parties to the document is inadmissible and that the express terms of a document cannot be contradicted by any oral evidence of the intention of the parties."
>
> (Balkishen Das vs. Legge 22 A 149 (PC) and K.S. Feroz Shah vs. Sohbat Kha etc. AIR1933 PC 178)
>
> "The general rule" says Chief Justice Tindal in Shore v. Wilson " I take to be that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plaint common meaning of the words themselves, and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument it is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument nor any party in takin under it, for the ablest advice would be controllers and the clearest title undermined if, at some future parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."
>
> It may here be said that the principle cited is applicable only where both the parties rely on the document in which case there is prohibition to admit oral evidence qua the intention of the parties to the document. . .
>
> There cannot be any cavil with this principle. But in Balikshen Das and others (supra), the Privy council while construing section 92 of the Evidence Act nevertheless said that this was subject to the provisos. In effect therefore, whether the case is one where the validity of the sale itself is in question either because of misrepresentation, fraud, mistake or failure of consideration, the evidence led is not intended to alter the terms of the documents but to prove its invalidity."

34. Therefore, applying the principles laid down by the Supreme Court in the *Muhammad Shafi* case (supra), Defendant cannot depose oral testimony that is contrary to the documents produced and relied upon by Defendant. Defendant cannot take the position that Plaintiff is not entitled to return of the amount of the Advance Guarantee Deposit as the two AN-26 Aircrafts were not delivered.

Plaintiff was not a party to the contract between Defendant and Khazar Airlines/Turkmenistan, and cannot be held responsible for its outcome, which was a different contract (Ex. No.“D-1/3”). Even otherwise, this position is contrary to the evidence brought on record by Defendant that Plaintiff was not a party to the Contract between Defendant and Khazar Airlines/Turkmenistan. Therefore, Plaintiff cannot be made to suffer for any non-performance of an obligation by a third party, such as Khazar Airlines/Turkmenistan.

35. Finally, apart from the Agreement Deed executed between Plaintiff and Defendant (Ex No.”D-1/4”), Defendant also executed with Khazar Airlines a Contract Agreement for Leasing two AN-26 Aircrafts dated 08.07.1998 (Ex. No. “D-1/3”). Clause 5.2 of the said Contract required Defendant to deposit a Guarantee Payment of US$35,000. The Defendant paid this Guarantee Payment to Khazar Airlines/Turkmenistan from funds deposited by Plaintiff. Defendant’s timely compliance with its contractual obligation for putting up the Guarantee Payment of US$35,000 was made possible by Plaintiff’s deposit of Rs.2,300,000. Therefore, Defendant benefitted from the acts of the Plaintiff, i.e. in this case, depositing of the amount of Rs.,2,300,000 with Defendant towards the Advance Payment Guarantee.

36. Section 70 of the Contract Act, 1872, states as follows:

> “**Section 70. Obligation of person enjoying benefit of non-gratuitous act**. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

37. In the facts at hand, Plaintiff has benefited under Section 70 of the Contract Act from Plaintiff’s actions. The Defendant is bound to compensate Plaintiff and return Plaintiff’s funds deposited with Defendant. Further, after the cancellation of the Agreement Deed (Ex. Nos.“D1/4”, “D-1/5” and “D-1/6”), Defendant is also obligated to return funds to Plaintiff that Defendant has utilised for its benefit. Defendant cannot hide behind its contract with Khazar Airlines/Turkmenistan (Ex. No.“D-1/3”).

38. Defendant has acknowledged its liability to Plaintiff to the extent of US$29,250 vide its letter dated 30.05.2001 (Ex. No. “D-1/7”). Defendant has already expressed its willingness to pay Plaintiff a sum of US$29,250 subject to as and when Khizer Airlines remits the same to Defendant. Defendant cannot delay payment of US$29,250 on account of failure of Khazar

Airlines/Turkmenistan not returning funds to Defendant. Defendant is bound to compensate Plaintiff as per its acknowledgment of liability.

39. Therefore, Issue No. (v) is decided in the affirmative and in favour of Plaintiff, who is entitled to recover from Defendant the Advance Guaranteed Deposit arranged by Plaintiff and deposited with Defendant for onward transfer through Defendant to Khazar Airlines pursuant to Article 1.1 of the Agreement Deed dated 14.05.1998 to the extent of US$29,250 as admitted by Defendant.

Issue No. (vi)

40. The Plaintiff has claimed interest/mark-up. However, no evidence was produced in support of the claim. Accordingly, Plaintiff has failed to prove its claim for award of mark-up from the date of non-payment.

41. Plaintiff has also prayed for the recovery of sums in United States dollars. The Supreme Court of Pakistan has held in *Sandoz Limited and Another v. Federation of Pakistan and Others*, 1995 SCMR 1431 and in *TERNI S.P.A. v. PECO (Pakistan Engineering Company Limited)*, 1992 SCMR 1431, that Courts in Pakistan can pass a judgment and decree in a foreign currency.

42. Accordingly, while this Court declines Plaintiff's claim for mark-up from the date of accrual of the cause of action till judgment, it has no hesitance to pass judgment and partly decree the suit in United States Dollars Twenty Nine Thousand Two Hundred Fifty (US$29,250) coupled with a specified simple mark up on the said US$29,250 (not on compound basis) from the date of decree till its realization. At present, banks in Pakistan are offering, at best, a 1% to 2% per month markup on US$ Dollars. The mark-up offered by banks on US Dollar deposits is much lower than what banks offer for Pakistan Rupees deposits. Accordingly, this bench, exercising its discretion under section 34 of the Civil Procedure Code, 1908, read with the judgment of the Supreme Court of Pakistan in *Raja Muhammad Sadiq and 9 Others v. WAPDA through Chairman, WAPDA House, Lahore and 3 Others*, PLD 2003 SC 290, is inclined to award a 1% per month simple markup on US$29,250 from the date of the decree till its realization.

43. Therefore, Issue No.(vi) is decided in the affirmative and in favour of Plaintiff in terms discussed herein above.

Issue No. (vii)

44. In view of the above facts, circumstances and discussion, I am of the opinion that Plaintiff has established its case for recovery against Defendant to the extent of US$29,250. As such Issue No.(vii) is decided in the affirmative, and the Suit is hereby partly decreed against Defendant to the extent of US$29,250 plus 1% per month simple markup from the date of decree till its realization.

45. The cost(s) of the Suit are also awarded to the Plaintiff. Hence, the suit is further decreed to the extent of cost(s) as well.

I had partly decreed this suit on 30.05.2023. The above are the reasons for passing judgment and for the Part Decree.

Karachi;
Dated: 28.08.2023 J U D G E