

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 826 of 1987

Messrs Mustafa Sons (Pvt) Ltd.,

Versus

The Port Qasim Authority

Plaintiff : Through Mr. Bilal A. Khawaja, Advocate for the Plaintiff.

Defendant : Through Mr. Sattar Muhammad Awan, Advocate for the Defendant.

Date of hearing : 08.08.2016

Date of Judgment : 15.08.2016

JUDGMENT

Muhammad Faisal Kamal Alam, J: The present claim is brought by Plaintiff-Messrs Mustafa Sons, a Private Limited Company against the Defendant-The Port Qasim Authority (PQA), which has been established under the Port Qasim Act, 1973, inter alia, in respect of the civil works-“**PORT OPERATING SERVICES, PACKAGE-II, CONTRACT MW-47**”, which was awarded to Plaintiff, being the lowest amongst all Tenderers/bidders. It has been averred by the Plaintiff that various impediments were created by the Defendant in the smooth completion of work awarded, which eventually resulted in irreconcilable dispute between the parties hereto and particularly when 5th and 6th running bills of Plaintiff were not fully paid, latter had issued notices of termination of the Contract. However, as per pleadings of the Plaintiff, even after termination, its claim for the work already done was not settled by the Defendant, which aggravated the grievances of Plaintiff

and resulted in filing of the present proceedings, with the prayer clause reproduced herein below :-

“It is, therefore, prayed in the interests of justice that this Hon’ble Court may be pleased to pass Judgment and Decree for a sum of Rs.13,560,438.08 together with 15% interest calculated with quarterly rests from the date of institution of the suit till such time that payment is made and costs.”

2. Notices were issued and Defendant in response thereto contested the claim of Plaintiff and while denying the allegations, inter alia, Defendant primarily blamed the Plaintiff for doing work at a slow pace and even abandonment of work site. The Defendant also alleged that it is in fact the Plaintiff which has breached the terms of the subject Contract.

3. From the pleadings of the parties, following issues were settled by the order dated 05.02.1989:

- “1. Whether the plaintiff has suffered loss of Rs.466,666.66 on account of alleged illegal suspension of the work by the defendant for the period from 15th April, 1986 to 19th May, 1986?*
- 2. Whether the 5th and 6th running bills of plaintiff were rightly rejected by the defendant as they did not contain non BOQ item?*
- 3. Whether the plaintiff claim also included the work which was not mentioned in the contract. If so what is the quantity and value of such work?*
- 4. Whether the plaintiff has suffered loss of Rs.2,66,666.66 on account of suspension of work from 5th April, 1987 to 25th April, 1987?*

If so is the plaintiff entitled to recover the same from defendant?

5. *Whether the plaintiff is entitled to various claim mentioned in para 28 of the plaint?*

6. *Whether the contact has been rightly forfeited by the defendant and the balance payment withheld by the defendant in accordance with the terms of the contract?*

7. *To what relief if any, the plaintiff is entitled?"*

4. Both sides have led their evidence and the matter was ripe for final arguments. The order dated 06.10.2015, however, observes that issue regarding maintainability of the suit is to be addressed, followed by other orders passed on different dates of hearing. Eventually on 25.02.2016, following Additional Issue was framed_

"Whether the person, namely, Rashid Khan, who has instituted the suit by signing the plaint and testified on behalf of the Plaintiff was authorized to do so in terms of Order XXIX Rule 1 of CPC.?"

5. On 09.03.2016, Mr. Rashid Khan, the Managing Director of Plaintiff, has been examined and he produced original Board Resolution, which has been exhibited as Exhibit P.W.-1/Z-1 and his testimony has been exhibited as Exhibit "Z".

6. Findings on the issues are as follows:

FINDINGS

ISSUES NO.1 to 7. : Subject to Additional Issue.

ADDITIONAL ISSUE : Suit dismissed being not maintainable.

REASONS

ADDITIONAL ISSUE

7. This is the core issue and therefore, is to be determined first.

8. Mr. Bilal A. Khawaja, learned counsel representing the Plaintiff has argued that the issue of maintainability vis-à-vis Order XXIX, Rule 1 of CPC (Civil Procedure Code, 1908) and non-filing of Board Resolution at the time of filing the instant suit, should have been taken at the first instance by the Defendant's side. He further argued that the Defendant neither in its Written Statement has specifically questioned the competency of Mr. Rashid Khan, the present Managing Director, who instituted the suit, nor any issue was earlier framed to this effect. According to Mr. Bilal A. Khawaja, the main object to raise this issue at this belated stage is nothing but to prolong the proceeding. To augment his arguments, learned counsel has cited the two reported cases; **(i)** 2004 MLD Page-1780 (Muhammad Imran Basheer Versus Associated Industries Ltd., Nowshera and another) and **(ii)** 1988 CLC Page 1381 (Messrs Mastersons through its partner Versus Messrs Ebrahim Enterprises and another), besides placing reliance on Article 51 of the Articles of Association of Plaintiff's Company, which he has filed under his Statement dated 13.02.2016. The above submissions of Plaintiff were controverted by Mr. Sattar Muhammad Awan, learned counsel representing the Defendant, who argued that this issue being purely of legal nature can be taken at any stage of the proceedings. He further argued that in view of the two leading Judgments of the Hon'ble Supreme

Court; (i) PLD 1966 Supreme Court Page-684 (Muhammad Siddiq Muhammad Umar and another Versus The Australia Bank Ltd.) and (ii) PLD 1971 Supreme Court Page-550 (Khan Iftikhar Hussain Khan of Mamdot Versus Messrs Ghulam Nabi Corporation Ltd, Lahore) [**the Mamdot case**], regarding non filing of Board Resolution in favour of the person, who has signed and verified the Plaint, are relevant.

9. It would be advantageous to reproduce the entire testimony of the above named witness: -

"I produce the Board Resolution of Plaintiff Company-M/s. Mustafa Sons (Pvt.) Limited dated 27.10.1987 as Exhibit P.W.-1/Z-1.

**CROSS TO MR. SATTAR MUHAMMAD AWAN,
ADVOCATE FOR THE DEFENDANT.**

The witness was given the case file and after seeing the plaint and affidavit-in-evidence, he stated that it is correct that factum of alleged Board Resolution dated 27.10.1987 has not been mentioned either in pleadings or affidavit-in-evidence. It is correct that on that date, that is, 27.10.1987, the Plaintiff Company had three Directors including me (P.W.-1). It is correct that for the meeting, in which the above alleged Board Resolution was passed, no prior notice was given. Voluntarily states that since all the Directors work under the same roof, therefore, usually such Board meetings are held without any formal notice. It is correct that no notice of the above meeting, in which alleged Board Resolution was passed, was ever given to the then Corporate Law Authority, which is now Securities and Exchange Commission of Pakistan. It is correct that this Board Resolution (Exhibit P.W.-1/Z-1) does not bear common seal on it (of the Plaintiff Company). He voluntarily states that this is a usual practice in Plaintiff Company that other Board Resolutions also do not have such common seal of the Company. It is incorrect to suggest that the above Board Resolution (Exhibit P.W.-1/Z-1) was prepared after I was cross examined on 10.10.1998. It is incorrect to suggest that the Board Resolution (Exhibit P.W.-1/Z-1) does not contain power to institute proceedings. It is incorrect to suggest that Plaintiff Company did not authorize me to institute the instant proceedings and to adduce evidence {on its behalf}."

10. After recording of evidence, both the learned counsel made their respective submissions, which were reiteration of their earlier stance with the only addition that learned counsel of Defendant has read the cross-examination of Mr. Rashid Khan (PW-1), the Managing Director of Plaintiff's Company, to show

that the said witness in his cross-examination has not disputed the fact that the Plaint as well as Affidavit-in-Evidence is completely silent about the aforementioned Board Resolution (Exhibit P.W.-1/Z-1). It was next argued that acknowledgment of fact by the above named witness that no prior notice of the meeting in which the above Board Resolution (alleged) was passed, even makes the aforesaid Board Resolution a doubtful document.

11. Learned counsel for the Defendant has referred to Sections 164 and 172 of the Companies Ordinance, 1984, to fortify his plea that since the above named witness has admitted that neither any prior notice of the meeting in which Board Resolution (alleged) was passed nor the alleged Board Resolution filed with the then Corporate Law Authority (which is now Securities and Exchange Commission of Pakistan), hence, Plaintiff has violated the afore referred mandatory provisions of the Companies Ordinance as well, besides, the said Board Resolution has lost its validity and, therefore, the present suit has been instituted incompetently by an unauthorized person, which is liable to be dismissed on this ground alone.

12. The above provisions of the Companies Ordinance, 1984, has been examined and I am of the considered view that Section 164 relates to non-routine resolution, whereas, the Board Resolution in question is a routine one. Similarly, Section 172 also, does not help the Defendant, as it relates to special resolutions, as defined in Section 2, Sub-Section (36) of the Companies Ordinance, 1984, inter alia, passed by not less than three-fourths of members entitled to vote, which in fact is not the issue involved in the present case.

13. The Hon'ble Supreme Court in the Mamdot case (ibid) discussed in detail while laying down the law that whether the suit was competently filed by Khursheed Mehmood who claimed to be the Director Incharge of the Respondent's Company (of the above case) against the Appellant-Khan Iftikhar Hussain Khan of Mamdot. The Hon'ble Apex Court has even considered the fact that whether the Board Meeting in which the said Resolution was passed was duly convened or not. After minutely examining the record of the case, it was held that the Meeting of 28th September, 1951, in which the Board Resolution stated to be passed, was not properly convened, as notice whereof was never served upon the Appellant (of the above case), who was one of the Directors of the Respondent at that time. In this regard, the Hon'ble Supreme Court has also referred the Halsbury's Laws of England, Third Edition, Volume 6, page 315, wherein the following statement of law is made : -

“A meeting of directors is not duly convened unless due notice has been given to all the directors, and the business put through at a meeting not duly convened is invalid. Whether or not there was a regular board meeting is immaterial for purposes of binding the company if all the shareholders consent to what is done. It is not necessary to give notice of an adjourned meeting. If no fixed notice is required, the notice must be fair and reasonable.”

14. Ultimately it was held by the Hon'ble Supreme Court in above Mamdot case that the suit of the Respondent's Company was rightly dismissed by the learned trial Judge.

15. Mr. Bilal A. Khawaja, in rebuttal, has strenuously argued that the above Mamdot case is clearly distinguishable on two

grounds; (i) there was a dispute amongst the Directors in that case, but in the instant case there is no such issue and (ii) Defendant in the present case is not aware of the internal procedure of the Plaintiff's Company, being an outsider and, therefore, the plea of Defendant that no prior notice was given to Directors of Plaintiff, is misconceived. Defendant cannot intervene in the affairs of Plaintiff Company, as the former (Defendant) is neither on latter's (Plaintiff) Board nor its shareholder.

16. The scope and applicability of Order XXIX Rule 1 of CPC, was deliberated upon in a decision handed down by the learned Division Bench of this Court reported in PLD 1997 Karachi Page-62 (Abdul Raheem Versus UBL) [**Abdul Raheem case**]. After taking into account the entire plethora of case law on the above provision, this point of law has been summarized in paragraph-37 of the above decision, the crux of which is (i) an objection with regard to institution of suit can be raised either in the pleadings, or, where an additional issue is framed and evidence is led, or, can even be taken by the Court itself, and (ii) if the Articles of Association empowers a Director or any other officer to institute and conduct the litigation, then the absence of Board Resolution is a curable defect, but if neither the Articles of Association contained any such authority, nor there is a valid Board Resolution, being duly passed in a properly convened Board Meeting, then defect is not curable and cannot be ratified subsequently.

17. Mr. Rashid Ahmed Khan (PW-1) in his cross-examination (on 10.10.1998) though has stated that he has been duly authorized to give evidence in the instant suit but at that relevant time could neither produce any Board Resolution nor

Articles of Association of Plaintiff Company. Since the issue with regard to maintainability of the suit was raised, hence it was deemed proper to frame aforementioned Additional Issue and the Plaintiff was given an opportunity to lead evidence. Appraisal of this further/additional evidence proves the objection of Defendant that the purported Board Resolution was not duly passed in a validly convened meeting, as no prior notice whereof was given to other Director(s). Justification given by said PW-1 that since all Directors' work under one roof, therefore, for holding a Board meeting no such prior notice was required, is not a tenable defence and would be violative of law settled by the above reported Judgments of Mamdot case and subsequently Abdul Raheem Case. Even otherwise, if a Board Meeting is allowed to be held without prior notice to other directors, then it would lead to a chaotic situation and it will be against the basic principle of good corporate governance, which cannot be permitted and, that is why, in Mamdot case (supra), the Hon'ble Supreme Court has discussed this very issue in detail.

18. The aforementioned case law cited by Plaintiff has also been considered and the factors weighed with the learned Courts while giving their respective decisions were that objection for non-compliance of the provision of Order XXIX Rule 1 of CPC was a belated one and Plaintiff was not given ample opportunity to lead evidence on this issue. I am of the considered view that the present case is clearly distinguishable from the above mentioned decisions relied upon by Plaintiff, inter alia, in view of the law laid down in the Mamdot case and summarized subsequently in Abdul Raheem Case (supra) as well as in another reported decision of this Court-2005 CLD Page-1208 [Razo (Pvt.) Limited Versus Director, Karachi City Region

Employees Old Age Benefit Institution and others]. Secondly, with due deference, the cited case law is not a good law in view of the principle laid down by Hon'ble Supreme Court in the Mamdot case and subsequently by a Division Bench of this Court in Abdul Raheem Case (supra). Thirdly, an Additional Issue was also framed and Plaintiff was given ample opportunity to address this very issue of maintainability by leading additional evidence, but as discussed above, the defect in instituting the suit could not be cured. With regard to Plaintiff's plea about invoking Article 51 of the Articles of Association (of Plaintiff Company), a perusal whereof shows that it relates to general powers, inter alia, of engagement and dismissal of Managers, Engineers, Technicians, Secretaries, Accountants, Assistant and all other employees, agents and distributors of the Company, but it does not specifically confers any power on any of the Directors or Officers of Plaintiff including the said PW-1, an authority to institute legal proceedings. Therefore, even the Articles of Association of Plaintiff is silent and does not empower either the said PW-1 or any other officer to institute and defend legal proceedings, as held in the afore-referred Abdul Raheem Case. At this point another reported decision of this Court would be relevant to mention, which has also been taken note of in the Abdul Raheem Case. The reported decision is 1987 CLC Page-367 (Abubakar Saley Mayet Versus Abbot Laboratories), in this case it was held, inter alia, that if a suit is instituted by an unauthorized person then it means that the Plaint is not existent for all intents and purposes.

19. The upshot of the above discussion is that Additional Issue is answered accordingly. The instant suit has not been

instituted under a valid authorization and being filed incompetently is consequently hereby dismissed.

20. Parties are left to bear their own costs.

JUDGE

M.Javid.P.A.