

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 139 of 2007

Diamond Weld Rods (Pvt) Limited

Versus

Messrs Stal Co GmbH and others

Date of hearing : 15.01.2018

Date of decision : 29.01.2018

Plaintiff

*[Diamond Weld Rods
(Pvt) Limited]*

: Through M/s. Shahanshah Hussain
and S. Arshad Ali, Advocates.

Defendant No.2

*[Messrs CIM Shipping
Incorporation]*

: Through Mr. Aga Zafar Ahmed,
Advocate.

Nemo for Defendants No.1, 3 and 4.

Case law cited by the Plaintiff's counsel

Case law relied upon by Defendant No.2 counsel

2011 PTD Page-1460

(A. P. Moller versus Taxation Officer of Income Tax)

Research Material:

Cited by Plaintiff Counsel

- (1) Legal Terms and Phrases (Judicially Defined). By M. Ilyas Khan.
- (2). Black's Law Dictionary (Eighth Edition)

Law under discussion:

- (1). The Carriage of Goods by Sea Act, 1925.

- (2). Code of Civil Procedure, 1908
[CPC]
- (3). Qanoon-e-Shahadat Order, 1984.
(Evidence Law).
- (4). The Karachi Port Trust Act, 1886.

JUDGMENT

Muhammad Faisal Kamal Alam, J: This is a suit, filed by the Plaintiff-Diamond Weld Rods (Pvt.) Limited, for recovery of Rs.49,39,445.00 (*Rupees Forty Nine Lacs Thirty Nine Thousand Four Hundred Fifty Five Only*) against the Defendants. Following relief has been sought by the Plaintiff:-

“The Plaintiff, therefore, prays as under: -

- i). Judgment and Decree for Rs.49,39,445.00 against Defendants No.1, 2 and 3 jointly and severally.*
- ii). Interest @ 20% per annum from the date of the suit till the payment of decretal amount.*
- iii). Permanent injunction restraining Defendant No.4 from remitting to Defendant No.1 an amount equal to the claim of the Plaintiff in this suit.*
- iv). Cost of the Suit.*
- v). Any other relief which this Hon’ble Court may deem fit and proper in the circumstances of the case”.*

2. After service of notice, only Defendant No.2 contested the claim of Plaintiff by filing its Written Statement. Remaining Defendants were

ordered to be proceeded exparte, by the order dated 31.03.2008, as these Defendants No.1, 3 and 4 failed to file their part of pleadings.

3. The present controversy arises out of a contract for supply of Wire Rods (*Low Carbon of Ukraine Origin*), the **[subject product]**, entered between the Plaintiff and Defendant No.1. The contract for supply of above product has been produced in evidence by the Plaintiff's witness as Exhibit-5 and is an undisputed document. Under this contract, a quantity of 1500 Metric Tons of subject product was to be shipped / supplied by the Defendant No.1 for a total sale price of US Dollars 710,179. The other details are also mentioned, *inter alia*, the payment mode, which was through an 'Irrevocable Letter of Credit', which has been produced in the evidence by the Plaintiff's witness as Exhibit P/6.

4. The grievance of Plaintiff is that due to the acts of Defendant No.2, which was acting as Local Shipping Agent, a delay was caused in unloading product from the Vessel, which resulted in incurring of demurrage and other avoidable expenses / charges. Defendant No.3 has been impleaded because the latter acted as indenter in the transaction, whereas, Defendant No.4 is the issuing Bank (*Muslim Commercial Bank*) through which the above Irrevocable Letter of Credit was opened and looking at the nature of the controversy, the Plaintiff has sought a specific injunctive relief against the said Defendant No.4 from disbursing the LC amount to Defendant No.1. The breakup of the claim of Plaintiff is that it paid Rs.1.8 Million (approximately) on account of freight and Rs.9,12,011/- (rupees nine lacs, twelve thousand and eleven only) towards unloading charges and Rs.1,36,808/- (rupees one lac, thirty six thousand, eight hundred and eight) for demurrage incurred on the Cargo, which was paid to Karachi Port Trust (KPT). It is averred in Paragraph-7 of the Plaint that on the account of unlawful demand of

Defendant No.2, the Plaintiff had to pay above amount of Rs.2.9 Million (approximately) again/twice, which the latter (Plaintiff) was not liable to pay, as freight was already prepaid. The second component of claim of Rs.20,00,000/- (Rupees Two Million Only) is towards business losses, which the Plaintiff allegedly suffered because of the delay in getting the shipment and consequently Plaintiff could not fulfill its contractual obligation in respect of third parties.

5. In their Written Statement, the Defendant No.2 has refuted the stance of Plaintiff by putting forth their case that the Defendant No.2 acted within the parameters of their legal obligation being Shipping Agent of Carrier, namely, Ocean Shell Shipping LLC (Dubai, UAE).

6. The crux of defence of Defendant No.2 is that actual Bill of Lading has been exhibited as “D/5” available at Page-80 of the evidence file, which was issued by the Carrier of the subject product on board the Vessel M.V. Soraya; the above named Ocean Shell Shipping LLC (Dubai, UAE) and not the one produced in the evidence by the Plaintiff as Exhibit P/8, on the basis of which, the Plaintiff has laid its claim against the Defendant No.2. Per learned counsel of Defendant No.2, the said Bill of Lading dated 30.10.2006 (Exhibit P/8), is not a genuine one.

7. From the pleadings of the parties, by order dated 29.09.2008, following Issues were adopted as Court Issues, which are reproduced herein below:-

“1. Whether the Defendant No.2 rightly demanded freight and unloading charges at Karachi from the Plaintiff/ultimate consignee, as the same was not prepaid by the Plaintiff or Defendant No.1 to the Defendant No.2

or its principal M/s. Ocean Shell Shipping LLC Dubai, UAE?

2. *Whether the bill of lading (Annexure “D”) to the plaint was issued by the carrier/M/s. Ocean Shell Shipping LLC Dubai, UAE?*
3. *Whether the Plaintiff was defrauded by Defendant No.1? If yes, whether the Plaintiff is entitled for any decree against Defendant No.2?*
4. *What should the Judgment and decree be?”*

8. Findings on the Issues are as follows:

FINDINGS

ISSUE NO.1.	As under.
ISSUE NO.2.	In Negative.
ISSUE NO.3.	As under.
ISSUE NO.4.	Suit partly decreed.

REASONS

9. In my considered view, the most important Issue is the Issue No.2, therefore, I deem it proper to give my finding first on the Issue No.2.

ISSUE NO.2.

10. Mr. Shahanshah Hussain along with S. Arshad Ali, the learned counsel representing the Plaintiff have vehemently argued that Exhibit-P/8, which in fact is the Annexure “D” to the Plaint (as referred to in the Issues), is the actual Bill of Lading on which it is clearly mentioned that freight has been prepaid. On the other hand, Mr. Aga Zafar Ahmed,

Advocate, who represents Defendant No.2 has disputed this position. The controversy revolves around which Bill of Lading is a genuine one; the Exhibit P/8 produced by Plaintiff's side or the Exhibit D/5 available at Page-80, which has been issued by Ocean Shell Shipping LLC (Dubai, UAE), which is the principal of present Defendant No.2-the Local Shipping Agent. Specific questions were put to the witness of Plaintiff about the Bill of Lading produced by Plaintiff. The said witness (*Qaiser Abbas Zaidi*) has acknowledged that it is not in his knowledge that the owner of the Ship M.V. Soraya has authorized the Defendant No.1 to issue the Bill of Lading on their behalf. Though the suggestion is denied that the said Exhibit-P/8 is a forged Bill of Lading but at the same time, status of present Defendant No.2 being Local Shipping Agent is not disputed, as also mentioned in the said Exhibit-D/5; the Bill of Lading produced by said Defendant No.2 in the evidence.

11. To a question, the Plaintiff's witness while deposing has admitted that the Plaintiff was defrauded by the Defendant No.1 and their claim for recovery of ocean freight is against the Defendant No.1 and not against the Defendant No.2. (*underling for emphasis*).

12. The said witness has not disputed when queried that only second Page of Exhibit-P/8-(the Bill of Lading produced by Plaintiff) is available and not the first Page. As against the above, the stance of Defendant No.2 is quite specific as mentioned in their Affidavit-in-Evidence. They have produced the Bill of Lading No.OSS-CHN-631-02 as Exhibit-D/5, issued by Ocean Shell Shipping LLC (Dubai, UAE). On this Bill of Lading, which has been issued from Dubai on 10.12.2006, it is mentioned that "freight to be collected at the destination Port". The second Page of this Bill of Lading gives further details, *inter alia*, the Port of loading is mentioned as Huangpu and the Port of discharge-

Karachi. Interestingly on this material aspect of the case, the Defendants' witness has not been cross-examined. The Defendant witness in his Affidavit-in-Evidence has also categorically stated that name of Master of the Ship M.V. Soraya was Mr. Shaikh Mohammad Anwar-ul-Alam. To support this contention, the Defendant's witness has also produced the crew list as part of Exhibit-D/3 on Page-75 of the Evidence File. Albeit, it is accepted in the cross-examination that on account of correction of name in the Bill of Lading, which is a requirement of Customs Authority of Pakistan, some delay in delivery of cargo did occur but it is also deposed by the Defendant witness that on account of nonpayment of freight charges to Defendant No.2 by Plaintiff, some delay was caused. If the above evidence is to be analyzed in the light of statutory provisions, the conclusion is that the Bill of Lading is a document, which is issued by either carrier of the Ship; either its owner or the Charterer under whose control the Vessel / Ship is operated for the time being, or, even by the Master of the Vessel (Ship). Mr. Aga Zafar Ahmed, Advocate has referred to Article III, sub-Article 3 of the Carriage of Goods By Sea Act, 1925, in support of his arguments, that the bill of lading is never issued by a shipper or a seller of goods as is done in the case of Plaintiff, as admittedly the aforementioned Exhibit P/8 is a Bill of Lading, on which the name of Defendant No.1 is mentioned. Admittedly, Defendant No.1 is the shipper / seller in the present case. Even the Dictionary meaning relied upon by the Plaintiff's side does not support the arguments. It would be advantageous to reproduce the term Bill of Lading as explained in the aforementioned two dictionaries, referred to by the Plaintiff counsel.

“**bill of lading** (layd-ing). A document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods; a

document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods. UCC 1-201(b)9G). A negotiable bill of lading is a document of title.____

A bill of lading may be regarded in three several aspects. (1) it is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document [that] contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a ‘document of title to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas.’ William R. Anson, Principles of the Law of Contract 380 (Arthur L. Corbin ed., 3rd Am. ed 1919).”

{Black’s Law Dictionary}

“**Bill of Lading** – Bill of lading is a document used in a foreign country, duly signed by ship owner or on his behalf, master or other agent stating that the goods have been shipped on a particular ship and stating the terms on which they have been delivered to and received by the ship owner.”

“A bill of lading is a receipt for goods shipped, on board a ship, signed by the person who contract to carry them, or his agent and stating the terms on which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract”. T. Muhammad & Co. Vs Federation DLR 1957 Dac. 197.

{Legal Terms and Phrases; (Judicially Defined)}

13. The conclusion of the above discussion is that the Bill of Lading Annexure “D” to the Plaint, which is Exhibit-P/8, was not issued by the carrier M/s. Ocean Shell Shipping LLC (Dubai, UAE), therefore, the Issue No.2 is answered in Negative; Annexure D/Exhibit P/8 is not a valid Bill of Lading.

ISSUE NO.1.

14. It is now a proven fact that even if Exhibit P/8 is not a forged document, still it does not fulfill the requirement of Bill of Lading and cannot be considered as such. Conversely, after appraisal of the evidence, it is the Exhibit-D/5, the Bill of Lading produced by Defendant’s witness, is a genuine one, as it fulfills the statutory requirement of a Bill of Lading. Therefore, the Plaintiff was required to pay the freight to Defendant No.2 as this Bill of Lading (*Exhibit D/5*) clearly mentions (on the said Bill of Lading) that “freight to be collected at the destination Port”.

15. This legal and factual position is further backed by the statutory position; Sections 47 and 48 of the Karachi Port Trust Act, 1886, wherein, *inter alia*, it is spelled out that goods will not be removed from the public warehouse or sheds, until the freight in respect thereof is paid either to the master or owner of the Vessel. The cited Judgment of A. P. Moller (*Supra*) by the learned counsel for Defendant No.2 also supports his arguments to the extent that unless there is an agreement to the contrary, the common law presumes that freight is payable only on delivery of goods to the consignee at the Port of discharge. In the same reported Judgment handed down by the learned Division Bench of this Court, it has been further held that the carrier has a lien on the goods shipped for freight charges and is entitled to hold them till he is paid. If the above testimony of Plaintiff’s witness is seen in the light of this legal

position, it is not difficult to hold that even if the Plaintiff had to pay demurrages to Karachi Port Trust (KPT) and other expenses to any third party, then such payments were not on account of some unlawful demand or negligent acts of Defendant No.2 and thus the present claim of Plaintiff against the Defendant No.2 does not lie. Similarly, the Defendant No.2 collected the unloading charges/discharging cost of Rs.912,011/= (Rupees Nine Lac Twelve Thousand Eleven Only) for unloading the goods/subject product, as per its entitlement. The Issue No.1 is, hence, answered accordingly, that the Defendant No.2 rightly demanded freight and unloading charges at the Port of Discharge, which is the Karachi Port, from Plaintiff / the ultimate consignee.

ISSUE NO.3.

16. The Plaintiff did not lead any evidence about the second component of its claim of Rs.2,000,000/- (Rupees Two Million Only), which has been placed under the head of business losses. Since this claim was not proved by the Plaintiff, therefore, the latter is not entitled for the same.

17. Now advertent to the demurrage, Port Charges and other expenditure, which the Plaintiff incurred and the same falls within the first component of Plaintiff's claim, viz. of Rs.2.9 Million (Rupees Twenty Nine Lacs Only). It is a matter of record that on 27.02.2007 the Defendant No.4 (Muslim Commercial Bank) was restrained from remitting an amount of Rs.1890626/- (Rupees 1.9 Million approximately) to Defendant No.1 in respect of the subject letter of credit. In due course, the said amount was deposited with the Nazir of this Court and finally this amount along with accruals which comes to Rs.2262385/- (Rupees 2.2 Million approximately) was paid to Plaintiff

by the Nazir of this Court vide a Cheque No.53450085 dated 11.12.2017, in terms of the order dated 29.11.2017. For all intent and purpose, the actual amount for which the present proceeding has been filed, has already been reimbursed to the Plaintiff. Secondly, it has already been held hereinabove that Plaintiff was never defrauded by Defendant No.2 (M/s. CIM Shipping and Corporation), therefore, the latter (Defendant No.2) is not liable to pay any amount to Plaintiff and the freight as well as the unloading and other miscellaneous charges, which the Defendant No.2 has recovered, it was entitled for the same. Thirdly, about the three receipts of Karachi Port Trust, which has been exhibited as P/14, P/15 and P/17, by the Plaintiff's witness, though are undisputed documents under which an amount of Rs.1,36,808/- was paid by Plaintiff to Karachi Port Trust, but such expenditure was not accrued for any of the acts of omission or commission of Defendant No.2, hence payments made to Karachi Port Trust are not recoverable from Defendant No.2, in view of the discussion in the foregoing paragraphs. The Plaintiff's witness has further testified that the Plaintiff was defrauded by Defendant No.1 and obviously in these circumstances and in view of this clear admission, Plaintiff would have had a claim against Defendant No.1 (Messrs Stal Co GmbH and others), but, since no evidence was led by Plaintiff about the purported business losses, therefore, even to this extent, no damages can be awarded in favour of Plaintiff against Defendant No.1. Hence, Issue No.3 is answered Accordingly.

ISSUE NO.4.

18. The grievance of Plaintiff even against Defendant No.1 (seller/shipper) already stood addressed when the Plaintiff got back the afore referred freight amount by way of the afore mentioned Order.

Thus, Prayer clause (i) has already been partly granted, *whereas*, prayer clause (iii) seeking permanent injunction against Defendant MCB was earlier granted in favour of Plaintiff by the Order of 27.2.2007, *inter alia*, when said Defendant MCB was restrained from remitting a portion of the amount in respect of the Letter of Credit in question to Defendant No.1, and was later paid with accruals to Plaintiff as discussed above. Consequently, this suit is partly decreed in view of the above, but, it is dismissed against the Defendants No.2 and 3.

19. Parties to bear their own costs.

Karachi.

Dated : 29.01.2018

M.Javid.P.A.

JUDGE