

**ORDER SHEET
HIGH COURT OF SINDH AT KARACHI**

Admiralty Appeal No. 05 of 2014

DATE	ORDER WITH SIGNATURE(S) OF JUDGE(S)
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Before:-

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Agha Faisal

Sajid Plastic Factory.....Appellant

Versus

MSC Bahamas & othersRespondents

Dates of hearing 02.10.2018, 05.10.2018, 06.03.2019 & 26.09.2019.

Mr. Hamid Ali Shah, Advocate for Appellant.

Syed Abbadul Hussnain, Advocate for Respondent No. 1 to 8.

Mr. Jawad A. Sarwana, Amicus Curiae.

None present for the Respondent Nos.09 & 10.

Muhammad Ali Mazhar, J: This appeal has been brought to challenge an order dated 11.6.2014, passed by the learned single judge (O.S) on CMA No.151 & 152 of 2012 in an Admiralty Suit No.12 of 2012.

2. Short-lived Facts

The appellant is a sole proprietorship concern and engaged in the business of imports of various goods and variety of merchandize. The appellant was consignee of goods through respondent No.9 whereas the respondent No. 1 to 4 are ships/vessels beneficially owned by the respondent No.5, the master shipping company. The respondent No.6 signed four bills of lading and the respondents No.7 & 8 are local agents. The respondents No. 7 & 8 received the payments and also referred to the respondent No.9 as shipper. The consignments i.e. scrap items weighing 509.24 Metric Tons against the consideration of US\$400,908.55 through invoice 0810101 dated 08.10.2008 were shipped through respondent No.9. The appellant hired 24 containers of the respondent No.5 & 6 through respondent No.7. The respondent No.6 being the agent of the respondent No.5 signed four (4) bills of lading with company's seal, containing the

information about the Containers numbers and respective weight, Seal No and the booking reference etc. The respondent No.7 issued arrival advices on 11.11.2010, 01.12.2010 and 03.12.2010 informing therein that 24 containers of the appellant were transshipped from Salalah port to Port Bin Qasim. The appellant sought clearance of consignment filing GD on 14.11.2010 and in the course of shifting of the containers for examination of goods, the containers were weighed and it was found that the said containers were almost empty. The appellant agitated the matter before respondent No. 1 to 8 but of no avail. Feeling aggrieved, the appellant invoked the admiralty jurisdiction of this court under section 3(2)(g) & (h) and sued the respondents for recovery of damages of US \$ 1455908.55 equivalent to Rs.131,031,331.00 which includes the Invoice Value of the Consignment/Cargo. The Respondents submitted to the jurisdiction and filed different applications, counter affidavits and fully participated in the proceedings. A ship arrest order was also passed on 17.08.2012 and security in the sum of US\$500,000/- has been submitted by the respondent No.1 to 8 with the Nazir of this court. The respondent No. 1 to 8 filed two application CMA 151/2012 seeking stay of suit and CMA 152/2012 seeking the return of the plaint. The learned Judge was pleased to stay the suit by allowing the application CMA No.151/2012 vide Impugned Order dated 11.06.2014 and CMA 152/2012 was disposed off having become infructuous.

3. The learned counsel for the appellant argued that while passing the impugned order, the learned judge has not taken into consideration the convenience of the parties but only considered the convenience of the respondent No.1 to 8, disregarding the facts that not only the parties, their counsels rather witnesses are also available in Karachi. The stay of suit amounts to denial of justice. The learned judge miscalculated the case of M.A. Chowdhary vs. MITSUI O.S.K Lines Limited (PLD 1970 SC 373) in which suit was never stayed. The learned judge also unheeded the law laid down by this court in M/S. Aslo Marines vs. M.T. Magda and another (PLD 1985 Karachi 745) and M/S. Mercantile Fire vs. M/s. Arcepey Shipping Company (PLD 1978 Karachi 273). It was further contended that the court has also disregarded the part of the material proceedings whereby M.V. MSC Clementina was ordered to be arrested vide order dated 17.08.2012 and was allowed to sail subject to furnishing security in the sum of 500,000 US\$ with the Nazir of this court by means of Bank Guarantee bring forth by Standard Chartered Bank. He further argued that the learned single judge also disregarded the part of the material proceedings whereby vide order dated 24.08.2012, 24 containers lying at Karachi Port were inspected by an officer of this court. This order was passed by consent on CMA No.149/2012 filed by

respondent No.1 to 8 and the said respondents also paid the inspection fee to the officer of this court. The Commissioner submitted his report on 05.09.2012. The court further ignored an order dated 27.03.2013 passed again with the consent of the parties for forensic examination of the 24 containers. This entire activity amounts to material participation of respondent No.1 to 8 in the suit. The learned single judge also unnoticed the direction in suit vide order dated 27.03.2013 that once the report of expert is submitted, the matter be put up in court for settlement of issues and if need be, the commissioner shall be appointed for recording evidence of the parties for early disposal of the case. The learned counsel for the appellant referred to following judicial precedents:-

1. 1987 SCMR 393 @ 395 (State Life Insurance Corporation of Pakistan vs. Rana Muhammad Saleem). Under section 28 of Contract Act every agreement by which any party thereto is restricted absolutely by the usual legal proceedings in the ordinary courts is void to that extent.
2. 2010 CLC 1267 @ 1270. (Messrs Unitrade Impex & others vs. Federation of Pakistan) The first determining factor is that whether the civil court at Rawalpindi had no jurisdiction in spite of the fact that there was consent of both the parties. After going through the case law cited by the learned counsel of the petitioner and the respondent, it cannot be denied that the consent of the parties do not give jurisdiction to the Court, which had no jurisdiction.
3. PLD 1994 Lah. 525 @ 544 (Messrs.' Rupali Polyester Ltd vs. Dr. Nael G. Bunni). The principles which emerge that the jurisdiction vested in the Courts cannot be taken away even by express agreement of the parties and the arbitration agreement even where Rules of International Chamber of Commerce apply do not have the effect of depriving the Courts of their jurisdiction.
4. 1992 SCMR 1174 at 1178 (Messrs Kadir Motors (Regd) Rawalpindi vs. Messrs. National Motors Ltd, Karachi). The intention behind the said provision of law (Sec 28 of Contract Act) is that all those agreements which restrain a person to enforce his rights under a contract by usual legal proceedings in ordinary tribunals are void. It obviously implies that a party cannot be restrained to enforce his rights in ordinary Court of law but if by mutual agreement between the parties a particular Court having territorial or pecuniary jurisdiction is selected for the determination of their dispute, there appears to be nothing wrong or illegal in it or opposed to public policy.
5. Spiliada Maritime Corporation v Cansulex Ltd [1986]. The Spiliada was a ship owned by a Liberian company, flying the Liberian flag, and managed both in Greece and England. The vessel was to take sulphur from Vancouver to ports in India. The bills of lading said they were to be construed and governed by English law, When the case came to the House of Lords on a further appeal, Lord Goff outlined the principles behind when a stay or dismissal of proceedings could be granted. Where there is another available forum to hear the case, the burden of proof is on the claimant to show why the trial should take place in England. Factors such as convenience, expense, availability of witnesses and where the companies do business, could all be considered by the court. The Court summed up its decision underlying the principle that the Court should have regard to the interest of all the parties and to meet the ends of justice. The principles of appropriate forum are:

- i). To allow the plaintiff to keep the benefit of the security obtained by commencing the proceedings;
- ii). To allow proceedings to be commenced or continued where the claim is not barred by time;
- iii). To allow proceedings before a forum where practical justice should be done. The practical justice demands that the plaintiff is not to be deprived of having started the proceedings within limitation;
- iv). To allow proceedings in the country or before the courts where there is access to the expert witnesses.

6. **Eleftheria Case (1969) 1 Lloyd's Rep 237.** The Eleftheria case/Brandon Rule. Despite an exclusive jurisdiction clause, the court can refuse a stay of proceedings, if exceptional circumstances amounting to strong cause are shown. The question in a comprehensive manner was first dealt with in the Eleftheria Case(1969) 1 Lloyd's Rep 237 where Brandon J held that the Plaintiff had the burden of proving a strong cause. While the court should, in coming to its decision, take into account all the circumstances of a case, the following were identified by Brandon J to be the matters pertinent to have regard to: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Courts, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: a. In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. b. Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. c. With what country either party is connected, and how closely. d. Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. e. Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial

7. **Gulf Oil Corp Vs. Gilbert, Doing business as Gilbert Storage & Transfer {330 US 501 (1947)}**. The Supreme Court of United States of America while considering the question whether the United States District Court has inherent power to dismiss the suit pursuant to the doctrine of Forum Non Conveniens and, if so, whether that power was abused in this case. The Supreme Court prescribed the important consideration /factors of the convenient forum as under:-

"If the consideration and weight of the factors requisite to given result are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to the source of proof, availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weight relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex", "harass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

8. **Mac Shannon v. Rockware Glass Ltd (1978) AC 795.** Lord Diplock interpreted the majority speeches in the Atlantic Star as an invitation to drop the use of the words 'vexatious' and 'oppressive' (an invitation which I gladly accept)

and formulated his distillation of principle in words which are now very familiar. He resorted to:

“In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English Court”.

4. The learned counsel for the respondent No.1 to 8 not only supported the impugned order but further argued that the suit filed by the appellant is not maintainable as this court in its admiralty jurisdiction had no jurisdiction to entertain this matter. The learned counsel did not deny ownership of the carrier and the carriage of goods contract i.e. bill of lading executed but argued the respondents never committed any breach of the terms of the contract. The respondents successfully discharged their liability by discharging the cargo at the port of destination. The containers were delivered at the port of destination in the sealed condition and as such nothing happened in sea giving rise to any cause of action to the appellant. The appellant had purchased the cargo from the respondent No.9 hence the respondent No.1 to 8 has had no concern as it is clearly stated in the document itself that the carrier is not responsible for the particulars furnished by the shipper and neither the particular are checked by the carrier and in this regard Clause 14 of the bill of lading is very much clear. Two inspections were carried out by the orders of this court which revealed that the containers had been properly sealed and lying in the intact condition which proved that nothing happened in the sea. He further argued on the legal proceedings instituted by the respondents before the High Court of Justice, Queens Bench Division, Commercial Court, London, the stay is operating against the appellant therefore the present proceedings are not maintainable and instead of defending the validly instituted proceedings in London, the appellant filed suit in this court and for this reason, an application was moved in the suit for staying the proceedings till the decision of already pending proceedings before the Queen’s Bench Division London with another application as an alternate to return the plaint for want of jurisdiction as per relevant clauses of the Bill of Lading does not have the jurisdiction to entertain this suit.

5. The learned Amicus Curiae submitted a brief note on the status of admiralty jurisdiction of the High Court involving action in rem and foreign jurisdiction/international arbitration clauses that there is no fetter under the Admiralty Jurisdiction of the High Court ordinance, 1980 from exercising jurisdiction in an action in rem against a vessel even if there is an express foreign jurisdiction clause between plaintiff and defendant(s). He referred to the following judicial precedents:-

C.V. 'Lamon Bay' and others v. Sadruddin and others, 2005 CLD 133 in which the learned division bench of this court held as under:

This argument is based on the provisions of Code of Civil Procedure and completely ignores the nature and characteristics of an action in rem which is different from an ordinary civil suit. In exercise of Admiralty Jurisdiction which can be invoked by an action in rem, the Admiralty Court can exercise jurisdiction over all ships whether Pakistani or not, and whether registered or not and wherever the domicile of their owners may be. The Admiralty Court can exercise jurisdiction in respect of all claims, causes and questions specified in clauses (a) to (q) of subsection 2 of section 3 of the Ordinance wherever arising. If the claim is entertainable under the Admiralty Jurisdiction which can be invoked by an action in rem, then irrespective of the fact that the cause of action has arisen within the territorial jurisdiction of the Court or not and the parties are domiciled in a foreign country, an action in rem can be entertained.

Port Qasim Authority & others vs. Official Assignee of Karachi & others, 2007 CLD 143 Karachi. The learned Judge described the concept of rem as follows:

“When an action in rem is resorted to under the Admiralty Jurisdiction of this Court, it is in fact an action against property or ship and in case the plaintiff succeeds in its action, then the property or the ship is to be sold towards the satisfaction of the claim. The action in rem under the Admiralty Jurisdiction of this Court is legal proceedings against the corpus of the offending ship.The object of such an action is to acquire jurisdiction over the ship as the owner of the vessel might be located overseas over which the Court may not have jurisdiction.” (Pages 148-149)

Booz-Allen & Hamilton Inc. vs. Sbi Home Finance Ltd., AIR 2011 SC 2507 = (2011) 5 SCC 532. The court observed regarding rem, personam and arbitration clauses (As per Mitsui case, foreign jurisdiction clauses are in the nature of arbitration clauses):

“Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are:

- (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- (iii) guardianship matters;
- (iv) insolvency and winding up matters;

Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007]

“Not all matter are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These

include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give.”

The subsequent edition of Russell [23rd Edition, page 470, para 8.043] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration. Mustill and Boyd in their *Law and Practice of Commercial Arbitration in England* [2nd – 1989 Edition], have observed thus:

“In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not....

Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order....”

6. It was further contended by the learned amicus curiae that right in rem is a right exercisable against the world at large as contrast from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, the judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. Besides arrest of vessel, another related issue for the Court dealing with actions in rem (against the vessel) is after a security /bank guarantee for release of the vessel, how long should such guarantee be retained by the court in the event that the plaintiff does not proceed to the foreign tribunal. Almost in all of the reported case laws, once the issues in rem have been decided, the courts have then turned to the merit of the case that is the dispute between the parties.

7. Heard the arguments. According to the definition of “cause” postulated in the Admiralty Jurisdiction of the High Court Ordinance, 1980, the expression “cause” includes any cause, suits, action or other proceeding

in the High Court in the exercise of its admiralty jurisdiction. The Sindh High Court and High Court of Balochistan within their respective territorial jurisdiction may exercise admiralty jurisdiction whereas the Lahore High Court and Peshawar High Court within their respective territorial jurisdiction may exercise said jurisdiction in cases in which any question or claim relating to aircraft is to be determined. The Admiralty jurisdiction of the High Court is stipulated under Section 3 of the Admiralty Jurisdiction of High Court Ordinance, 1980 in which the High Court has jurisdiction to hear and determine causes, questions or claims. For the ease of reference, Section 3 of the Admiralty Jurisdiction of High Court Ordinance, 1980 is reproduced as under:-

3. Admiralty Jurisdiction of the High Court.---

(1) The Sindh High Court and the High Court of Baluchistan shall have and exercise, within their respective territorial jurisdiction. Admiralty jurisdiction as is in this Ordinance provided and the Lahore High Court and the Peshawar High Court shall, within their respective territorial jurisdiction, have and exercise the said jurisdiction in cases in which any question or claim relating to aircraft is to be determined.

(2) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following causes, questions or claims---

(a) Any claim to the possession or ownership of a ship or to the ownership of any share therein or for recovery of documents of title and ownership of a ship, including registration certificate, log book and such certificates as may be necessary for the operation or navigation of the ship;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage done by a ship;

(e) any claim for damage received by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults, the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(i) any action or claim in the nature of salvage of life from a ship or cargo or any property on board a ship or the ship itself or its apparel, whether services rendered on the high sea or within territorial waters or internal waters or in a port, including any claim arising by virtue of the application by or under section

12 of the Civil Aviation Ordinance, 1960, (XXXII of 1960), of the law relating to salvage to aircraft and their apparel and cargo;

(j) any claim in the nature of towage in respect of a ship or an aircraft, whether services were rendered on the high sea or within territorial waters or internal waters or in a port;

(k) any claim in the nature of pilotage in respect of a ship or an aircraft;

(l) any claim in respect of necessaries supplied to a ship;

(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;

(n) any claim by a master or members of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts or the Merchant Shipping Act, 1923 (XXI of 1923), is recoverable as wages or in the Court and in the manner in which wages may be recovered;

(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(p) any claim arising out of an act which is or is claimed to be a general average act;

(q) any claim arising out of bottomry or respondentia;

(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship as a Naval Prize or in violation of customary law of the sea or otherwise, or for the restoration of a ship or any such goods after seizure, or for Doritos of Admiralty, together with any other jurisdiction for the grant of such reliefs as are provided under the Merchant Shipping Acts or the Merchant Shipping Act, 1923 (XXI of 1923), any other jurisdiction which has vested in the High Courts as a Court of Admiralty immediately before the commencement of this Ordinance or is conferred by or under any law and any other jurisdiction connected with ships or aircraft in respect of things done at sea which has by tradition or custom of the sea been exercise by a Court of Admiralty apart from this section.

(3) The jurisdiction of the High Court under clause (b) of sub-section (2) includes power to settle any account outstanding and unsettled between the parties the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the Court thinks fit.

(4) The reference in clause (i) of subsection (2) to claims in the nature of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck as, under any law for the time being in force, are authorised to be made in connection with a ship or an aircraft.

(5) The preceding provisions of this section apply:---

(a) in relation to all ships or aircraft, whether Pakistani or not and whether registered or not and wherever the residence or domicile or their owners may be;

(b) in relation to all claims, where-so-ever arising including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land; and

(c) so far as they relate to mortgages and charges, to all mortgages and charges created under foreign law;

Provided that nothing in this subsection shall be construed as extending to cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Acts or the Merchant Shipping Act, 1923 (XXI of 1923).

8. In the alike phraseology, subject to the provisions of Section 5, the High Court may also hear and determine the causes of action in

personam. Any judgment passed by the High Court in its Admiralty jurisdiction may be challenged by way of appeal which shall lie to the bench of two or more Judges of the High Court, however, an appeal to the Supreme Court from the judgment or final order of the High Court in exercise of its Admiralty jurisdiction shall lie only if the value of the subject matter of the dispute in appeal is not less than one lac rupees and the Supreme Court grants leave to appeal. Section 9 of the Admiralty Jurisdiction of the High Court Ordinance, 1980 had repealed the Courts of Admiralty Jurisdiction (Pakistan) Act, 1891, the Admiralty Court Act, 1840 and the Admiralty Court Act, 1861 in so far as they apply to and operate in Pakistan. Under Chapter XXXII of the Sindh Chief Court Rules (Original Side), Rules 729 to 775 are the Rules framed and mounted under the Colonial Courts of Admiralty Jurisdiction Act, 1890. The said Rules germane and correlated with diversified and expanded characteristics of the Admiralty Jurisdiction including Rule 731 in which by instituting Admiralty suit in action in rem, any party may apply for the warrant of arrest of the property proceeded against. More than enough routine and procedural matters are also provided under the Rules to deal different situations and set of circumstances in the Admiralty Jurisdiction of this court including arrest of ship.

9. The relevant portion of the impounded order is reproduced as under:-

6. After having considered the facts and circumstances of the present case in light of the foregoing, I conclude that the defendants have been able to make out a case for stay of the suit. I have not, with respect, found the submissions to the contrary made by the learned counsel for the plaintiff convincing. Thus, I cannot, with respect, accept that the plaintiff as consignee is not bound by the contract of carriage as evidenced by the bills of lading. In my view, such conclusion would be clearly contrary to what is provided in the Bills of Lading Act, 1856 and would be most disadvantageous for consignees in this country. Since the consignee is bound by the totality of the contract, and the jurisdiction clause is part thereof, it cannot be said that the latter is not binding as well. This would be so even if the jurisdiction clause is to be treated as being equivalent to, or in the nature of, an arbitration clause. As regards the specific points taken by learned counsel in terms of what might be called the *Eleftheria* principles, I am, with respect, unable to agree that a case has been made for not staying the suit. Thus, while it is true that the evidence in the Bahamas is outside both Pakistan and England, tendering it in English proceedings would have the advantage of respecting the sanctity of the contract. As is clear from *Mitsui*, this was a matter to which considerable importance was attached by the Supreme Court. Insofar as the evidence in Pakistan is concerned, it cannot be said that its nature is such that it cannot also be tendered in England. The fact that the carrier has already initiated proceedings in the English High Court and apparently obtained an injunction against the plaintiff indicates that it is serious about litigating in that jurisdiction and is not merely seeking some procedural advantage (point 5(d)). The submission that the plaintiff's claim may become time barred if it has to proceed in England (point 5(e)(iii)) would appear to be

misconceived; if anything, periods of limitation under English law are more generous than equivalent provisions under our law. since the contract of carriage is governed by English law, it is obvious that the High Court there would be better placed to deal with, e.g., questions of law, and this is so notwithstanding the similarity and connection between English law and Pakistani law especially in shipping matter and the relative familiarity of Pakistani lawyers with English law. Having considered the totality of the circumstances, I am therefore of the view that the dispute between the parties ought to proceed in England and not in this country.

7. In *Mitsui* the Supreme Court made clear that in cases involving a foreign jurisdiction clause, the plaint could not be returned. The proper course would be to stay the proceedings if the Court concluded that the matter ought to proceed in the foreign jurisdiction. Since I have so concluded, CMA 151/2012 is hereby allowed and the present suit is stayed. The other application, CMA 152/2012, becomes infructuous and is disposed off as such.

10. The bill of lading is an evidence of the contract of affreightment, usually entered into before the bill of lading is signed which is a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board. It is also a document of title without which delivery of the goods cannot normally be obtained. Ref: per Lord Bramwell in *Sewell v. Burdick* (1884), 10 App.Cas.at p.105, and *The Ardennes (Owner of Cargo) v. The Ardennes (Owners)*, [1950] 2 All E.R.517; [1951] 1 K.B.55, where evidence was admitted of the contract which was made before the bill of lading was signed and which contained a different term. *Rodocanachi v. Milburn* (1886), 18 Q.B.D.67. The actual terms of bills of lading vary from company to company. But usually there are provisions in them setting out; the name of the vessel; port of shipment; port of delivery and to whom delivery is to be made; the number of the goods shipped; their apparent condition and leading marks; a general paramount clause incorporating the Hague Rules; a list of "Excepted Perils"; a "Deviation" clause; the amount of the Freight to be paid; the extent of the Shipowner's Lien over the goods carried; how delivery is to be made; a clause incorporating the York-Antwerp Rules, 1950, in relation to General Average; a "Both-to-Blame" collision clause and what law is to govern the contract. The parties to a bill of lading or a charter-party are often domiciled in different countries and the place or places where the contract is to be performed are often different from the place where the contract was made. Hence it is important to find out which system of law is applicable to any particular contract. This is called the "governing" or "proper" law of the contract. Lord Atkin explained the rules determining the proper law of a contract. "The legal principle which

are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts of conditions lead to a prima facie inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, e.g. the country where the contract is made, the country where the contract is to be performed. If the contract relates to immovable the country where they are situated, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give prima facie indications of intention, they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such.” Ref: R.v. International Trustees for the Protection of Bondholders Aktiengesellschaft, [1937] 2 All E.R.164, at p.166; [1937] A.C.500, at p.529, applied in *The Metamorphosis*, [1953] 1 All E.R.723, at p.726 in relation to a bill of lading as evidence of a contract of carriage and in *The Assunzione*, [1954] 1 All E.R.278; [1954] P.150, C.C.

11. There are two forms of admiralty action: action *in rem* and action *in personam*. An action *in rem* is one in which the plaintiff seeks to make good a claim to or against a certain property for e.g., a ship or cargo in respect of which or in respect of damages done by which he alleges that he has an actionable demand. Thus in collision actions and in other cases where the plaintiff claims maritime lien, he can, if the *res* be within the jurisdiction, by process served upon its corpus, procure its arrest and detention by the court until either the owners bail it out by giving security for the amount claimed by him or until the court gives judgment upon the claim, when, if he be successful, effect may be given to such judgment by sale of the property in order to satisfy it. The effect of such judgment or sale is that the order of the court operates directly upon the statutes of the property and transfers an absolute title to the purchaser. An action *in*

personam is an ordinary action as in common law courts. The judgment of the court is a personal one (in the nature of a command or prohibition) against the unsuccessful party, though it may be enforced against his property by subsequent proceedings but even if the court sells the property by execution under the judgment it does not thereby transfer to the purchaser an absolute title but only such title as the owner may in fact have had. Ref: B.C. Mitra, Tagore Law Lectures on The Law of Carriage by Sea, 1972, Eastern Law House, Lecture XIII, p. 167. The present author is of the opinion that all the High Courts in India which exercise admiralty jurisdiction should follow this ancient tradition in order to show the ancient origin and special nature of their admiralty jurisdiction, Halsbury's Laws of England, 2nd (Hailsham) Edn., Vol. 1, para 84, p.65. This statement of the law in so far as it describes the basic nature of the action holds good even today, ref: Halsbury's Laws of England, 4th Edn. (Re-issue), Vol. 1 (1), para 305, p.420 and paras 311-312, pp. 426-7 and notes thereunder. Ref: the Banco case, (1971) 1 All ER 524 (CA) and The Monica S. (1967) 3 All ER 470. The present law preserves the jurisdiction based on maritime lien (The Supreme Court Act, 1981 (U.K.), section 21 (3), and extends the right to proceed in rem to many claims which do not give rise to maritime lien (ibid., section 21 (2) and (4). Ref: Halsbury's Laws of England, 2nd (Hailsham) Edn., Vol. 1, para 84, p. 65, *Castrique v. Imrie*, (1870) LR 4 HL 414 and *Maritime Jurisdiction and Admiralty Laws in India* by Samareshwar Mahanty. Edition 2009

12. In the case of *Mayar (H.K.) Ltd., v. Owners and Parties, Vessel M.V. Fortune Express*, the Indian Supreme Court has held that, *de hors* the provisions of the Civil Procedure Code, 1908, the court has inherent discretionary jurisdiction to stay proceedings in appropriate cases where the court thinks fit to do so. For so holding the Supreme Court relied on decisions of Calcutta, Madras and Bombay High Courts. The Supreme Court quoted with approval the following passage from the *Hansraj Bajaj* case of Calcutta High Court. The jurisdiction to stay an otherwise competent suit is to be sparingly exercised and within the strict limits of rigorous condition, the first principle is that a mere balance of

convenience is not a sufficient ground for depriving a plaintiff of his right of prosecuting his action in or his right of access to the competent courts of the land. The second principle is that the court stays an action brought within the jurisdiction in respect of a cause of action arising entirely out of jurisdiction when it is satisfied that the plaintiff will thereby suffer no injustice whereas if the action is continued the defendant will in defending the action be the victim of such injustice as to amount to vexation and oppression and which vexation and oppression would not arise for the defendant if the action were brought in another accessible court where the cause of action arose. In such a case the courts have also insisted that the onus is upon the defendant to satisfy the court, first, that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court and secondly, also that the stay will not cause any injustice to the plaintiff. The court may decline to stay the suit notwithstanding the foreign jurisdiction clause pleaded in that case holding that the defendant has not made out a case that the plaint did not disclose a cause of action or that the suit was frivolous, vexatious, oppressive to the defendant or amounted an abuse of the process of the court. The Court further held that the principle of *forum non conveniens* is not attracted to the facts of this case. The cases on questions of stay fall broadly into three categories: (a) those involving foreign jurisdiction clauses, (b) those involving plea of *lis alibi pendens*, and (c) those involving the principle of *forum non conveniens*. Ref: *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.*, AIR 2006 SC 2800, *Alexandros Dryron S.A. v. Owners and Parties Interested in the Vessel M.V. "Prapti,"* 1990 CWN 196 at p. 205 pr, 9, (2006) 3 SCC 100: AIR 2006 SC 1828 (SCC paras 14-15, p.115-6), *Bhagat Singh Bugga v. Dewan Jagbir Sawhney*, AIR 1941 Cal 670; *Hansraj Bajaj v. Indian Overseas Bank Ltd.*, AIR 1956 Cal 33, *Krishnan v. Krishnamurthi*, AIR 1982 Mad 101, *Crescent Petroleum Ltd. v. "MONCHEGORSK"*, AIR 2000 Bom 161 and AIR 1956 Cal 33.

13. The *prima facie* rule is that parties should be beholden to their contract and an action in defiance of their agreement to submit to foreign

jurisdiction. However, the court is likely to be less rigid if the terms of the agreement do not stipulate *exclusive* jurisdiction of the foreign court. Nevertheless, the court has a discretion in the matter of stay on the basis of a foreign jurisdiction clause when the defendant is present in the court's jurisdiction. In *The Eleftheria* the principles to be followed in exercise of the discretion has been summed up by Brandon, J., in following words: "The principles established by the authorities can, I think, be summarized as follows; (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction is not bound to grant a stay but has a discretion whether to do so or not. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. The burden of proving such strong cause is on the plaintiff. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, but without prejudice to the following matters, where they arise, may properly be regarded:- (a) In what country the evidence on issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security of their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial." Ref: *Mackender v. Feldia A.G.*, (1967) 2 QB 590 (604), *Law v. Garrett*, (1878) 8 Ch D 26; *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.*, (1901) 1 KB 249; *The Cap Blanco*, (1913) p.130; *The Eleftheria*, (1969) 2 All ER 641; *The Sindh*, (1975) 1 Lloyd's Rep. 372; *The Makefjell*, (1976) 2 Lloyd's Rep. 29; *Aratra Potato Co. Ltd. v. Egyptian Navigation Co.*, *The El Amria*,

(1981) 2 Lloyd's Rep. 110 (CA); *DSV Silo-und Verwaltungsgesellschaft mbH v. Senner (Owners), The Sennar*, (1985) 2 All ER 104 (HL); *Owners and Parties Interested in the vessel M.V. "Fortune Express" v. Maavar (HK) Ltd.*, 2005 (1) CHN 204, *Evans Marshal & Co. Ltd. v. Bertola S.A.*, (1973) 1 All ER 992, (1975) 1 Lloyd's Rep. 372, *The Athene*, (1922) 11 Lloyd L Rep. 6; *The Fehmarn*, (1958) 1 All ER 333; *The Adolf Warski*, (1976) 2 Lloyd's Rep. 241, (1969) 2 All ER 641. See also *Spiliada Maritime Corporation v. Consulex, Ltd., The Spiliada*, (1987) AC 460 (1986) 3 All ER 843,

14. So far as the general doctrine of forum non conveniens is concerned, it was held in the case of *The Atlantic Star* the House Lords, while granting stay on the basis of liberal interpretation of 'oppression' and 'vexation', held that in English law, unlike in Scots law, there is no general doctrine of forum non conveniens. It has, however, been observed that the more flexible test of "what justice in the particular case demands" laid down therein in preference to the test of oppression and vexation amounts to a rather fine distinction and the two tests differ "more in theoretical approach than in practical substance". English law has, by now, developed to the point where it is indistinguishable from the (originally) Scottish doctrine of *forum non conveniens*. Ref: (1974) AC 436, (1974) AC 436, *MacShannon v. Rockware Blass Ltd.*, (1978) AC 795 (812, 822). In this decision the House of Lords has reiterated the liberalized approach, *The Abidin Daver*, (1984) AC 398 (411): (1984) 1 All ER 470 (HL) 476, per Lord Diplock; *Spiliada Maritime Corporation v. Consulex, Ltd., The Spiliada*, (1987) AC 460 (474): (1986) 3 All ER 843 (HL) 854, per Lord Goff of Chieveley; *Re Harrods (Buenos Aries) Ltd.*, (1991) 4 All ER 334 (CA); *Ace Insurance SA-NV v. Zurich Insurance Co. and Zurich American Insurance Co.*, (2000) 2 Lloyd's Rep. 423.

15. The Court neither can assume jurisdiction by its own nor the court ought to give up its jurisdiction conferred by the law to decide the lis between the parties. In fact for deciding or adjudicating a lis lodged in an Admiralty suit for an action in rem or personam, this is Admiralty

jurisdiction of the High Court Ordinance, 1980 which confers powers and jurisdiction to the High Court to try cases. No such legislative intent or connotation can be gathered or congregated that while exercising admiralty jurisdiction, this court can only ask to furnish the surety/security and then stay the suit with the directions to the parties to resolve the dispute in terms of jurisdictional clause incorporated in the bills of lading. The terms and conditions mentioned in the bills of lading with regard to the jurisdiction of court at any particular place cannot be considered so sacrosanct or untouchable in admiralty jurisdiction under our codified law but the court while exercising jurisdiction to stay the suit has to comprehend whether the court has otherwise jurisdiction to decide the lis in its applicable admiralty laws or not. No such condition in our laws is mentioned to oust the partial or outright jurisdiction of this court but the case has to be decided in the parameters and confines of the law. The stay of proceedings cannot be claimed as a matter of right otherwise the whole purpose of Admiralty jurisdiction of the Sindh High Court vested in the law will become redundant and superfluous and its jurisdiction would only be restricted and limited to arrest the ship and ask for security as precondition to allow sailing of vessel then stay the suit which is not the actual philosophy and astuteness of law. According to the facts, the appellant was consignee of goods through respondent No.9, whereas, the respondent No. 1 to 4 are ship/vessel owned by respondent No.5. The respondent No.6 assigned four bills of lading and the respondent No. 7 and 8 being the local agents received the payments. The appellant purchased scrap items from respondent No.9. Accordingly, 24 containers of the appellant were transshipped from Salalah port to Port Bin Qasim and the appellant sought clearance of consignment but in the course of shifting and examination of goods it was found that some containers were almost empty and the appellant agitated the matter before respondent No. 1 to 8 but of no avail, thereafter, appellant invoked the admiralty jurisdiction of this Court under section 3(2)(g) & (h) and sought for the recovery of damages. The ship arrest order was also passed by the learned Single Judge of this court on 17.08.2012, however, required security was furnished by respondent No. 1 to 8 with the Nazir of this

Court. The learned Single Judge on CMA 151/2012 stayed the suit, whereas, other application CMA 152/2012 was disposed of having become infructuous. The learned Single Judge while staying the suit observed that since the contract of carriage is governed by English Law, it is obvious that the High Court there would be better place to deal with e.g., question of law, and this is so notwithstanding the similarity and connection between English Law and Pakistani Law especially in shipping matters and the relative familiarity of Pakistani lawyers with English Law, therefore, learned Single Judge was of the view that dispute between the parties ought to proceed in England and not in this country. Learned Single Judge also relied on the case of *M.A. Chowdhury vs. Messrs Mitsui O. S. K. Lines Ltd* (PLD 1970 S.C. 373) in which also the choice of forum clause in the bills of lading was involved. The learned Single Judge held that in a case involving a foreign jurisdiction clause plaintiff cannot be returned but the proper course would be the stay proceedings if the court concluded that the matter ought to proceed in foreign jurisdiction. In our insight and comprehension, the backdrop of the instant case unambiguously make obvious that the ship was arrested vide order dated 17.08.2012 and was allowed to sail subject to furnishing security with the Nazir of this court by dint of Bank Guarantee. Vide order dated 24.08.2012, 24 containers lying at Karachi Port were ordered to be inspected by an officer of this court. This order was passed by consent on CMA No.149/2012 which was filed by respondent No.1 to 8 and the said respondents also paid the commission fee and the Commissioner submitted the report on 05.09.2012. The learned single judge also ignored court order dated 27.03.2013 which expresses that once the report of expert is submitted, the matter shall be fixed for settlement of issues and if need be, the commissioner shall be appointed for recording evidence for early disposal of the case. What put on display is material participation of the defendants in the proceedings in the trial court. They submitted and surrendered to the jurisdiction and some orders were passed by consent even on the application of defendants. Factors such as convenience, expense, availability of witnesses and where the companies do business could all are to be considered by the court. The

court should have regard to the interest of all the parties and to meet the ends of justice and to allow the plaintiff to keep the benefit of the security obtained by commencing the proceedings and allow proceedings before a forum where practical justice should be done. The practical justice demands that the plaintiff is not to be deprived of having started the proceedings within limitation. Despite an exclusive jurisdiction clause, the court can refuse a stay of proceedings, if exceptional circumstances amounting to strong cause are shown. While the court should in coming to its decision, take into account all the circumstances of a case. In exercising its discretion the court should take into account all the circumstances of the particular case including the probability that the plaintiff would be prejudiced by having to sue in the foreign Court because he would be deprived of security for his claim and would be unable to enforce any judgment obtained. Quite the reverse, the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense and stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of some other Court. In exercise of Admiralty Jurisdiction, this court can exercise jurisdiction over all ships whether Pakistani or not and whether registered or not and wherever the domicile of their owners may be. The Admiralty Court can exercise jurisdiction in respect of all claims, causes and questions specified in the Ordinance wherever arising irrespective of the fact that the cause of action has arisen within the territorial jurisdiction of the court or not and the parties are domiciled in a foreign country, an action in rem can be entertained. The jurisdiction of this court in an independent jurisdiction conferred by law which cannot be ousted or drive out under Bills of Lading Act, 1856 or merely for the reason that some respondents have filed their suit in High Court of Justice, Queens Bench Division, Commercial Court, London which can be decided independently without any predominating or overriding effect on the pending suit in our local laws and jurisdiction. Here not only security has been furnished but some material orders have already been passed in the trial court so in all

fairness, the issues should be settled and parties may be afforded an opportunity to adduce evidence so that the pending suit may be decided on merits rather than lying dormant or hanging around without any lawful purpose and justification. In our consciousness we do not recognize that the continuance of the action in this court would operate an injustice to the defendants. The defendants have also failed to make out a case that the plaint did not disclose a cause of action or that the suit is frivolous, vexatious, oppressive to them or amounted an abuse of the process of the court.

16. In the wake of above discussion, the impugned order is set aside with the directions to the learned single judge of this court at Original Side to decide the Admiralty Suit No.12/2012 on merits. In the end we also appreciate the assistance provided by the learned Amicus Curiae.

Karachi:-
Dated.9.3.2020

Judge

Judge