

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1574 of 2000

Ahmad Mian Siddiqui -----Plaintiff

Versus

Kenya Airways Limited-----Defendant

Dates of hearing: 01.03.2016 and 31.03.2016

Date of Judgment: 18.04.2016

Plaintiff: Through Mr. M.S. Qureshi, Advocate.

Defendant: Through Khalid Anis-ur-Rehman & Adeel Abid, Advocates.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for recovery of damages amounting to Rs.14,090,615/- and the plaintiff has sought the following relief(s):-

- a) a sum of Rs.14,090,615.00 as damages/compensation;
- b) a sum of Rs. U.S \$ 150,000.00 equivalent to Rs.9,000,000.00 being prospective annual loss of business on import of fresh vegetables from Nairobi, Kenya to Norway.
- c) Costs;
- d) Such further/other/additional relief or reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case.

2. Briefly the facts as stated are that the plaintiff, a Pakistani national and settled in Norway, claims to have established his business in Norway by engaging in imports of various food items and fresh vegetables from Kenya and other countries. The plaintiff claims that he had a turnover of Millions of Norwegian Krone i.e. (N.K.R) during the

years 1998 and 1999, more specifically detailed in Para 2 of the plaint. It is further stated that the plaintiff came to Pakistan for business purposes and planned to go to Kenya with his two business associates namely Mr. Muhammad Waseemuddin and Mr. Ijaz Hussain to hold and negotiate with suppliers in Kenya of various food items, and simultaneously he and his associates also planned to watch ICC Cricket Tournament which scheduled to be held from 12.10.2000. It is further stated that the object for going to Kenya was twofold; firstly to negotiate business deals with suppliers in Kenya for supply of fresh vegetables in Norway, and secondly, to watch ICC Cricket Tournament and for this purpose the plaintiff purchased three return tickets from M/s. Maimoon Travels and paid an amount of Rs.90,615/-. Plaintiff also applied to obtain Visa at Islamabad for Kenya and in the meantime the defendant announced a scheme for participants and visitors of ICC Cricket Tournament in Kenya by arranging Visa and a tour package and on such announcement, the plaintiff enquired about the Visa from the concerned staff of the defendant and the plaintiff was assured that in this package the defendant would arrange the Visa. Accordingly, the plaintiff took back his passport and Visa application from Kenyan Embassy and asked the defendant to arrange Visa for Kenya. Thereafter the tickets were issued to the plaintiff and his two associates, and they were also issued a TELEX recommendation for issuance of Visa at arrival and on 11.10.2000 the plaintiff and his associates travelled on Flight No.PK-225 to Muscat and thereafter boarded on Flight No.KQ-313 for Nairobi but on arrival, the Immigration Authorities refused to grant Visa to the plaintiff and his two associates despite assurance by the defendant that Visa would be issued on arrival. The plaintiff states that they were detained till 6:00 a.m. in the morning and were treated as criminals and suffered humiliation, insult, mental torture and, agony at the hands of the

defendant. It has further been stated that thereafter they were deported and lodged a complaint with the defendant and demanded adequate compensation, which was not given, hence instant Suit.

3. Upon filing of written statement, the matter was listed for Issues on 06.08.2001 and the following Issues were settled by the Court:-

- i. Whether the suit is maintainable and the plaintiff has cause of action against the defendants?
- ii. Whether the real purpose of the plaintiff for visit to Kenya was business, if so its effect?
- iii. Whether the plaintiff is a fan and fond of cricket and wanted to watch ICC Cricket Tournament?
- iv. Whether the defendants could over-ride the discretion of Kenyan Immigration Authorities and ensure the issuance of Visa?
- v. Whether the plaintiff failed to satisfy the immigration authorities for obtaining visa at the Naimrobi Airport?
- vi. Whether the plaintiff was liable to comply with all the government travel requirements under the terms of Conditions of Contract and General Conditions of Carriage of passengers?
- vii. Whether the plaintiff suffered any injury or losses as claimed in the suit?
- viii. Whether the defendants are liable to compensate the plaintiff for any losses he suffered?
- ix. Whether the three air tickets were issued by the Defendant and the Country Manager of the Defendant by letter dated 11.10.2000 addressed to Immigration Office, Quaid-e-Azam International Airport Karachi assured and confirmed that the Defendant has arranged visa for the plaintiff and his two associates, Waseemuddin and Ijaz Hussain and Visa would be available on arrival at Nairobi Airport, Keyna?
- x. Whether the Defendant by letter dated 19-10-2000 regretted for the inconvenience caused to the Plaintiff and offered Rs.12000/- to the Plaintiff as a gesture of goodwill? If so, to what effect?
- xi. What should the decree be?

4. Evidence was recorded through Commissioner and the plaintiff examined himself as **(P.W-1)** by filing his affidavit-in-evidence and various documents, Mr. Ejaz Hussain **(P.W-2)** and Mr. Waseemuddin **(P.W-3)**. The defendant led its evidence through Mr. S.G. Mehdi, the Country Manager as **(D.W-1)**, who also exhibited various documents through his Affidavit-in-Evidence.

5. Learned Counsel for the plaintiff has contended that it was only the promise of the defendant for arranging Visa, on the basis of which the plaintiff withdrew his Visa application pending before the Kenyan Embassy, whereas, the defendant issued a TELEX Confirmation **Ex.P-1/6** as well as Letter dated 11.10.2000 and **Ex.P.W-1/10**, which confirmed that the plaintiff is travelling to Nairobi to attend ICC Cricket Tournament and defendant has arranged Visa to be available at arrival, and therefore, the defendant upon its failure to arrange Visa is liable to pay the damages as claimed. He has further contended that the plaintiff was detained at Nairobi Airport for 12 hours, whereas, thereafter the plaintiff was sent back to Pakistan, which was due to failure of the defendant to arrange for plaintiff's visa at arrival. He has further submitted that the plaintiff because of this deportation, suffered insult, humiliation, mental torture, business losses and agony and in support of such claim he has referred to **Ex.P.W-1/23** and **P.W-1/24**, which are Medical Reports from Dr. Ziauddin Hospital as well as Aga Khan University Hospital. In support of his contention he has relied upon the cases reported as **PLD 1996 SC 737 (Sufi Muhammad Ishaque versus The Metropolitan Corporation, Lahore), 1997 CLC 546 (Qazi Dst Muhammad versus Malik Dost Muhammad and 4 others), 1995 CLC 739, PLD 1997 Karachi 566 (Abdul Qadir versus S.K. Abbas Hussain and 2 others), PLD 1990 Lahore 432 (Syed Ghayyur Hussain Shah and another versus Gharib Alam), SBLR 2003 Sindh 258, PLD 2004 Karachi 439 (Dr. Pro. Haroon Ahmed versus Messrs British Airways and 3 others), 2005 SCMR 1950 (Azizullah versus Jawaid A. Bajwa and 3 others), 1999 CLC 192 (Miss Irshad Jehan versus P.N.S.C.)**

6. On the other hand, Learned Counsel for defendant has contended that the Carriage by Air prior to 2012, was being regulated under the Carriage by Air (International Convention Act, 1966), whereafter a new

law has been incorporated in the year 2012, however, the present proceedings are to be governed by the Act of 1966, wherein, the liability of the Carrier is restricted. Learned Counsel has referred to **Ex.P.W-1/8**, which is the application of plaintiff for issuance of Visa and has contended that the plaintiff has himself stated the reasons for entering as to see cricket match and do business. He has further submitted that it is a settled proposition that Visa on arrival is only issued upon satisfaction of the Immigration Authorities, whereas, in the instant matter the two associates were granted Visa and entry after they had been able to satisfy the Immigration Authorities. Learned Counsel has further contended that even if a person is holding a valid Visa, entry in the Country, of which the Visa is issued, is only subject to the satisfaction of the Immigration Officer on arrival and if a passenger fails to satisfy, he can be refused entry and be deported. He has further submitted that from day one the intention of the plaintiff was to do business firstly, and then to see the cricket match. Whereas, the offer and recommendation of defendant to arrange Visa was only to such passengers / visitors, who were exclusively going to watch Cricket Tournament, as a promotion package was arranged by the defendant. Learned Counsel has further submitted that the plaintiff has failed to substantiate and prove through documentary evidence as to what losses were suffered in business, which even otherwise was not the responsibility of the defendant as the Visa, which was being arranged by the defendant was only for the purpose of watching ICC Cricket Tournament and not for any business. Learned Counsel has referred to **Ex.P.W-1/5**, which is the Airline ticket and has submitted that the conditions of contract are clearly printed on the ticket, which also refers to the terms of contract in clause-10 of the ticket and is to be read with general condition of carriage issued by the Airline available as **Ex.D.W-1/2**.

He has specifically referred to clause 13.1 of such terms, which provides that the passengers are required and responsible for obtaining travelling documents and Visa and in case of refusal of entry the passengers would be liable to pay fine/charges in that regard. In support of his contention he has relied upon the cases reported as, **[1980] 3 ALL ER page 359 (Rothmans of Pall Mall (Overseas) Ltd and others v Saudi Arabian Airlines Corporation), [1997] 1 All ER page 193 (Sidhu and others v British Airways plc Abnett (known as Sykes) v British Airways plc) [2002] 2 All ER page 565 (Morris v KLM Royal Dutch Airlines King v Bristwo Helicopters Ltd.), [2006] 1 All ER page 786 (Re Deep Vein Throbosis and Air Travel Group Litigation), AIR 1960 SC 1058 (East and West Steamship Co., George-town, Madras v. S.K. Ramalingam Chettiar), 1989 CLC 129 (B.G. Francies and others versus Government of Netherland and others), PLD 1973 SC 311 (Messrs A.Z. Company Karachi versus Government of Pakistan and another), 1993 SCMR 441 (Syed Ahmad Saeed Kirmani versus M/s. Muslim Commercial Bank Ltd. Islamabad), AIR 1937 PC 279 (E.B.M. Company Ltd. versus Dominion Bank, PLD 1963 Karachi 791, (M. Younus & Co. versus Hajiani Mariam Bai and others) PLD 1969 Karachi 233 (Messrs Muhammad Amin Muhammad Bashir Ltd. versus Messrs Muhammad Amin Bros. Ltd.), 1991 MLD 1101 (Messrs Ashrafi (Private) Ltd. versus Abdul Majeed Bawany through L.Rs), PLD 1992 Karachi 444 (DADA Steel Mills (Pvt.) Limited, Karachi versus m.v.I. VAN and 2 others and PLD 1975 Karachi 819 (Deutsche Dampschiffahrt Gesellschaft Vs. General Insurance Co. Ltd., Karachi.**

7. I have heard both the learned Counsel and perused the record including the Evidence File. The case of the plaintiff as set-up in the plaint is in respect of the claim of damages allegedly suffered due to

humiliation, insult, mental torture and agony which has been more precisely stated in Para 11 of the plaint and reads as under:-

“That the Plaintiff claims as compensation from the Defendant in the sum of Rs.5,000,000.00 on account of mental torture, agony and humiliation suffered at the hands of the Defendant, 9,000,000.00 on account of loss of business because Plaintiff would have imported four tons of fresh vegetables to Norway every week and would have earned minimum profit of U.S. \$ 150,000.00 annually, which is equivalent to Rs.9,000,000.00. In addition, the Defendant is also liable to refund to the Plaintiff the cost of three air return tickets amounting to Rs.90,615.00 thus making an aggregate sum of Rs.14,090,615.00 which amount is payable by the Defendant to the Plaintiff. The Plaintiff also claims U.S. \$ 150,000.00 equivalent to Rs.9,000,000.00 from the Defendant on account of further loss of business.

8. Plaintiff in support of his claim examined himself as **PW-1**, and Mr. Ejaz Hussain (**P.W-2**) and Mr. Waseemuddin (**P.W-3**) and on perusal of his evidence, it appears that he has stated that sometime back his firm had imported vegetables from Kenya but they were not satisfied with its quality, and therefore *one of the purpose of going to Kenya was also to talk about it with the concerned person*. He further admits in his evidence that *I have not read the terms and conditions printed on the airline ticket* i.e. **Ex.1/5**. He has further admitted that **Ex.P/8** produced in evidence was written and signed by him on his arrival at Kenya Airport, perusal whereof clearly reflects that the reasons for entry was written as **“to see cricket match and business”**. Insofar as the evidence on record placed on behalf of the plaintiff is concerned including the averments in the plaint as well as **Ex.P.W-1/8**, it clearly reflects that the intention of the plaintiff was not only to see cricket but to do business as well. Whereas, the defendant had offered a package of Airline ticket and Visa on arrival only for those passengers/travelers, who were going exclusively for watching the ICC Cricket Tournament. It is needless to state that by now it is settled proposition and well known to all travellers that the Visa on arrival is only issued after the Immigration Officer interviewing the passenger is satisfied in that regard. In fact even in cases where Visa is issued by the

Embassy of the Country duly endorsed on the passport, the entry at arrival is always subject to satisfaction of the immigration officer of that Country. It happens too often that though Visa is endorsed on the Passport of the person travelling, but on arrival in that Country, the Immigration Officer refuses entry into the Country. The Visa is always subject to satisfactory entry through Immigration process. In this matter, it appears that though there were three passengers on board the same flight along with the plaintiff but two were allowed Visa / entry upon satisfaction of the Immigration Officer, whereas, apparently it appears to be a fault on the part of the plaintiff to have ventured into the scheme announced exclusively by the defendant for the persons interested to watch ICC Cricket Tournament, by making an attempt to do business as well as watch cricket, if possible. In these circumstances, the fault lies in the conduct of the plaintiff insofar as travelling is concerned. A Division Bench of The Lahore High Court in the case of ***B.G.FRANCIS and Others Vs. Government of Netherland and Others (1989 CLC 129)*** has dealt with somewhat similar situation and has been pleased to hold as under:

16. The issuance of Visa to the appellant from the Counsellor's office of Netherlands Embassy in Islamabad, and not at Lahore as alleged by the appellant, cannot be formed basis of action re: respondent 1's officers' acts complained against which took place in Amsterdam. A visa as explained in Luke. T. Lee's Consular Law and Practice, pages 178 and 179, is a document or an endorsement placed upon a passport testifying that the passport has been examined and found in order for the bearer's passage to or continued residence in the country granting the visa; it is only prima facie evidence that the holder, according to the available information and examination, is entitled to enter the sending State but it is no guarantee that he will be able to do so as the final decision still rests with the immigration officials who may refuse permission to enter the country even though an alien has a valid passport and visa. The issuance of visa does not partake of creation of any contractual obligation binding the state to allow unhindered entry into its territory to the holder of visa.

9. On Perusal of the record as well as the Evidence led on behalf of the plaintiff in respect of the damages, so claimed, it appears that the plaintiff in this regard has not examined any independent witness in support of such claim. The plaintiff has though placed on record certain

documents such as **Ex. P.W-1/1** to **P.W-1/22**, which appear to be relating to some correspondence between the plaintiff and its suppliers, however, mere production of such documents does not justify the claim of business losses including losses in respect of future business. The plaintiff has not been able to produce sufficient evidence in the shape of his income tax returns in Pakistan or in Norway, nor the annual turnover and/or sales, and neither, the profit and loss account being maintained by the plaintiff prior to his visit to Kenya and subsequent thereto. He has even admitted in his cross examination that he had not produced any such documents, though he was in possession of the same. In these circumstances the Court cannot grant any compensation or losses as are being claimed on behalf of the plaintiff. Mere filing of some documents/correspondence is no evidence to justify such a claim. Therefore, insofar as the claim of business losses is concerned, same merits no consideration and is hereby rejected.

10. Insofar as the claim in respect of mental torture is concerned, the plaintiff has only exhibited two documents i.e. **Ex.P.W-1/23** and **Ex.P.W-1/24**, which are medical reports issued by Dr. Ziauddin Hospital and Aga Khan Hospital respectively. Insofar as **Ex.P.W.1/23** is concerned same appears to be a Coronary Angiography Report issued by the Cardiologist namely Dr. Abdul Haque Khan. Neither the said Cardiologist has been examined by the plaintiff as a witness, nor any other officer/Doctor of the hospital has been examined as a witness. Such report does not reflect that as to what mental torture was suffered by the plaintiff, whereas, even otherwise it is not clear as to whether the plaintiff was cardiac patient before the alleged incident or not, and whether the present claim in respect of cardiac problem was due to happening of the alleged incident. Similarly **Ex.P.W-1/24** has been issued by another Cardiologist namely Dr. Sajid Hamid Dhakan at the Agha Khan Hospital and he has

also not been examined, therefore, again it is not possible to ascertain as to whether the cardiac problem occurred due to the alleged incident. It is settled law that a document not proved through its owner is not admissible in evidence. See ***Deutsche Dampschiffahrt versus General Insurance Co. Ltd., Karachi (PLD 1975 Karachi 819)***. In the circumstances, claim in respect of mental torture and ill health also fails and is accordingly dismissed.

11. In cases of claim for damages firstly it is to be determined that a person had actually suffered mental shock and injury, and if yes, then he is entitled to compensation, however, the difficult question is that what should be the amount of damages, as there is no hard and fast rule determined or settled by the Courts, and it is always dependent on the peculiar facts and circumstances of the case. It is always on the basis of the evidence led by the party in that regard as to its extent and magnitude of suffering, but even in that situation in the end it is left with the discretion vested in the Court to decide and arrive at a just and fair amount of compensation as damages. In this matter I have not been able to persuade myself to a remotest of level that the plaintiff has led any credible and reliable evidence in support of its claim, neither in respect of business losses as alleged, nor in respect of mental torture, agony and or ill health. The burden in such cases heavily lay on the plaintiff to prove the damages sustained by him through evidence and all the particulars of the damages are also to be proved by him. Mere general or vague oral assertions in this respect cannot be sufficient to discharge the onus cast upon the plaintiff. See ***Messrs Ashrafi (Private) Limited Vs. Abdul Majeed Bawany (1991 MLD 1101)***, ***Nawar Ali Khan V. Abdul Sattar Abu Bakr (PLD 1968 Karachi 154)*** and ***Adam Limited V. Muhammadi Steamship Company Limited (PLD 1962 Karachi 227)***. Moreover, the plaintiff having failed to produce any evidence as to loss occasioned by such conduct of the

defendant as alleged, is not entitled even to nominal damages. See ***Messrs Muhammad Amin Muhammad Bashir Ltd. versus Messrs Muhammad Amin Bros. Ltd. (PLD 1969 Karachi 233)***

12. In view of hereinabove discussion, the Issues are answered as follows:-

ISSUE No.1: In Affirmative.

ISSUE No.2: In Affirmative, consequently, the claim of the plaintiff fails.

ISSUE No.3: No answer required.

ISSUE No.4: In Negative.

ISSUE No.5: In Affirmative.

ISSUE No.6: In Affirmative.

ISSUE No.7: In Negative.

ISSUE No.8: In Negative.

ISSUE No.9: In Affirmative.

ISSUE No.10: In Affirmative.

ISSUE No.11:

13. In view of hereinabove facts and circumstances of the case, I am of the view that the plaintiff has not been able to prove its claim for damages and business losses, consequently, the Suit of the plaintiff stands dismissed, however, with no order as to cost(s).

Dated: 18.04.2016

Judge