ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. 1587 / 2008

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiffs: **Muhammad Ali Tabba & Others through Mr. Khawaja Shamsul Islam Advocate.**

Defendants: **Etihad Airways through Mr. Jawad A. Sarwana Advocate**

1) For hearing of CMA No. 14129/2013.
2) For hearing of CMA No. 14130/2013.
3) For hearing of CMA No. 14131/2013.
4) For hearing of CMA No. 14132/2013.

Date of Hearing: **19.12.2017**
Date of Order: **29.01.2018**

1) This is an application under Order VII Rule 11 CPC filed on behalf of the Defendants through which the Defendants seeks rejection of the plaint as being barred in law.

Learned Counsel for the Defendants has contended that this is a Suit claiming damages on the ground of mental anguish, shock and physical torture due to alleged non-functioning of the passenger seats in the First Class Cabin properly, whereas, under Article 17 of the Convention for the Unification of Certain Rules for International Carriage by Air commonly known as the (Montreal Convention) which is now a part of the local law, through enactment of Pakistan Carriage by Air Act, 2012 an Airline is only liable for a damage sustained in case of death or bodily injury of passenger if such death or injury takes place on board the Aircraft or during the course of any of the operations of embarking or disembarking, whereas, this is not the case of the Plaintiff as the injury alleged to have been caused is not a bodily injury. Therefore, the Suit is barred in law. Learned Counsel has further contended that time and again this Article has been interpreted in the Foreign Jurisdiction including in the United Kingdom and United States of America and those judgments have clearly held that a claim for

damages without a bodily injury is not maintainable against the carrier. Per learned Counsel the judgments of the foreign jurisdiction are binding insofar as the International Convention and its interpretation is concerned. He has further contended that in pith and substance the claim of the Plaintiffs is a claim under Tort and Article 17 clearly excludes any such tortuous claim; therefore, the Suit is barred in law and the plaint is liable to be rejected. In support he has relied upon ***Pakistan Defence Officers Housing Authority and others V. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707), Metal Construction of Greece S.A. (MEKTA S.A.) Athens through Attorney V. Owners of the Vessel m.v. Lady Rea (2013 CLD 1829), Nazir Hussain and others V. A. C. and others (2002 YLR 3484), Fariduddin and another V. Mehboob Ali (1994 SCMR 1485), Abdul Latif V. Chairman, Board of Intermediate Secondary Education, Sukkur (1986 CLC 1908), Eastern Airlines, Inc. V. Floyd Et Al., (499 U.S. (1991), Air France V. SAKS (470 U.S. 392 (1985),*** and ***InterGlobe Aviation Ltd V. N. Satchidanand (Civil Appeal No 4925 of 2011)***.

On the other hand, learned Counsel for the Plaintiffs has contended that this application is misconceived in facts and law, inasmuch as in the written statement no such objection has been raised, whereas, it has been filed apparently after settlement of issues and at the evidence stage. He has further contended that in claim of damages the plaint cannot be rejected as the Plaintiff must be given a chance to lead his evidence. Learned Counsel has referred to the legal notice and its reply by the Defendants and has contended that the Defendants in response to the legal notice have accepted that the incident as alleged did occur during the journey and even offered compensation and now the dispute is only to the extent of quantum of compensation, whereas, this objection was never raised even in the reply to the legal notice. Learned Counsel further contended that affidavit in evidence has been filed in this matter and suddenly various applications have been filed for seeking rejection of plaint as well as amendment in the written statement and reframing of issues which according to the learned Counsel is an afterthought. Per learned Counsel the Article relied upon by the Defendants is not an exhaustive law, whereas, Section 42 of the Specific Relief Act, 1877, has to be interpreted keeping in mind the conduct of the Defendants and the

changed circumstances as are prevailing in the modern day as according to the learned Counsel in addition to a bodily injury, other injuries caused must also be compensated. In support learned Counsel has relied upon ***Dr. Naheed Fatima and 3 others V. Messrs Pakistan International Air Corporation (PIAC) through Chairman and another (PLD 2011 Karachi 514), Arif Majeed Malik and others V. Board of Governors Karachi Grammar School (SBLR 2014 Sindh 333).***

I have heard both the learned Counsel and perused the record. This is a Suit for Damages, wherein, the claim of the Plaintiffs is to the effect that while travelling on First Class Tickets on 29.06.2008 on Flight No. EY100 from New York to Abu-Dhabi they experienced a very bitter, painful and embarrassing long journey, as out of the five seats reserved for the Plaintiffs, three seats were non-operational. It is further stated that this resulted in an uncomfortable long journey which caused backache, whereas, a very high and premium fair was paid by the Defendants for comfortable and convenient journey on such a long flight. According to the plaint, the incident has not been denied, whereas, various emails were exchanged and on 5.8.2008 while admitting the incident the Defendants offered a refund of US $ 354 as well as 60,000 Etihad guest miles for the in-operational seats. It would be advantageous to reproduce the contents of the said response as under:-

> "Dear Mrs. Tabba,
>
> We have received a report from our Cabin Manager Ms. Alison O'Leary regarding your assigned seat's serviceability on flight EY100 on the 29th of June 2008. We would like to thank you for taking the time whilst on your flight in providing our crew with your details.
>
> We certainly appreciate how important the working of the seat is to the comfort and enjoyment of your flight and we are extremely sorry that it was inoperable. Mr. Tabba, we do value you as our guest and we apologize that your expectations were not met by us on this occasion. We are currently experiencing problems with our premium seating and our engineering team is working very hard indeed to rectify these anomalies as and when they occur. This matter is also being addressed by all the concerned senior management.
>
> Etihad is trying very hard to ensure that we provide all of our guests with a service that offers all what we would expect of an airline today, and are confident that we will achieve our goal in the near future. We would very much welcome the opportunity to have you and or your family on board Etihad as our guest(s) in the near future and to this end we would like to offer you 20000

Etihad Guest miles as a way of saying how sorry we were for the inconvenience you experienced.

We look forward to the pleasure of welcoming you and your family on board Etihad in the near future when everything would be entirely as we all would wish.

Thank you,

Yours sincerely,

Sd/-
Cherryl L. Luneta
Guest Affairs Executive"
(Emphasis Supplied)

It further appears that while filing the written statement no such objection was ever raised regarding maintainability of the Suit and therefore, on 20.11.2013 by consent the following issues were settled:-

"1) Whether the services as expected from a five star airline for First Class Passenger was granted to the plaintiffs?

2) Whether the defendant airways immediately offered plaintiff No.2 (Mrs. Feroz Tabba) before her flight took off from New York to Abu Dhabi refund of fare difference between First Class Diamond and Business Class Pearl Zone as her seat in First Class found inoperable? If so, what is its effect?

3) Whether the plaintiff No.2 (Mrs. Feroz Tabba) enjoyed the luxury and comforts of a First Class Diamond Zone journey while seated in business class on Flight EY-100 from New York to Abu Dhabi? If so, its effect?

4) Whether the plaintiff suffered any inconvenience, mental shock, agony, torture, depression, unwarranted hardship and physical trauma on defendant airways Flight EY-100 from New York to Abu Dhabi? If so its effect?

5) Whether any cause of action has accrued against the defendant airways? If not, what is its effect?

6) Whether the plaintiff is entitled to damages and costs, if any?

7) What should the decree be?"

It further appears that immediately thereafter the Defendants have filed four applications including the application under

consideration under Order VII Rule 11 CPC. Through other applications the Defendants seek amendment in written statement as well framing of additional issues including issue regarding maintainability of instant Suit. Though there is no cavil to the proposition that an objection regarding maintainability of a Suit can be raised at any stage of the proceedings, but it is also a settled proposition that a party who intends to object as to maintainability of a Suit must do so at the very first instance. Admittedly, in this matter the written statement is silent to this effect which fact is further confirmed as an application under Order VI Rule 17 CPC for amendment in the written statement is also pending on behalf of the Defendants, wherein, the objection of maintainability has been raised. It further appears that such objection was also not raised while responding to the legal notice of the Plaintiffs. In the email as above as well as in the subsequent emails, the Defendants have apologized for the incident and have offered compensation which was rejected by the Plaintiffs being too meager. Therefore, in all fairness there is only the quantum of compensation which appears to be in dispute but for reason best known to the Defendants now the objection of maintainability has been raised. At the same time the defendants have also filed other applications (perhaps as an alternate to the present application) that in case this is dismissed, they may seek amendment in written statement and settlement of an additional issue.

However, it may be observed, that although in terms of Order 7 Rule 11 CPC, if the Court comes to a conclusion that a Suit is barred in law, then it is the duty of the Court to reject the plaint, as the word used in such provision is "*shall*". But at the same time it may also be appreciated that it is not that in every case wherein, the issue of maintainability is raised and it is answered by holding that Suit is not maintainable, that an application for rejection of plaint in terms of Order 7 Rule 11 CPC must also be sustained. These are two distinct things / events which needs to be understood. There may be a case that ultimately the Suit at the trial is dismissed as not maintainable, but on the same issue it is not necessary that the plaint may also be rejected under Order 7 Rule 11 C.P.C. Suffice it to say that the question of whether a suit is maintainable or not is moot with respect to whether or not a plaint is to be rejected as being barred by law. Both are a different species altogether and it may well be that a plaint is not rejected in

terms of Order 7 Rule 11 CPC but the suit is dismissed eventually as not maintainable for a possible host of reasons.[1]

Coming to Article 17 of the Montreal Convention, 1999, it may be observed that prior to this, this convention was known as Warsaw Convention 1929 which was first amended at The Hague 1955 and thereafter, at Guadalajara, Mexico, in 1961 through supplementary Convention and finally the Montreal Convention was passed. Prior to the Carriage by Air Act, 2012 these conventions were part of the Local Law through the Carriage by Air Act, 1934, superseded by the Carriage by Air (International Convention) Act, 1961. All these conventions are now part of the 2012 Act and duly incorporated in the Schedules of this Act. Article 17 of the Montreal Convention under the First Schedule to 2012 Act reads as under:-

> "17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The aforesaid Article provides that the carrier is only liable for damage sustained in the event of *death* or *wounding* of a passenger or any other *bodily* injury suffered by a passenger if the incident which caused the damage so sustained took place on board the Aircraft or in the course of any of the operations of embarking or disembarking. It is not in dispute that the alleged incident happened on board, but what is being disputed is that mental shock, allegedly caused due to non-operational seats and the conduct of the crew, did not fall within "bodily injury" as provided under Article 17, and therefore the Carrier cannot be held liable for any sort of damages. Though in the cases of foreign jurisdiction relied upon by the learned Counsel for the Defendants it has been interpreted and observed that under Article 17 as above the liability of the carrier is restrictive in nature and the carrier will only be liable for damages when there is either *death* or *bodily injury* suffered by the passenger. It cannot also be disputed that in the interpretation of a law enacted on the basis of an International Convention / treaty, like the one in hand, it is of great importance that the Courts of the treaty

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[1] Al-Meezan Investment Management Company Ltd V. WAPDA First Sukuk Company Limited, Lahore, PLD 2017 SC 1

Countries, and in particular the Higher Courts (like this Court), strive for accordant, uniform and consensual form of interpretation as far as possible. Such congruous and consensus is not always attainable, but a Court shall always make an effort and it must constantly aim to have such interpretation achieved. But having said that, and coming to the present law in hand, which is based on the Warsaw Convention of 1929, one must not forget that it was arrived at way back in 1929 (more than 85 years back). In 1999 at least 121 states convened in Montreal, Canada, not to amend the Warsaw, but to replace it with a new International treaty. And one of the primary objective or may be the objective was to arrive at a consensus that recovery for mental injury in absence of accompanying injury should be included. But, despite a majority of states voicing approval, somehow the 1929 Warsaw Convention's limitation of bodily injury was retained. Notably the idea behind Warsaw Convention was to limit air carrier liability. And this was at the relevant time for the reason that the airline business was fostering as a new industry and needed protection from such claims in its infancy. In the first half of the 20th Century, air travel was viewed as dangerous. The amount of claims even otherwise had a very low limit. In the past Courts have applied a protectionist approach while interpreting Article 17 ibid, to exclude mental injury and in this approach an airline employee could molest a minor, hold a gun to a passenger's head, racially discriminate, or slander and so on and so forth without fear of liability. The US Courts, later on realizing this inequity began allowing recovery of mental injury in some circumstances outside the plain reading of Article 17 and the decisions varied accordingly. Some Courts allowed mental injury recovery when it flowed from, or was caused by bodily injury. Others awarded it when it was associated with or occurred in close proximity to bodily injury. In *Husserl v Swiss Air Trans. Co.,*[388 F. Supp. 1238, 1252-53 (S.D.N.Y. 1975)] recovery was allowed for mental injury where there was no physical injury, whereas, in *Rosman v Trans World Airlines*, Inc. [314 N.E.2d 848, 854-57 (N.Y.1974)] the Court read "bodily injury" to require "palpable objective bodily injuries".

But now this is not the case. The limit of claims have increased, whereas, Article 17 needs a new interpretation. In fact there always have been divergent views of the Court on this issue till the decision of

the US Supreme Court in the case of *Eastern Airlines, Inc, v Floyd* [499 U.S. 530 (1991)]. However, this trend has also spawned atypical and anomalous results e.g. a passenger could recover for a scratch on the arm but not for psychological damages stemming from molestation, unless the passenger could prove that mental injuries were derived from scratch rather than the assault.[2]

It is to be appreciated that airlines are no longer in the same position of infancy as they were in 1929. The original idea or goal of protecting the fledgling industry is no longer needed. The air travel is now much safer as compared to those days, whereas, in cases like the one in hand, it is the alleged inefficiency on the part of the airline which is being agitated. So are the Courts in this country required to continue with such hard-nosed and inexorable attitude and approach and follow the decisions of the foreign Courts even today, when the surrounding circumstances have changed considerably? I believe no! As in the case of, ***Dr. Pro. Haroon Ahmed v British Airways*** (**PLD 2004 Karachi 439**) a learned Single Judge of this Court has gone a step ahead and has awarded damages to the plaintiff, despite a plea being raised regarding protection / exemption under the Warsaw / Montreal Convention. The Court has been pleased to hold as under;

> Now adverting to more onerous task of determining firstly the liability if any of the air carrier in case of denied boarding and secondly as to which of the carrier could be held liable in case where more than one carrier is involved in contract of carriage.
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> Adverting to first aspect of the issue, liability of carrier as, regards the passenger under the Convention, as adopted through Act of 1966, is limited to certain specified incidence, occurrence or act of omission and commission on the part of carrier or their servants and agents. Statutory liability of a carrier, extends to damage that may be sustained in the event of (i) death, (ii) wounding or (iii) any other bodily injury suffered, by the passenger, provided specified incidence, occurrence or happening took place on board of the aircraft or in the course of any of the operation of embarkation or disembarkation and for the (iv) damages sustained by the delay in carriage by air of the passenger (See rules 17(1) & 19). The specified incidence, occurrence or happening may be referred to as "statutory wrong" which entails "statutory liability" in term of rule 22 up to a maximum limit of 250,000 Franc. However, where it is proved that, damage has occasioned from the act of omission either of the carrier or, of his servants or agents done with intent to cause damage, or recklessly with knowledge that damage would probably result, then limit of liability could not be availed.
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> ……The carrier even by contract cannot exclude or limit its liability, if the damage is caused by the willful misconduct or by such default as is, in the opinion of the Court, equivalent to willful misconduct either on the part of the

[2] Carey v United Airlines, 255 F.3d 1044, 1053(9th Circuit 2001)

carrier or any of his servants or agents provided the servant or the agent did such act within the scope of employment or agency as the case may be. There is no reason why the defence akin to the statutory defence, as discussed above, could be availed of in cases where the wrong could not be classified strictly within the ambit of "statutory wrong" as defined under the Convention.

From the scheme of the Convention as well as the Act of 1966, it appears that cases of breach of contract of the kind in hand are not contemplated therein. Thus it does not mean that where a wrong done, breach committed or injury inflicted is not within the contemplation of the Convention and the Act of 1966, the; carrier is absolved of any liability, aftermath or consequence Applying age aid legal maxim "ubi jus ibi remedium" (where there is right there is remedy). As to "statutory wrong" the Convention provides complete code as to rights and liabilities both of the cattier a" the passenger. However, any wrong, breach or mischief not 'within the contemplation of the Convention or the Act of 1966, same could be redressed either tinder law governing contract, in case of Pakistan under the Contract Act, 1872, or general law or even in appropriate cases under Trot. This view finds support from the case reported as Pakistan Airlines Corporation 1996 CLC 627. This Court maintained award of damages on account of breach of contract of carriage for the fault of clerk of PIA who had torn the relevant coupon of the ticket and the passenger was left in lurch in another High Contracting State (India). In a case from American jurisdiction cited by Mr. Akhtar Hussain cited as `Ralph Nader v. Allegheny Airlines Inc'. 426 US 290, plaintiff in said case, denied boarding, declined to accept `denied boarding compensation' fixed under regulations of Civil Aeronautics Board and instead brought suit in US District Court asserting in addition to statutory cause of action under the Federal Aviation Act as well, a common lads tort action based on fraudulent misrepresentation arising from airline's alleged failure to inform him in advance of its deliberate overbooking practices District Court allowed compensatory and punitive damages. The U.S. Courts of Appeal reversed the finding, holding that common law tort, action is not available and sent the matter to the Board for determination whether the non-disclosure of overbooking is within the preview of Federal Aviation Act. On Certiorari the U.S. Supreme Court 'expressed unanimous view, that the plaintiff's common low action cannot be stayed pending reference to the Board.

Where a carrier, his servant or agent disembarks a passenger or wrongfully denies him to board or embark, as happened in the instant case, the air carrier could be held liable for failure to carry the passenger by air at all and so also consequences for the delay arising therefrom. The air carrier as a rule will be liable to refund the fare and so also damages and any incidental loss or expense and excess amount of fare, if any, paid to another carrier to reach the destination. (See section 73 of the Contract Act, particularly illustration [r] thereto).

As discussed above, the Convention is silent, as regard liability Pair carrier for the breach of contract of carriage. By this, it does not mean that, air carrier is rendered absolved of all the liability in cases of breach of contract, occurrence of any wrong other than "statutory wrong," such would be anomalous position, there is no wrong without a remedy. Where any injury is caused or loss occurs during the course of or in furtherance of carriage by air that may not be within the contemplation of Convention, a passenger, consignee or any other person will always have a remedy against the carrier. Where statutory liability of air carrier under the Convention terminates; realm of general law governing contractual obligation begins or where no remedy under general law of contract is available remedy under tort may be extended provided a case is made out.

In my humble opinion the act of the Defendant No-2 denying, boarding to the Plaintiff and his son is out of the purview of the "statutory wrong" therefore the statutory liability would not clinch on the carrier. As observed above, this does not mean that Plaintiff is rendered helpless, general law will come to his rescue. Section 9 of the Code of Civil Procedure acknowledges inherent right of a

> person to bring any suit of civil nature, and the Civil Court may take cognizance of all such cases unless expressly or impliedly barred. In the instant case no implied or express bar was pleaded. The implied bar that could be inferred may be restricted only to the claim arising out of "statutory wrong," for which Convention is a complete code and, not otherwise. As observed above, case of the Plaintiff falls out of the ambit of "statutory wrong" nevertheless, carrier is liable for the wrong under the contract of carriage and general law of land.

In these circumstances and in view of the aforesaid discussion, (when this is only the stage of summary rejection of plaint, without any evidence being led), I am compelled to observe that insofar as the judgments relied upon from the foreign jurisdiction are concerned, presently they can at the most be termed as persuasive in nature and do not have a binding effect. By this observation, I do not mean to say that they cannot be considered and are always to be discarded; but while interpreting and applying them, it must always be kept in mind the overall circumstances and facts prevailing in the matter. As observed earlier, in this case the Defendants have already offered compensation. Secondly, they never raised such objections through its written statement and even consented as to the settlement of issues, wherein, no such issue was raised by them. Therefore, in all fairness one must kept in mind the peculiar facts of this case when the Defendants rely upon judgments from the foreign jurisdiction. Notwithstanding this, if this Court comes to a conclusion that a foreign judgment is not to be followed in a particular case, then this Court is free to give effect to a provision of law or a convention as it deems fit.

Further it is not that this Court must always concur and agree with the view taken and arrived at by a court of foreign jurisdiction. Having said that it must also be kept in mind by this Court that in cases involving International Conventions and Foreign Treaties any interpretation which is in contradiction of the view taken by the foreign court has to be arrived at carefully and that a deeper appreciation of the facts so prevalent in a particular case are required to be done.

Though much reliance has been placed by the learned Counsel for the Defendants on Article 17 however, at the same time one must keep in mind the provisions of Article 25 of the said Convention which reads as under:-

> "25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as is in the opinion of the Court equivalent to willful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."

The aforesaid Article provides that the carrier shall not be entitled to avail himself of the provisions of this Schedule (which includes Article 17 as well) which exclude or limit his liability, if the damage is caused by his *willful misconduct* or by such default on his part as is in the opinion of the Court equivalent to *willful misconduct*. It further provides that the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by *any agent* of the carrier acting within the scope of his employment. Now when this Article 25 is read in juxtaposition with Article 17 (both have been listed under Chapter III-Liability of the Carrier) it would emerge that reliance on Article 17 in a case wherein, the evidence is yet to be led by the Plaintiffs is not only premature but so also misconceived. On the one hand, the Defendants are seeking protection and or exemption under Article 17 on the ground that the damage sustained can only be claimed in cases of death or a bodily injury, whereas, at the same time Article 25 provides that the carrier is not entitled to avail the benefit of such provision if the damage is caused by *willful misconduct* of the Defendants or by such default on the part of the Defendants which in the opinion of the Court is equivalent to willful misconduct. When both these Articles are read harmoniously an inescapable conclusion is drawn that in no manner a plaint can be rejected merely by applying Article 17 as above. It is for the Court after appraisal of the evidence to come and arrive at a definite conclusion that whether the damage caused is to be termed as *willful misconduct* within the contemplation of Article 25 or the carrier is entitled for availing the benefit of Article 17 for excluding or limiting the liability, ibid. There may be an argument that both these Articles are independent, rather Article 25 only deals with the amount of *liability* as mentioned in Article 22 ibid; however, at this stage I am not inclined to give any definite finding to that effect inasmuch as it may have a bearing on the trial of the Suit, but to put the record straight, it may be

observed, that exemption or exception in Article 25 is available to the carrier from the provisions of this Schedule (entire Article 17 to 30 falling under Chapter-III-Liability of Carrier), which exclude or limit liability if the damage is not caused due to willful misconduct. Tentatively, I am of the view that it is in respect of the entire Schedule and not only for limiting the liability in monetary terms as provided in Article 22. However, this is an issue which can only be dealt with after conclusion of trial as it cannot be presumed at this stage of the proceedings that the claim of mental shock and agony as claimed is not because of the willful misconduct on the part of the carrier. Therefore, in cases of like nature it would always be necessary to adduce evidence and prove before the Court that such act does not falls within *willful misconduct* of the Defendants and therefore, the carrier is not liable for damages and is entitled to the protection and or exemption / exception as provided under Article 17.

In view of hereinabove facts and circumstances of this case, the application under Order VII Rule 11 CPC appears to be misconceived and so also premature. Accordingly the same is hereby dismissed.

2 to 4). Adjourned.

Dated: 29.01.2018

J U D G E

ARSHAD/