IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.209 of 2005
&
High Court Appeal No.215 of 2005

Before:
Mr. Justice Nadeem Akhtar &
Mr. Justice Muhammad Iqbal Kalhoro

Date of Hearing: 17.11.2014.

High Court Appeal No.209 of 2005:

Appellant, M/s. Maniar Tours & Travels (Pvt.) Limited, through Mr. Anwar Muhammad Siddiqui, advocate.

Respondent No.1, M/s. Hashwani Hotel Limited, through Mr. Muhammad Arif Khan, advocate.

Respondent No.2, M/s. General Sales (Pvt.) Limited, through Mr. Aijaz Ahmed Khan, advocate.

High Court Appeal No.215 of 2005:

Appellant, M/s. Hashwani Hotel Limited, through Mr. Muhammad Arif Khan, advocate.

Respondent No.1, M/s. Maniar Tours & Travels (Pvt.) Limited, through Mr. Anwar Muhammad Siddiqui, advocate.

Respondent No.2, M/s. General Sales (Pvt.) Limited, through Mr. Aijaz Ahmed Khan, advocate.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- This combined judgment shall decide the captioned appeals filed against the judgment and decree dated 09th May 2005 passed by the learned single Judge of this Court in Suit No.1224 of 1996 filed by the Hashwani Hotels Limited against M/s. Maniar Tours & Travels (Pvt.) Limited and another, whereby, while

partly dismissing the suit for declaration and permanent injunction, he granted compensation to the plaintiff (Hashwani Hotels Limited) with costs.

2. The facts material for the disposal of above appeals are that Hashwani Hotel Limited (hereinafter referred to as "the respondent No.1") filed a suit for declaration, permanent injunction and compensation against Maniar Tours & Travels (Pvt.) Ltd. (hereinafter referred to as "the appellant") and General Sales (Pvt.) Limited (hereinafter referred to as "the respondent No.2") with the following prayers:

> *1. a declaration that the Defendant No.1 was a mere licensee on the Shop No.26, measuring 478 sq. ft., located in the shopping arcade of the Marriot Hotel, situated on the plot of land bearing Survey No.15, Sheet CL-9, Civil Lines Quarters, Abdullah Haroon Road, Karachi, from 1.8.1981 (when it was first granted a LICENSE to have access to and to use the said Shop) to 31.7.1991 (when the LICENSE period expired), and that from 1.8.1991 it has been illegally and wrongfully entering upon and using the said Shop;*
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> *2. a mandatory injunction directing the Defendant No.1 to remove all its goods, materials, employees, effects and things from the said Shop;*
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> *3. a permanent injunction restraining the Defendant No.1 from entering upon and using the said Shop after it has removed therefrom all its goods, materials, employees, effects and things;*
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> *4. an order directing the Defendant No.1 to pay to the Plaintiff compensation for the illegal entry and use of the said Shop, at the rate of Rs.18/- per sq. ft. per month (with an upward inflation adjustment of atleast 20% per annum), plus the applicable excise duty, electricity and other charges, taxes and levies, along with interest thereupon at the rate of 18% per annum, from August, 1991 till the Defendant No.1 stops entering upon and using the said Shop;*
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> *5. a declaration that the amount of Rs.28,680 deposited by the Defendant No.1 under the Agreement of License dated 1.8.1981 stands forfeited in favour of the Plaintiff who is entitled to the said amount because of the illegal and wrongful entry and use of the said Shop by the Defendant No.1 after the expiry of the license period;*

6. grant of costs of the proceedings to the Plaintiff;

7. grant of any other, further or better relief that this Hon'ble Court deems fit and proper in the circumstances of the case.

3. Averments made in the plaint disclose that the respondent No.1 was a Public Limited Company engaged in the business of running hotels in Pakistan and owned, among others, the Marriot Hotel (formerly the Holiday Inn Hotel) situated on the plot bearing Survey No.15, Sheet CL-9, Civil Lines Quarters, Abdullah Haroon Road, Karachi. On 23.04.1981, the respondent No.1 gave an area of 15646 square feet comprising the shopping Arcade on the ground floor of Hotel premises to the respondent No.2 on the lease for a period of six years commencing from 16.04.1981 with authority to sub-license any or all of the shops in the premises. The respondent No.2 under an agreement granted the appellant a LICENSE to have access to and use the shop No.26, measuring 478 square feet, located in the premises for a period of five years starting from 01.08.1981. The license period under the agreement between the respondents, No.1 & 2 expired on 31.07.1986. However, the agreement was renewed for a further period of five years commencing from 31.07.1986 until 15.04.1992 on a revised rate of Rs.10 per square foot per month as license fee along with other charges but almost a year later the respondents No.1 & 2 agreed to terminate the lease of premises with effect from 31.12.1987. Thereafter, the respondent No.2 sent a letter to the appellant to the effect that lease-hold rights in respect of the premises had been surrendered to the respondent No.1 from 01.01.1988, thus, thenceforth it would have a direct arrangement as a licensee with the respondent No.1. And an amount of Rs.28,680/- deposited by it under the agreement of license had also been transferred to the respondent No.1 to its credit. The appellant was further requested to pay

the license fee, service and other charges in respect of the shop directly to the respondent No.1. The respondent No.1 through a letter dated 10.01.1988 confirmed the assumption of rights and obligations under the agreement of license and started sending monthly invoice to the appellant for the license fee in respect of the shop in its occupation, which the appellant started paying coupled with other charges. Before expiry of the licensee on 30.07.1991, the respondent No.1 sent a letter to the appellant offering to renew the license at the revised rate of Rs.18 per square feet for further period of five years plus other charges. However, in case it failed to communicate the acceptance of the offer, it would be presumed that it had no intention to use the shop beyond the period of the license. The respondent No.1 instead of getting the acceptance of its offer received a notice from the appellant denying the relationship of licensor and licensee. The respondent No.1 thereafter repeatedly requested the appellant to stop using the shop and to pay compensation to it for the illegal use of the shop but the said requests were completely disregarded. The appellant since August 1991 had been illegally entering upon and using the shop without even paying the license fee, service and other charges, and to seek unlawfully the protection available to the tenants under the rent laws was falsely claiming to be a lessee of the respondent No.1. It was under such facts; the respondent No.1 filed the above suit against the appellant and the respondent No.2.

4. The respondent No.2 did not choose to contest the suit, however, the appellant resisted the same by filing the written statement, wherein it raised preliminary objection over maintainability of the suit and pleaded that it was time barred; and no cause of action had accrued to the respondent No.1 to file the suit. Regarding facts, the appellant

maintained that its relationship with the respondent No.2 was of a lessee and a lessor, which stood transferred to respondent No.1 after expiry of lease between respondents No.1 and 2. The license agreement was a sham and bogus document, which was prepared and executed by the respondent No.1 and the respondent No.2 to save the taxes being charged by the Central Excise Department over their rental income. The appellant further pleaded in the written statement that the alleged license agreement between it and the respondent No.2 expired on 31.07.1986, which, thereafter, was not renewed for a further period of five years at the rate of Rs.10/- per square feet as they had agreed to execute a proper rental agreement at the revised rate but before that, the respondent No.2 malafidely in collusion with the respondent No.1 surrendered the lease to the respondent No.1. The appellant being the lessee had the exclusive control and possession of the said premises, as such had every right to enter upon and use the said shop.

5. The learned single Judge, upon divergent pleadings of the parties, framed the following issues.

> *"1. Whether the Defendant No.1 after being inducted as licensee of shop No.26 vide agreement dated 8.8.81 became the tenant after expiry of such agreement?*
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> *2. If the Defendant No.1 did not become the tenant:*
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> *i) Whether the use of the shopNo.26 by the Defendant No.1 after 1.8.91 was unauthorised and /or illegal? And*
>
> *ii) Whether the Defendant No.1 is liable to cease the use of the shop No.26 and also pay compensation to the plaintiff for the unauthorised use from 1.8.1991 to date? And (sic)*
>
> *iii) What should be the quantum of compensation due to the plaintiff?"*
>
> *3. If the Defendant No.1 did become the tenant, then*

i) *Whether the suit is maintainable and the Plaintiff is entitled to pay any relief?*

ii) *What should the decree be?*

6. The respondent No.1 examined Muhammad Akhtar Bawani Finance Controller in support of its case. The appellant, however, did not lead any evidence in support of its claim. The Learned Single Judge after hearing the parties partly dismissed the suit and partly decreed it in terms stated hereinabove.

7. The appellant and the respondent No.1 being dissatisfied distinctively with the impugned judgment and decree have preferred the separate appeals, which are in hand.

8. Mr. Anwar Muhammad Siddiqui, the learned counsel for the appellate at the very outset of his arguments, contended that the suit was not maintainable from the very inception of its filing. According to him, the suit was instituted by a person who was not authorized by the Board of Directors of the company to do so through a resolution that, under the law, was a mandatory requirement, which should be fulfilled in a suit filed by the company. He painstakingly argued that since the incompetent person filed the suit, it was defective, bad in the law and was liable to be dismissed on that sole score. Learned counsel further submitted that on that particular point the appellant cross examined the Respondent No.1's witness by suggesting to him that the Director namely S.H. Tehsin (who instituted the suit) was not competent to authorize him to depose in the suit without a resolution of Board of Directors in his favour, which, albeit, he had denied but the matter of fact was that there was no authority vested with him to either file the suit

or to empower Mr. Muhammad Akhtar Bawani to depose for the company. In this regard he referred to the case of Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs) Vs. Messrs Ghulam Nabi Corporation Ltd., Lahore (PLD 1971 Supreme Court 550). He lastly prayed for allowing his appeal and dismissing that of the Respondent No.1.

9. Conversely, Mr. Muhammad Arif Khan, learned counsel for respondent No.1 argued that the suit was filed by the Director of the Company, who was competent in terms of Order XXIX CPC; no such plea was taken by the appellant in the written statement nor in this regard any issue was framed by the learned trial Court to afford an opportunity to the respondent No.1 to produce the relevant resolution passed in favour of S.H. Tehsin who had filed the suit on its behalf. He argued that in absence of any such plea taken by the appellant in the suit, the respondent No.1 was not required to file the copy of the resolution. According to learned counsel, per Article 79 of Memorandum and Articles of Association of Hashwani Hotels, the Director was competent to institute /conduct /defend etc. any legal proceedings by or against the company or its officers; therefore, no illegality had occurred even if no resolution was produced before the trial Court. He further argued that even otherwise the non-production of requisite resolution at the time of institution of the suit was only a technical flaw having no bearings on the merits of the case and was ignorable. Learned counsel, however, candidly conceded to a query that at the time of presentation of the plaint and then subsequently during the proceedings of the suit or in the instant appeals neither the required resolution nor any Memorandum and

Articles of Association authorizing the said Director of the company to institute the suit was filed.

10. After hearing the learned counsel for the parties, we with their consent decided to examine the above legal question before hearing the appeals on factual points.

11. Admittedly, the suit on behalf of the respondent No.1 was filed by one S.H. Tehsin, stated to be working as a Director in the company. In terms of Order XXIX Rule 1 CPC the secretary, any director or other principal officer of the corporation, who is also able to depose to the facts of the case, may sign and verify any pleadings filed on behalf of or against the corporation. The question, which still requires an answer, would be whether the law ibid does authorize any one of them mentioned therein to institute the suit on behalf of the company. In order to find one, we need to read the Order XXIX Rule 1 CPC to understand its reference and import. For ready reference, the same is reproduced herewith:

> *"Subscription and verification of pleading. – In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case".*

12. A bare perusal of the above provision of law makes it abundantly clear that it does not either deal with the frame of the suit nor it confers any authority upon the person, stated therein, to institute the suits on behalf of the corporation. It merely enables and permits the referred officer of the company to sign and verify the pleadings in a suit filed either on behalf of or against the corporation. The authority to the employee of the corporation to sign the pleadings in terms of Order

XXIX CPC cannot be enlarged or construed to have included the power to institute the suit, unless the same is established by producing the necessary resolution (permitting such employee to file the suit) adopted by the Board of Directors of the company in his favour. The same point came to be examined in the case of National Insurance Corporation and others Vs. Pakistan National Shipping Corporation and others (2006 CLD 85) wherein the learned single Judge of this Court has observed as under:

> *"5. Admittedly the plaintiffs are the corporate body created under the statue C.P.C. provides a special provision to deal with the cases of the statutory Corp. as well as company incorporated under the Companies Ordinance, 1984. Under the law, the plaintiffs are to be sued in the name of their corporate name which has been done in this case. Under Order XXIX rule 1, C.P.C which deals with such cases provides that "in suits by or against a corporation, any pleading may be signed and verified on behalf of a corporation by the Secretary or by any Director or other principal officer of the corporation who is able to depose to the facts of the case.*
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> *6. It will be noticed that the said provision only deals with the signing of and verification of pleadings in the suit filed by such Corp. and Companies. It neither deals with the frame of the suit nor authorizes the institution of suits. It only permits the persons mentioned in it to sign and verify the pleadings".*

13. The rule *ibid* only describes that the pleadings in the suit either against or on behalf of the company might be signed and verified by the secretary or by any director or any principal officer who (being conversant with the facts of the case) is able to depose the same. A corporation is deemed a juristic entity that can take decisions and act upon them only through the Board of Directors. An authorization to take decisions within the corporation would be deemed legal and valid only when it has the sanctity of approval by its Board of Directors. The individual representing the corporation or company is not competent to act on its behalf on his own in the matters pertaining to the suits pending

in the Courts of law without getting the requisite approval/authority from the Board of Directors through a resolution. The philosophy in the context appears to be making the corporation responsible as a whole for any act performed (or in the larger sense, an omission committed) by its representative in respect of the proceedings of a given case after getting an authority to appear and act on its behalf. In absence of the requisite resolution or authority duly extended to its representative, the company could find an easy excuse to avoid the consequences by pretending ignorance and lack of knowledge to the actions and omissions of its representative. Under the circumstances, therefore, the pleadings by or on behalf of the corporation /company shall not be competent unless it is shown on the record that the person signing and verifying the same is authorized by the Board of Directors through a resolution to file them in the Court. Ability of a person to sign and verify the proceedings would only mean that he is conversant with the facts of the case, which he can depose during the trial. Such capacity, however, would not make the person entitled to file the pleadings on behalf of the company. The ability to sign and verify the pleadings and the authority to institute the same are two quite distinctive features in the eyes of law, which therefore cannot be allowed to overlap each other. For reliance the decision of Divisional Bench authored by one of us (Nadeem Akhtar, J.) in an unreported case of M/s. Rice Export Corporation of Pakistan Vs. M/s. European Asian Agencies & others (High Court Appeal No.140 of 2005) can be cited:

> *"7. Rule 1 of Order XXIX CPC specifically deals with the signing and verification of pleadings in Suits by or against corporations. Under this Rule, pleadings in Suits by or against a corporation are required to be signed and verified on its behalf by its secretary or by any director or other principal officer who is*

> *able to depose to the facts of the case. A corporation, being a juristic entity, can take decisions or act only through its Board of Directors, and an authority or authorization by or on behalf of a corporation is deemed to be valid and legal only when it has the sanction or approval by its Board of Directors. It is well-settled that pleadings by or on behalf of a corporation /company are not competent unless the person / officer signing and verifying the same is so authorized by the Board of Directors of the corporation /company. If any authority is needed on this point, reference may be made to the leading case of Khan Iftikhar Hussain Khan of Mambot (represented by 6 heirs) V/S Messrs Ghulam Nabi Corporation Ltd., Lahore, PLD 1971 SC 550, which has also been relied upon in the impugned judgment by the learned single Judge. In the instant case, RECP, being a corporation, was required to authorize either its secretary or any director or other principal officer to sign and verify the plaint and to institute the Suit on its behalf. However, this legal requirement was admittedly not fulfilled".*

14. As regards the contention of the learned counsel for the respondent that filing a resolution at the time of institution of a suit is merely a technical flaw having no bearings on the merits of the case and could be overcome at any stage of the proceedings, it may be observed that authority to file the suit on behalf of the company is vital to it validity as it is the requirement envisaged under the law. If the law requires a thing to be done in a particular manner, then it has to be done in that manner otherwise, the same would be deemed illegal *(A communi observantia non est recedendum).* The person who instituted the suit was required to file the resolution in his favour, which he could not; hence, such lapse on his part could not be termed merely a technical one. The record also does not bear any testimony to the fact that at any subsequent stage an effort was made by the respondent No.1 to make up for the lacuna left at the time of filing of the suit. The non-production of the requisite resolution at the time of institution of the suit would have been considered as a mere technical bona fide lapse on the part of the respondent No.1, had the same, although available on record, not been

produced due to some inadvertence and subsequently efforts made to bring it on the record. In the present case, however, the record is silent about any anxiety shown by the respondent to produce copy of the resolution or Memorandum and Articles of Association at any stage of the proceedings to establish competency of the person who instituted the suit. The Hon'ble Supreme Court in an unreported decision in the case of Trading Corporation of Pakistan vs. M/s. Cargill Incorporated and others (Civil Appeal No.4-K of 2009) while dealing with the issue has observed as under:

> *"We have heard both the learned ASCs. In our opinion, the defect of non-production of power of attorney before the learned civil Court at the time of filing of the plaint is of technical nature. We have perused a copy of the power of attorney which is available on record and find that this is a curable defect as it may not have been produced at the time of filing of plaint due to inadvertence."*

15. Under the law, therefore, the legal position is obvious. The authority given to an employee to institute the suit on behalf of the company shall be filed along with the plaint to establish his competency to act on behalf of the company. In absence whereof and particularly so when despite being warned through some objection by the other side, nothing is done to correct the wrong as is the situation attending in the present case. That be so, we are of the view that the defect left by the respondent No.1 at the time of institution of the suit being incurable, in view of the peculiar facts and legal position discussed above, is fatal to the proceedings initiated by it. Admittedly, the appellate Court cannot make right the wrongs, which are either irremediable in nature or get so due to indolence of the party against which such wrong is alleged by its opponent /contender. In this matter by not producing the resolution at the time of the institution of the suit, which is a legal requirement of the law,

and then perpetually failing to do so, despite having been warned through the cross-examination of its witness, the respondent No.1 failed to fulfill a legal requirement, which goes to the roots of the case. The plea in relation to such legal flaw left unattended can be raised without any exception at any stage of the proceedings. Even in the appeals in hand, no such document containing the resolution showing authority of the person instituting the pleadings on behalf of the respondent No.1 has been produced. Under the circumstances, we are of the view that the suit of the respondent No.1 from the very beginning was not maintainable for want of the necessary authority/resolution. Consequently, HCA No.209 of 2005, filed by the appellant, is allowed and the impugned judgment and decree passed in Suit No.1224 of 1996 are set aside; and HCA No.215 of 2005, filed by respondent No.1, is dismissed with no order as to costs.

Above are the reasons of our short order dated 17.11.2014.

JUDGE

JUDGE