ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.S.A.No.06 of 2017
Nisar Ahmed Shah
Versus
Etihad Airways through its Chief Executive

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	08.05.2017	**Mr. Nisar Ahmed Shah and ch. Ishfaq Ahmed, Advocates for the appellant.** **Ms. Alizeh Bashir and Shafaq Abid, Advocates for the respondent.**

Through the instant regular second appeal, the appellant, Nisar Ahmed Shah, who is an Advocate of the High Court, impugns the judgment dated 23.01.2017, passed by the Court of the learned Additional District Judge, Islamabad, whereby, the appellant's appeal against the judgment and decree dated 27.09.2016, passed by the Court of the learned Civil Judge, Islamabad, was partly accepted, and the said judgment and decree dated was modified. Vide the said judgment and decree dated 27.09.2016, the learned Civil Court decreed the appellant's suit to the extent of US $1,744/- whereas vide the appellate judgment and decree dated 23.01.2017, the learned Appellate court modified the judgment and decree of the learned Civil Court, by decreeing the appellant's suit to the extent of US $3,000/- in addition to US $1,744/-.

2. The appellant's case is that on 20.02.2015, the appellant traveled from Islamabad to Amsterdam via Abu Dhabi by flight No.EY223 with booking reference No.2QUSVI. On arrival at Amsterdam, the appellant discovered that his luggage had been lost due to the respondent's negligence. The appellant claims that in his luggage, he had put the items

listed in paragraph 5 of his suit. The appellant claims that he had refused the respondent's offer for a settlement in the sum of US $600/-. The appellant claims that due to the respondent's negligence, the appellant was not able to make an effective presentation at the conference. The plaintiff prayed for a decree of US $23,209/- in his favour.

3. The respondent contested the suit by filing a written statement. The respondent admitted that on 20.02.2015, the appellant traveled to Amsterdam on Etihad Airways flight No.EY-232; that on account of purchasing a ticket for travel on Etihad Airways, the appellant agreed to be bound by *inter-alia* the Montreal Convention as well as Etihad Airways' conditions of carriage; that under the provisions of the said Conventions the appellant could claim a maximum amount of US $1800 for lost luggage; that the appellant had not paid an additional amount as "special declaration of value"; that the appellant did not act in accordance with the respondent's standard baggage handling procedurals in order to claim compensation for the lost luggage. The respondent admitted that the appellant's luggage was declared as lost; that the process of compensating the appellant for the lost luggage was initiated on 18.03.2015, by requesting the plaintiff to provide the receipts of the items in the lost luggage; that on 24.03.2015, the appellant provided the list of the items in the luggage, and claimed an amount of US$9,000/-; that as "special declaration of value" had not been filed by the appellant, he was offered compensation in the amount of US $600/-; that the appellant declined

the said offer, and on 11.05.2015, issued a legal notice to the respondent claiming US $18,209/-; that on 23.06.2015, the appellant was offered US$1,744/- as compensation; that the respondent took all the measures necessary for tracing the appellant's lost luggage, but to no avail; that the appellant's luggage had not been lost due to the respondent's negligence.

4. From the divergent pleadings of the contesting parties, the learned Civil Court, vide order dated 07.10.2015, framed the following issues:-

"i) Whether the plaintiff is entitled for decree of damages and recovery of Dollars 23,209$, as prayed for?OPP
ii) Whether the plaintiff has no cause of action to file the instant suit as the same relates to carriage by air and is therefore, exclusively governed by the provisions of the Carriage by Air Act, 2012? OPD
iii) Whether the suit of the plaintiff is not maintainable in its present form?OPD
iv) Whether the plaintiff is not come with clean hands?OPD
v) Relief. "

4. The appellant entered the witness box as PW.1, and had his statement recorded on oath. The appellant produced his air ticket as Exh.P.1; attendance card for the conference as Exh.PA; and Exh.PB; luggage tag/receipt as Exh.PC; copy of the invoice for digital camera as Exh.PE.; copy of the invoice of Apple I-Phone 6 plus as Exh.PF; publication pamphlets as Exh.PG; copies of receipts of Expenditure Exh.PH/1/2 and 3, and copy of legal notice as Exh.PL and copy of letter dated 23.06.2015 as Exh.PK. On the other hand, Mr. Muhammad Rehan Faiz appeared as D.W.1 and tendered his affidavit-in-evidence which was marked as Exh.DW/1. Vide judgment and decree dated

27.09.2016, the learned Civil Court, decreed the suit to the extent of US $1,744/-.

5. Against the said judgment and decree, the appellant preferred an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment & decree dated 23.01.2017, the learned Appellate Court, modified the judgment and decree passed by the learned Civil Court, by decreeing the appellant's suit to the extent of US $3000/- in addition to US $1744/-. Against the judgments and decrees of the learned Courts below, the appellant has preferred the instant regular second appeal.

6. Learned counsel for the appellant after narrating the facts leading to the institution of a suit, submitted that the learned Courts below erred by decreeing the suit only to the extent of US $1744/-, and that the learned Appellate Court should have decreed the suit by granting the complete relief prayed for by the appellant in his suit. He submitted that almost all the facts in the case were admitted, and that the appellant had suffered mental agony, and suffering due to the respondent's negligence in loosing the appellant's luggage. Furthermore, it was submitted that the appellant had expensive items (i.e. Digital Canon Camera worth US $3,074 and I-Phone 6 plus worth US $1,128/-) in his luggage which was lost to the respondent's negligence; that the petitioner had 200 pamphlets costing US $1000/- for the collection of donation during the conference; that had the plaintiff been in possession of the pamphlets during his stay in Amsterdam, he could have collected donations to the tune of US $5,000/-; that the appellant had expanded US $490/- on

clothes and baggage; that the appellant paid US $1,250/- on "urgent expenses" during his stay abroad; that the appellant sought the reimbursement of his air ticket costing US $1,079/-; that the respondent was bound to pay the appellant's compensation due to metal stress and agony; that under paragraph 3(3) of the Fourth Schedule to the Carriage by Air Act, 2012, it was the respondent's obligation to deliver the appellant's checked-in luggage; that under paragraph 17 of the said Act, the respondent was liable to compensate the appellant for the loss to his checked-in luggage on account of the fault of the respondent's servants and agents; that on account of such a loss of checked-in luggage, the appellant was entitled to enforce such rights as flowed from the contract of carriage. Learned counsel prayed for this Court to decree the suit for US $23,209/-. In support of his contentions, learned counsel for the appellant placed reliance on the law laid down in the judgment in the case of Haroon Ahmad Vs. British Airways (PLD 2004 Karachi 4739), wherein an amount of US 500 per day for thirty days was held to be fair and reasonable compensation for denying boarding to a passenger in breach of an international contract of carriage by air.

6. On the other hand, learned counsel for the respondent submitted that the respondent does not admit any negligence on its part or on the part of any of its employees; that an amount of US $1744/- was offered as compensation to the appellant as a gesture of pure goodwill and the maintenance of an amicable relationship with passengers traveling on Etihad Airways; that the carriage by Air Act, 2012 was enacted

in order to give effect to *inter-alia* the Montreal Convention, 1999; that the Montreal Convention, 1999, is a part and parcel of the carriage by Air Act, 2012, as the same has been set out in the Fourth Schedule of the said Act; that by virtue of Section 3(4) of the said Act, the provisions of the Montreal Convention have the force of law in Pakistan; that Paragraph 22(1) of the Fourth Schedule to the said Act, *inter-alia*, provides that in case of damage caused by the delay, the carriage of baggage, the liability of carrier for each passenger shall be limited to 4,150/- special drawing rights. Furthermore, paragraph 22(2) to the Fourth Schedule to the said Act provides that in case of destruction, loss or damage or delay of the baggage, the liability of the carrier shall be limited to 1000 special drawing rights to the passenger, unless the passenger at the time of checking-in the baggage had submitted a "special declaration of interest in delivery" and had paid a supplementary sum if the case requires; that where such a declaration is filed, the carrier is liable to pay a sum not exceeding the declared sum; that the appellant had not filed a "special declaration of interest in delivery" at any stage with respect to any items, his luggage, therefore, the respondent was not liable to pay a sum more than that offered as compensation to the appellant. Learned counsel further submitted that the essential ingredients for filing a regular second appeal had not been satisfied in the case at hand. Learned counsel prayed for the appeal to be dismissed.

7. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance.

8. The facts leading to the institution of the regular second appeal have been set out in sufficient detail in paragraphs 2 to 5 above, and need not be recapitulated.

9. It is an admitted position that on 20.02.2015, the appellant traveled from Islamabad to Amsterdam on Eithad Airways' Flight No.EY-223. It is also admitted that the appellant lost his checked-in luggage. The vital question that needs to be determined is the compensation to which the appellant is entitled. It is well settled that when a person claims special damages, it is incumbent upon him to show as to under which head of account and how such damages were sustained. General damages are held to be compensatory in nature, and the amount assessed should not appear to be punitive or exemplary.

10. Indeed, the Carriage by Air Act, 2012, was enacted to *inter-alia* give effect in Pakistan to conventions concerning international carriage by air. These conventions included "the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999" ("the Montreal Convention"). By virtue of Section 3(4) of the 2012 Act, the provisions of the Montreal Convention set out in the Fourth Schedule to the said Act, has the force of law in Pakistan. Under paragraph 3(3) of the Montreal Convention, it is the carrier's obligation to deliver to the passenger a baggage identification tag, for each piece of checked luggage. Admittedly, such a tag was issued to the appellant on 20.02.2015 when he traveled from Islamabad to Amsterdam. The appellant did not receive his luggage at Amsterdam, and he complained to the respondent's staff. The

appellant was offered compensation to the tune of US $1744/-, which the appellant declined.

11. Paragraph 17(2) of the Fourth Schedule to the 2012 Act provides that the carrier is liable for the loss of checked baggage provided the loss took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, in the case of unchecked baggage, including personal items, the carrier is liable if the damage to such baggage or items resulted from the carrier's fault or the faults of its agents and servants. Paragraph 17(3) provides that if a carrier admits the loss of the checked baggage, or if the checked baggage does not arrive at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

12. In terms of paragraph 17(2) of the Montreal Convention, the respondent would be liable for the loss of the appellant's checked-in baggage, since it was lost after it was checked-in. The appellant could not point towards any provision of the contract between the appellant and the respondent, which entitled the appellant to enforce against the carrier the right to claim damages for the loss of checked-in baggage.

13. On the other hand, paragraph 22(2) of the Montreal Convention clearly provided that in case of loss of baggage, the liability of the carrier was limited to 1000 special drawing rights for each passenger unless the passenger at the time when the checked baggage is handed over to the carrier makes "a special declaration of interest in delivery" and has paid

a supplementary sum if the case so requires. In such circumstances, the carrier is liable to pay a sum not exceeding the declared sum, unless it is proved that the sum so declared is greater than the passenger's actual interest in delivery at the destination.

14. It is an admitted position that the appellant had not submitted a "special declaration of interest in delivery" at the time when the checked baggage was handed over to the carrier. In such circumstances, the respondent's liability would be limited to 1000 special drawing rights for the appellant's lost luggage. The learned counsel for the appellant could not refute the assertion of the learned counsel for the respondent that 1000 special drawing rights translate into approximately US $1744/-.

15. Since the appellant is an Advocate of the High Court he is expected to know the provisions of the 2012 Act and its Schedules. Therefore, the learned Courts below did not commit any irregularity by decreeing the appellant's suit only to the extent of US $1744/-.

16. Learned counsel for the appellant referred to paragraph 22(5) of the Montreal Convention and submitted that the limitation of liability under paragraph 22(2) of the Montreal Convention would not apply if it is proved that loss of luggage resulted from an act or an omission of the carrier, its agents or servants, done "with intent to cause damage" or recklessly and with knowledge that damage would probably result. There is no evidence on the record to suggest that the loss of the appellant's luggage was done intentionally or deliberately by the respondent. Therefore, in

my view, in paragraph 22(5) of the said Convention is inapplicable to the instant case.

17. The learned Civil Court held that the appellant could not prove that he was carrying valuable items, including I Phone 6 plus worth US $ 1,128/- in his luggage, instead of carrying it by hand. The learned Civil Court also noted that no "declaration of interest in delivery" had been submitted by the appellant. The learned Appellate Court has not disturbed the said findings of the learned Civil Court.

18. As regards the appellant's claim for general damages to the tune of US $10000/- the findings of the learned Courts below are at variance. The learned Civil Court declined to award any general damages to the appellant, whereas the learned Appellate Court has granted US $3000 as damages for mental agony and stress suffered by the appellant on account of lost luggage. Since the respondent has not impugned the said findings of the learned Appellate Court, I do not deem it necessary to go into the question of whether the learned Appellate Court was justified in awarding the said damages to the appellant.

19. It is by now well settled that a second appeal can only be filed (a) where the impugned decision is contrary to law or usage having the force of law; (b) where the impugned decision fails to determine some material issue of law or usage having the force of law; and (c) where there has been a substantial error or a defect in procedure provided by C.P.C. or by any other law, which produces an error or defect in the decision of the case upon the merits.

20. The grounds of the appellant's second appeal do not satisfy any of the requirements of

Section 100 C.P.C. The appellant has not pointed out to any judicial precedent, which has been violated by the learned Courts below in partially decreeing the appellant's suit.

21. In view of the above, this appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Qamar Khan*

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