

In the Name of Allah – The Most Gracious, The Most Merciful

**In the Name of His Highness - the Amir of Kuwait
Sheikh Sabah Al-Ahmed Al-Jabir Al-Sabah**

Appellate Court

Commercial Circuit / 4

In the session held openly in the court on 23/Moharram/1425 Hegira Era corresponding to 14/3/2004 A.D.

Presided over by : Justice/ Khalid Salem, and

**Membership of : Justice / Mohammed Izzat Al-Damanhoori and
Justice / Abdul-Rahman Hamad, and**

In presence of : Mr. Mishal Aayesh Al-Azmi - Session Secretary

The following judgment is passed :

In the appeal filed by :

Mr. Parker DawoodTajuddeen Ismail Parker

In his capacity of Agent for (Neewra Incorporated)/Al-Mashora Office – Al-Mashora Tower – Qibla, Tel:2406000.

VERSUS

The Legal Representative of Maersk Kuwait Co.(Mohammed Saleh Behbehani & Co. W.L.L.)

Served with summon at the Company's H/Q – Salhiya, Ali Salem St. Abdullah Ibrahim Al-Fares Bldg. – 7th Floor.

And both listed in the cause list vide No.1260/2003 Commerical Circuit/ 2.

The Court

After hearing of the pleading, perusal of the papers and deliberation.

Whereas the appeal's events and litigant's documents and their rebuttals and aspects of their defense – circumspected by appealed judgment and the court refers to it for prevention of repetition and are summarized in that the plaintiff in his capacity of an agent for (Neewra Incorporated) filed the case No.465/2002 – commercial



first instance versus the defendant – demanding the judgment for delegation of an expert – with assignment for description of the damages which were caused to the plaintiff and determining the value of goods plus the reparatory material and moral indemnity due to breach, by the defendant, of its contractual obligations – as a precursor for obligating the defendant with whatever may result from the report and describing it he stated that the plaintiff company, on order of “Al-Tamasok Al-Arabi Gen. Trading & Cont. Est./Kuwait” has shipped whatever of materials like computer and supplementary equipment with the defendant - Marine Shipping Co. – 5/3/1999 and notified it of completion of the shipment on 10/3/1999 in the container No.(P.A.N.U-2326560) on the Traffic Line above the board of MV Drago Maersk -9903 and its arrival date to Kuwait as per Traffic Line and expected arrival date on 10/4/1999, and the shipping documents shall be sent to Gulf Bank – Kuwait, and accompanied by Bill of Lading and several documents and on 10/4/1999 the ship was emptied on the quay of Kuwaiti ports, and on 25/4/1999 - the consignee – Al-Tamasok Est.sent to him its letter containing that stating that the goods sent to it are in the port and that it is ready to submit bank guarantee and on receiving of the documens from Gulf Bank it shall submit and get release of the bank guarantee and on 27/4/1999 the – the carrier line / the plaintiff informed in writing of its non-objection for delivering the freighted goods against the bank guarantee – instead of B/L due to provsion of guarantee against the goods’ value and thereafter the plaintiff came to know that the goods were taken out from the port on 10/5/1999 – on the ground of release order from the defendant to the Customs – to another party – other than the consignee company and without giving it the origianl freighting documents while they are present



with the Gulf Bank dealing with it and which returned them to the plaintiff and therefore it came to know that the goods were taken out from the Customs Compound to an unknow destination – issued from the defendant whereby its responsibility is established for the full value of the goods and damages which were caused to it like the value of goods and other expense spent by it – cotaining freight charge, insurance and different commissions in the loading port and different correspondence with relevant parties and the lost earning and loss caused to him due to its losing the goods' value and return of dealing with that value due to its violation of the contractual obligations and confirmation of the fault on its part whereby it was forced to file this case seeking the judgment for it for the aforesaid demands.

And wehreas in the session 3/2/2002 the court of first instance adjudicated for a delegation of an expert in the case – entrusting him with the assignment mentioned in the rendition of its judgment so he undertook it and submitted his report which was concluded with the result – its purport:

- (1) The relation binding the two parties of the case – is a contractual relation for transportation of the goods from the loading port to the arrival port in Kuwait as per the statement of the parties to the case, and
- (2) It is found by the expert that the order for release of the goods has been issued on 10/5/1999 by the defendant in favor of the Al-Tamasul Al-Arabi Est. i.e. as per the listing in the plaitniff's documents.
- (3) The experts found that value of goods shipped from the



shipping prior to the arrival port was for value of US\$ 1,860,000/= i.e. equal to KD 572,033/007 as per the exchange rate ruling on 12/3/2002 to which the plaintiff is entitled due to beach of the contractual conditions of the transport article.

- (4) Regarding the material and moral damages the experts opine to leave this portion for the court.

And whereas in the pleading session the plaintiff attorney (agent) appeared and amended his demand in respect of the defendant's representative – with demand for obligating the defendant with the amount concluded with in the expert report plus the legal interest and also the defendant representative submitted a memo –containing his objections against the expert report and a secondary case for obligating the plaintiff in the original case to pay to the defendant a provisional KD 500/= plus the expenses and fees – on the ground of the plaintiff giving incorrect information about the type of shipped goods as it mentioned that they are computers and supplementary equipment while it is proved on the release that they are the autos' spare parts (electronic brakes) and therefore it is obliged towards the defendant and to indemnify it a per the provisions of article (179/2) of the marine trade law and also it demanded introduction of Al-Tamasul Al-Arabi Est. as an adversary in the case and in the session 19/2/2003 the defendant's representative submitted a defense memo –containing a rebuttal with lapse of the case due to prescription of the year as per provision of article (201) of the marine trade law.

And whereas in the session 30/4/2003 the court passed the judgment:
First: In the original case : for lapse of the case due to prescription of the year as the case originates from marine transport contract and



this case has been filed after passing of more than one year from the delivery date of the goods – by the defendant to the consignee, and in the secondary case for its expiry due to proving of non-authenticity of the the plaintiff's claim in the secondary case and non-confirmation of giving incorrect information about the goods shipped with it.

And whereas this adjudication did not meet acceptance of the plaintiff company so it challenged it through the current appeal vide a declaration deposited with the Clerks Dept. of this court on 31/5/2003 and served on the appellee legally and demanded in its end – the judgment for acceptance of the appeal in the form and in the subject for cancellation of the appealed judgment –in respect of whatever it adjudicated for lapse of the original case due to the year prescription only and in the subject again for passing of new judgment in respect of the demands the appellant has mentioned in its closing amended demands as mentioned in the verbal process of session 19/2/2003 – grounding on two reasons – with the conclusion :

First:

Challenging the appealed judgment with faulty verdict for its accepting the year prescription while its validity for the prescription has been disrupted by the appellee's assigning it implicitly i.e. by its expressing the rebuttal for non-acceptance of the case for being filed in a non-capacitated and its discussing about methodology of its delivering the release order for the delivery order and then attributing the omissive responsibility to the appellant and its non-failure with the obligation and also its discussing about the experts



reort and its filing the secondary case – etc. whereby it is considered as assigning from rebuttal with the case prescription.

Second:

Challenging the appealed judgment with fault also for stoppage of the prescription due to its claim for the indemnity by filing, by the appellee – of a criminal case about subject of recieving of goods to whom not bearing the delivery documents and passing of the criminal court judgment in the misdemeanor case No.1997/2000 – ordinary misdemeanor (341/99 - Salhiya) and also it declaration in the investigations about the complaint No.941/1999 – in front of the public prosecution of the Capital that the Plaintiff has filed a legal case in USA demanding for payment of the goods' value.

And whereas in the pleading session both partie were represented by their attorney and appellee attorney defended for considering the apeal null and void because of not being served on the time and the appellant attorney submitted a docket and defense memo and in the last pleading memo the appellee attorney defended through a memo and in that session the court decided to pass the judgment in today session.

And whereas regarding the rebuttal expressed by the appellee attorney for lapse of the period of right of appeal due to its not being served with appeal declaration agains the appellee so it is refused and further he expected the fine and which is uder purview of the subject court so long it does not cross the limit of its discretionary power and so long it was not due to the act of the the appellant intentionally or negligence as per article(49) of the procedural law

and the appeal has fulfilled its legal conditions so it is accepted in the form.

And whereas regarding the subject – it is legally prescribed that assigning from the prescription of all type – is a legal action on one side – effected just by the intention of the assignor alone and it is subject to any formal pre-condition as it occurs expressly through any expression of the intention giving its meaning and it is not permitted implicitly by taking by the judgment debtor a position stating definitely – assigning from his right of sticking to the prescription after proving of his right in it and it is legally held that the right of inferring of this assignment is one of the matters in which the subject court is free so long its inference is has the actual justification having root in the papers and negating its adherence thereto as per the article (201) of the marine trade law setting forth:

[[The cases arising from the marine transport contract – expires by passing of one year from the delivery date of the goods or from the date on which the delivery must be effected, but the third para thereof states that : the prescription is disrupted with the claim through a registered letter with acknowledgment receipt and also it is disrupted by negotiations of settlement which are carried between the two parties or by delegating an expert for assessment of the damages and in addition to the causes / reasons prescribed legally or intended by the delivery that the delivery should be to the concerned]]

And since it is proved from the paper that the the appellee submitted a memo before the court of first instance on 12/8/2008 in which it



defended for non-acceptance of the case for being filed by a non-capacitated for the complaint submitted to the public prosecution on 26/10/2002 against whom it delivered the release order by mistake and in this complaint it recognizes of existence of contractual relation with the the appellant and it is responsible for release order and its assessment of the case subject goods' value and on 2/2/2000 the company (John Alder & Co. Inc.) which is the agent company of the the appellee company a letter addressed to the legal consultant of the the appellant company and that letter's subject about the wrong delivery of the litigation subject goods and also contained that the the appellee company lodged a criminal complaint in Kuwait against the consignee company and on 19/7/1999 the the appellant company sent a letter to the the appellee informing the latter that the documents sent to the Bank have been returned to it and therefore the the appellant company demanded details of the bank guarantee which was delivered by the the consignee to the the appellee as a proof for release of the cargo aimed at taking the actions for collection of the bank guarantee's value and on 2/8/1999 the the appellee company sent to the latter a letter for the same subject considering the latter as its branch - to send a copy of the financial guarantee which and to which the the appellee company sent the cargo to the cargo to the consignee instead of paying the money to the Bank so as to enable the the appellant to follow-up collection of the goods value and also the the appellant submitted a copy of the civil case summons filed -before the criminal court by the the appellee in the misdemeanor case No.341 of 1999-Salhiya against the owner of Al-Tamasok Est. and its civil claim against for KD 5001/- as provisional indemnity considering itself being damaged and specially the right of claim of the the appellant against it for

value of the goods delivered by mistake to the non-entitled and also it submitted a copy of the investigation memo and investigation verbal process in aforesaid the misdemeanor 341/1999 –Salhiya – prescribed in the memo dated 12/2/2000 that the B/L is forged.

And whereas the submitted documents state that negotiations between the two parties about the settlement and compensations for the destruction of goods and searching for the proofs and pursuit and demand of the the appellee company for the details and cooperation about facing the the recipient of the goods and disposer thereof and its filing of the misdemeanor case (341/1999-Salhiya) and its civil claim against it and further to its discussion for the expert report submitted in the case – whereby it is expression of the two parties intention for recovery of the shipped goods and from all of the aforesaid – the court infers : implicit assignment of that the appellee implicitly assigned from its right to adhering to the year prescription after completion of its period and proof of its right to sticking to it, and therefore again its re-acceptance of its right to the year prescription is not acceptable after that it forfeited its right and therefore the the appellee is being held responsible for the contractual responsibility as per article (175) of the marine trade law because it breached its contractual responsibility made with the the appellant – in violation of the provision of article (175) of the aforesaid marine trade law that sets forth ((the transporter is responsible for acts of the persons whom it employs for execution of its obligations listed in the marine transport contract)) for that the the appellee did not confirm before delivery of the goods that the holder of the b/l is the owner of the right and considering him the legal owner fo the b/l and it did not make assurance of accuracy of the b/l



and its workers after arrival of the goods to the agreed site – delivered them to the non-legal bearer of the b/l and therefore it has breached its contractual obligations – causing damage to the the appellant for non-delivering the goods and for this breach it has caused damages and whereby its contractual responsibility is materialized.

And whereas it is so and the plaintiff compay has changed its demand for obligating the the appellee company to pay the amount concluded in the expert report with legal interest and it is mentioned that the goods value is US\$ 1,860,000/= (US Dollar One million, Eight hunder sixty thousand only) which is equal to Kd 672,033/007 (KD Six hundred seventy thousand, thirty three and Fils 007 only) – entitled to the appellant company due to breachof the contractual conditions in the transport contract and the court is satisfied with the expert report for authenticity of the criteria on which he built the report for its elements and therefore the court supports that report and accepts it as depending on its merits and adjudicates for obligating the appellee company to the appellant sum of US\$ 1,860,000/= (US Dollar One million, Eight hunder sixty thousand only) which is equal to Kd 672,033/007.

And whereas regarding the legal interest so the court obligated the appellee company to pay to it a legal interest for the adjudicated amount at the annual rate of 7% effective from today – considering that the obligation subject is a commercial act and of unknown amount so – until full and final settlement date.



And whereas since it was so and the appealed judgment did not comply with this doctrine and adjudicated for lapse of the case due to the year prescription – so it must be cancelled and pass the judgment anew with the aforesaid judgment.

And whereas regarding the expenses so the court obliges the appellee company with the expenses of two cases as per the articles (119 and 147) of the procedural alw.

SO FOR THESE REASONS (MERITS)

The court passed the judgment:

First:

For acceptance of the appeal in the form.

Second:

And in the subject – for cancellation of the appealed judgment and for obligating the appellee to pay to the appellant company a sum of US\$ 1,860,000/= (US Dollar One million, Eight hunder sixty thousand only) which is equal to Kd 672,033/007 (KD Six hundred seventy thousand, thirty three and Fils 007 only) and its legal interest at the rate of 7% per annum –from today and until full and final settlement date and obliged with the expenses for the two instances of court and KD 20/= as attorney fees charges.

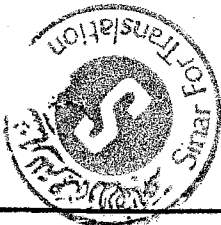
The Session Secretary

Sd/-

The Circuit Chief

Sd/-

Court Seal



Writ of Execution:

The Authority entrusted with the execution - must proceed thereto whenever it is so requested; an each authority should assist with its implementation even by use of compulsory force whenever it is required to do so in accordance with the law.

Handed over to the Plaintiff's Attonrey on 14/4/2004

(Head – Archives of The Court of First Instance)

