Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

C.P.No. D-1089 of 2016 a/w
C.P.Nos.D-1720, 1950, 2839, 5038 and 5039 of 2016

PRESENT :
MR. JUSTICE AQEEL AHMED ABBASI
MR. JUSTICE ARSHAD HUSSAIN KHAN

27.02.2017

Dr. M. Farogh Naseem, advocate for the petitioners.
Ms. Ismat Mehdi, advocate for petitioner in C.P.No.D-1950 & 1720 of 2016.
Mr. Ammar Yasser, advocate for the petitioner in C.P.Nos.D-5038 & 5039/2016.
M/s.Sarfaraz Ali Metlo, Muhammad Aqeel Qureshi, advocates for respondents
Mr.Manzoor Elahi holding brief for Ms. Afsheen Aman, advocates for respondents
Mr. Mir Hussain Standing counsel.

ARSHAD HUSSAIN KHAN, J. Through this common order the applications under Order VI Rule 17 read with Section 151, CPC bearing CMA. No.31239 / 2016, filed in C.P.No.1089 / 2016 and CMA No. 3406 / 2016, filed in C.P.No.D-1720 / 2016 respectively are being disposed of.

2. The aforesaid applications under Order VI Rule 17 read with Section 151, CPC have been filed by the respective petitioners such as CMA No.31239 /2016 filed in C.P.No.1089 /2016 seeking following amendments:-

1. After ground M, the following may be permitted to be added:-

"N. Section 3(5) of the 1990 Act permits the Federal Government to levy and collect tax at such extra rates or amounts not exceeding upto 17% of the value of goods, in addition to the tax levied under sub-section (1). A meaningful reading of both sections 3(1) and 3(5) would render that the total amount of tax cannot exceed 17%. In the present case since the tax u/s 3(1) is already 17%, no power can be exercised u/s 3(5) to charge any further tax. Otherwise, if sections 3(1) and 3(5) are construed as independent to each other, this will permit sale tax upto 34%, which would be confiscatory and expropriatory in nature and would render the tax unconstitutional. Therefore, it is imperative to read down section 3(5) so as to hold that sections 3(1) and 3(5) are to be read together so that the maximum cumulative tax under both the sub-sections could be upto 17%.

O. Without prejudice to the above, SRO 480(I)2007 dated 9.6.2007, which has been prescribed the 2007 Rules nor SRO896(I)/2013 dated 4.3.2013 whereby rule 58-S and rule 58-T have been inserted, have not been issued in pursuance

of section 3(5) of the 1990 Act. Hence the said section 3(5) cannot be employed so as to justify the latter SROs and rules.

P. *The charge levied under rule 58-T of the 2007 Rules is in relation to "extra amount of sales tax"; whereas section 3(5) does not permit an "extra amount of sales tax" but rather additional sales tax i.e. sales tax in addition to the one charged u/s 3(1) of the 1990 Act.*

Q. *Without prejudice to the above, section 3(5) of the 1990 Act is ultra vires the law and the Constitution as it amounts to providing an extra charging provision, which is not permissible.*

R. *Further without prejudice to the above, article 77 of the Constitution has now been categorically interpreted by the Hon'ble Supreme Court, according to which the power to impose a tax, charge or levy cannot be delegated to the Federal Government or any other authority. This amounts to abduction of the legislative powers, which is not permissible under the law and Constitution. It is the Parliament alone which can impose a tax or charge or fee. Section 3(5) of the 1990 Act and the Impugned Rules are thus violative of the doctrine of Parliamentary Supremacy and Separation of Powers.*

S. *Also without prejudice to the above, section 3(5) of the 1990 Act permits the Federal Government to impose sales tax in addition to the tax imposed u/s 3(1) at an extra rate or amount upto 17% on any goods, class of goods, any person or class of persons and in any mode, manner or at a time, subject to such conditions and limitations that may, by rules, be prescribed. The said provision i.e. section 3(5) confers naked, arbitrary and unbridled powers upon the Federal Government to impose the additional tax. The said sub-section 3(5), being without any guidelines and conferring naked and unbridled power, has not only been actually used arbitrarily and discriminatively in this case but is also capable of being used arbitrarily and discriminatively in this case but is also capable of being used arbitrarily and discriminatorily. Thus, the said section 3(5) of the 1990 Act is violative of articles 10-A and 25 of the Constitution. The Federal Government is at complete liberty to pick and choose any one upon who/which the additional tax could be imposed at any rate that it so deems.*

T. *In light of the above, section 3(5) of the 1990 Act and the Impugned Rules are ultra vires the law and the Constitution and is void ab initio and of no legal effect.*

U. *The Impugned Rules have not been approved by the Federal Cabinet. Thus the Impugned Rules cannot be construed as an act of the Federal Government. On this ground alone the Impugned Rules are ultra vires of Law and the Constitution."*

2. After prayer clause (d) the following may be permitted to be added:-

"(e) declare section 3(5) of the Sales Tax Act, 1990 to be completely without jurisdiction, unconstitutional, unlawful, illegal, void ab-initio and of no legal effect, while striking down the same."

Whereas through CMA. No.3406/2016 filed in C.P.No.D-1720/2016 though exactly the identical amendments are sought as that of CMA filed in Petition 1089/2016, however, the serial number of paragraphs/grounds and prayer clause are different.

3. The petitioners through their petitions have challenged Sr. No.5 to the table in Rule 58-S and Rule 58-T to the extent of the products mentioned in the said table in Rule 58-S of the Sales Tax Special Procedure Rule 2007, as amended through SRO 896 (I)/2013 dated 4.10.2013 and Sales Tax General Order No.27 of 2014 dated 18.3.2014.

4. Upon notice of the aforesaid applications, respondent No. 2 filed its objections by way of counter affidavit, wherein it is stated that the proposed amendments in the pleadings are misconceived, afterthought and an attempt to change the nature of the petition as the petitioner in the present petition has not sought any declaration in respect of section 3(5) of the 1990 Act, hence, petitioners are not entitled to the reliefs claimed in their applications.

5. Learned counsel for the petitioners during the course of the arguments has contended that proposed amendments would not change the complexion of the petitions. Conversely, it would facilitate to decide the issues comprehensively. Further contended that proposed amendments only introduce additional grounds so as to seek annulment of all provisions already mentioned in the prayers clause. It is also contended that proposed amendments are also aimed at avoiding multiplicity of proceedings. Lastly, contended that the proposed amendments are legal and constitutional questions, which even otherwise can be raised at any stage of the proceedings. To support their submissions learned counsel for the petitioners have relied upon following case law:

(i) **PLD 2016 SC 808** *(MESSRS MUSTAFA IMPEX, KARACHI AND OTHERS V. THE GOVERNMENT OF PAKISTAN THROUGH SECRETARY FINANCE, ISLAMABAD AND OTHERS)*

In this case the Hon'ble Supreme Court while discussing various provisions of Constitution, Sales Tax, Rules of business, inter alia, held that the levy of tax was the function

of Parliament under Article 77 of the Constitution. Such powers, if given to the Executive per se, would amount to a negation of the doctrine of parliamentary supremacy and the doctrine of separation of powers. Further held that Secretary, a Minister or the Prime Minister were not the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, was constitutionally invalid and a nullity in the eyes of the law. Consequently, fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division, or the Minister, were declared ultra vires.

(ii) **PLD 1985 SC 345** ***(Mst. GHULAM BIBI AND OTHERS v. SARSA KHAN AND OTHERS.)***

In this case the Hon'ble Supreme Court while discussing the scope of the Order VI Rule 17, CPC has, inter alia, held as follows:

"A short comment on observations made in some of the aforenoted judgments regarding the effect of provisions of Order II, rule 2, C. P. C. in so far as the refusal to allow proper amendments is concerned, will not be out of place. Often an application for amendment is opposed on the ground that it would introduce a new element in the case as distinguished from a new cause of action or a new case altogether. Of course, in so far as the new cause of action and a new suit is concerned that cannot be permitted to be introduced in the garb of amendment; but regarding the introduction of a new or different element which by itself does not constitute a different cause of action or a new suit it would be in accord with the provisions contained in Order 11, rule 2, C. P. C. It provides' that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action"; further that where the plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Similarly, it provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except, with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. If a genuine amendment which is permissible and should otherwise be liberally allowed in view of the principles highlighted in the foregoing discussion with reference to the case-law, is denied the provisions contained in Order II, rule 2 would create enormous difficulties for the applicant. It was in this context that this Court, made the following observation in the case of National Shipping Corporation v. Messrs A. R. Muhammad Siddik and another (1974SCMR131).

"The application for amendment was opposed by the petitioner on the ground that it introduced an entirely new cause of action which virtually altered the nature of the suit. The learned Single Judge overruled the objection for, in his view, the proposed amendment neither altered the nature of the suit, nor raised any new cause of action.

Learned counsel for the petitioner repeated the argument which was repelled by the learned Single Judge by the impugned order. It is difficult to see how the nature of the suit

will be altered by the new plea. It cannot be gainsaid that unless respondent No. 1 is allowed to raise this plea, his subsequent suit on the new plea would be barred under Order II, rule 2, C. P. C."

It was on the foregoing consideration, (bar contained in Order II, rule 2) that the leave to appeal was refused with a further very weighty remark which reads as follows :

"The Courts have always inclined to allow leave liberally to enable the parties to bring all points relating to a dispute between the parties before the Court so as to avoid multiplicity of proceedings."

In the light of the foregoing discussion, this appeal is allowed, the impugned judgment is set aside."

(iii) **PLD 1989 SC 340** (*PAKISTAN MOLASSES V. THE COLLECTOR OF CUSTOMS AND OTHERS*)

In this case the Hon'ble Supreme Court dealing with the scope of Order VI Rule 17, CPC inter alia, held that the rules of procedure are meant to advance justice and to preserve rights of litigants and they are not meant to entrap them into blind corner so as to frustrate the purpose of law and justice. Proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit. Further held that "On question of amendment of the pleadings this Court, as would be presently shown, has in recent years adopted a liberal view, as compared to the strict view of the master in some old cases. Keramat Ali and another v. Muhammad Yunus Haji and others (PLD1963SC191) in reality is the basic judgment on this issue. On the wider question relating to the purpose of the rules regarding pleadings a very important observation has been made in another recent judgment of this Court-Dino Manekji Chinoy and others v. Muhammad Matin (PLDI984SC1) to the effect that a strict view "on the technical plane, of pleadings without regard to the substance of the matter which results in defeating the ends of justice and leads to smothering genuine litigation, is not to be taken".

(iv) **PLD 1965 SC 690** *(HAJI ABDULLAH KHAN AND OTHERS V. NISAR MUHAMMAD KHAN AND OTHERS*)

In this case, the Hon'ble Supreme Court, inter alia, held that a

pure question of law means a question which not only does not require any investigation into fact, can be raised at any stage of the proceedings. The Hon'ble Supreme Court while repelling the observation of the High Court that "to allow the question of law or of fact to be raised in appeal for the first time would clearly prejudice the other party and thus defeat the ends of justice.", observed that question of law can be raised at any stage. Further held that it is the duty of the Court itself to apply the law. Whatever law becomes applicable on the admitted or proved facts, law has to be given effect to whether or not it has been relied upon by a party.

(v) **1999 SCMR 1072** *(Gatron (industries) Limited v. Government of Pakistan and Others)*

In this case, it is held that Constitutional petition under Article 199 before the High Court is competent if an order is passed by a Court or Authority by exceeding its jurisdiction even if the remedy of appeal/revision against such order is available, depending upon the facts and circumstances of each case. However, the petitioner had clearly stated in the petition the reasons for not exhausting the departmental remedies and High Court had rendered judgment on merits after hearing at length the submissions of the parties and opposing party had never pressed any objection as to the maintainability of the Constitutional petition before the High Court, discretion by the High Court in the facts and circumstances of the case, to entertain the petition and decide on merits, did not suffer from any illegality. Further held that vested rights created by statute cannot be taken away save by express words and necessary intendment. No doubt that the Legislature, is also competent to amend, vary or repeal the same but the right conferred through statute can only be taken away by legislative enactment and not by an executive authority through notification in exercise of the rule-making power or the power to amend, vary or rescind an earlier order/notification in the purported exercise of powers conferred under section 21 of the General Clauses Act.

(vi) **1992 CLC 182[S C (AJ&K)] (***SAKHI MUHAMMAD and another v. FATEH MUHAMMAD and 3 others)*

In this case it is held that Court while deciding a case, could take into consideration subsequent events which might have come into existence after the institution of suit or at the application stage. Court should ordinarily require party concerned to amend its pleading but if facts needed to be introduced by amendment did not necessitate investigation or same were admitted by opposite-party or could be easily resolved by the material on record, Court need not require amendment of plaint; relief could be given to party concerned without any amendment.

(vii) **Un-reported Order passed by Hon'ble Supreme Court in CIVIL APPEAL No. 619 of 2008** in the case of *The City District Government v. Samiullah Jung, etc*.

In this case the Hon'ble Supreme Court held as under:

> "2. In the light of the above, this appeal is allowed and the impugned judgment of the High Court is set aside. However, as far as the claim of the respondents for seeking amendment in the plaint is concerned, neither the document is before us nor have we been apprised as to what specific amendment would be sought and asked for by the respondents, therefore, such relief in these proceedings cannot be allowed and it shall be advisable for the respondents to move an appropriate application before the court of competent jurisdiction where the suit is pending and such learned court shall decide the fate of the application in terms of the law settled, particularly keeping in view the judgment of this Court in **Mst. Ghulam Bibi and others Vs. Saras Khan and others (PLD 1985 SC 345)**. The appeal is accordingly allowed."

6. On the other hand, learned counsel for the respondents has vehemently opposed the above applications and during course of his arguments while reiterating the contents of counter affidavit filed on behalf of the respondents in reply to the aforesaid applications has contended that the Federal Government has exclusive power to collect extra tax up to 17% of the value of the goods under sub-section (5) of Section 3 in addition to tax levied under Section 3(I) of the Act. The provision of the Section 3 are very clear and does not warrant any artificial interpretation as prayed by the petitioner. Further contended that the Federal Government has jurisdiction to make rules, inter alia, under sections 71, 3 and 4. The Rule 58-T provide list of goods and procedure to collect extra tax charged under Section 3(5) of the Act. Subsection 5 of Section 3 of the Act authorizes Federal Government to collect some amount of tax from the industrial sectors that otherwise enjoy complete or substantial exemption from sales tax under concessionary SROs. Further contended that the provisions of Section 3(5) are in consonance with the Constitution and are not discriminatory, hence, the said provisions of Section 3(5) of the Act, are intra vires the law and the Constitution. Lastly, contended that the applications are devoid of merits. The petitioners through the applications have attempted to change the nature/complexion of the petitions and the reliefs, which are not at all permissible in law, and as such the applications as well as the petitions are liable to be dismissed being without substance. The learned counsel in support of his stance in the case has also relied upon the case of **Mst. Ghulam Bibi (Supra).**

7. We have heard the arguments of learned counsel for the petitioners and respondents as well as learned standing counsel and with their assistance have also perused the record, relevant laws as well as the case law cited at the bar.

8. There is no cavil to the legal proposition that Court always has the jurisdiction under Order VI, Rule 17, C.P.C. and enjoys vast discretionary powers to allow amendments in a plaint at any stage of the proceedings, which in the opinion of the Court, are just and necessary for final disposal of case in between the parties in accordance with law. However, at the same time, the Court is bound to exercise such discretion in accordance with settled judicial principles, firstly, while allowing request for amendment in the plaint, no prejudice shall be caused to other side, and secondly, amendment shall be necessary for accurate determination of the dispute between the parties. It needs no reiteration that while allowing amendment in the plaint, the defendant's right should also be kept in view and no amendment should be allowed, which is aimed to change complexion of the case altogether or to introduce a new case based on new cause of action.

9. The scope and extent of Order VI Rule 17 of C.P.C. has been expounded through various judicial pronouncements and the case of Mst. Ghulam Bibi (Supra) can be summarized as follows:-

(i) Amendment can be allowed at any stage, if it does not change the cause of action of the suit;

(ii) Amendment can be allowed to seek consequential relief arising from the cause of action originally incorporated in plaint;

(iii) Amendment can be allowed to add additional relief available to plaintiff even before the higher Courts of jurisdiction, including High Courts and Supreme Court;

(iv) Amendment can also be allowed to base a plaint on different title;

(v) Amendment would also not be allowed to change complexion of the case;

(vi) Amendment cannot be permitted if it amounts to cause prejudice or injustice to opposite party;

(vii) Amendment would also not be allowed which may amount to introducing a new cause of action, which was not available at the time of filing of suit;

(viii) Rights accrued in favour of one party would not be allowed to be snatched away by allowing amendment in a

casual manner, unless it qualifies the test in the light of decisions of Superior Courts as referred to hereinabove and ;

(ix) Amendment is not allowed when (i) it is moved not in good faith, (ii) it is likely to result in injustice to opposite side, and (iii) the period of limitation has run, since the accrual of actual cause of action.

10. If the proposed amendments are analyzed in view of the above legal position, we are inclined to hold that these proposed amendments if incorporated in the existing pleadings of the petitioners, the same shall not either change the nature or complexion of the case, as the proposed amendments sought to be incorporated are legal questions, which even otherwise do not require any factual investigation. Conversely, since the present cases are constitutional petitions therefore, in order to avoid multiplicity of the proceedings, all constitutional points relating to subject issue can be dealt with comprehensively in the present constitutional petitions. Furthermore, since the respondent will have the right to amend their pleadings as well, in the event, the proposed amendments if allowed to be incorporated, therefore, we are of the view that no prejudice will be caused to the respondents. Accordingly, CMA. No.31239/2016 filed in C.P.No.1089 of 2016 and CMA. No.3406/2016 filed in C.P.No.D-1720/2016 respectively were granted vide our short order dated 27.02.2017 in the following terms_

> "For the reasons to be recorded later on, the listed applications (CMA No.31239/2016 in C.P. No.D-1089/2016 and CMA No.3406/2-16 in C.P. No.D-1720/2016) for amendments in the petition are granted. The petitioners are directed to file amended constitutional petition within one week. Thereafter, the respondents may file their objections to such amended constitutional petition within two weeks from the date of receipt of such amended petition with advance copy to the learned counsel for the petitioners.
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> Let notice be issued to the D.A.G. for 06.04.2017. Interim order passed earlier to continue till the next date."

These are the reasons for such short order.

JUDGE

JUDGE

*Jamil**