

THE HIGH COURT OF SINDH, KARACHI

C. P. No. D – 2491 of 2013

Present

*Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Arshad Hussain Khan*

Date of hearing : 16.11.2017
Date of order : 16.11.2017
Petitioner : M/s. S.Q. Corporation
through
Mr. Zayyad Khan Abbasi, Advocate.
Respondents : Federation of Pakistan through
Secretary, Ministry of Finance,
Islamabad & others
through
Mr. Kashif Nazeer, Advocate
& Mr. Mir Hussain,
Assistant Attorney General.

ORDER

AOEEL AHMED ABBASI, J:- Instant petition was filed on 06.06.2013 by impleading Federation of Pakistan through Secretary, Ministry of Finance, Federal Board of Revenue through its Chairman and Collector of Customs (Gwadar) at Custom House, Gadani, as respondents, whereas, following relief was sought:-

- a. *Declare that the SROs viz. 140(1)/2013 dated 26.02.2013 and 243(I)/2013 dated 26.03.2013 are without lawful authority and of no legal effect. is of no legal effect.*
- b. *Direct the Respondents to accept G.D. form the Petitioner in terms of Clause-9 of Part II of the second Schedules of Income Tax Ordinance, 2001 and also accept post dated cheques from the Petitioner in terms of SRO 592(I)/2012 dated 01.06.2012 and further allow the Petitioner to commence the ship-breaking operations i.e. provide breaking and delivery permission and not create any hurdles/obstacles in the Petitioner's ship breaking activities.*
- c. *Grant a permanent injunction, thereby suspending the operation of the impugned SRO 140(1)/2013 dated 26.02.2013 and SRO 243(I)/2013 dated 26.03.2013 and/or restraining the respondents, its Officers, its agent, servants, assignees from demanding any tax and applying the aforesaid SROs on the vessel "MT SUNDANCE" ex TRISTAR DUBAI of the Petitioner.*

d. Grant costs of the petition.

e. Any other and or better relief that this Honourable Court may deem appropriate in the circumstances of the case.”

2. On 07.06.2013, when the matter was taken up for hearing at katcha peshi stage before another Divisional Bench of this Court, learned counsel for the petitioner argued that the impugned SROs have been issued in violation of sub-section (3) of Section 53 of the Income Tax Ordinance, 2001, as according to learned counsel, the Federal Government cannot issue impugned Notifications unless, an amendment is introduced through an Act of the Parliament in the Second Schedule to the Income Tax Ordinance, 2001.

3. Notice of instant petition was issued to the respondents as well as DAG, whereas, in the meanwhile, operation of the impugned Notifications was suspended subject to furnishing Bank Guarantee in the equivalent disputed amount in terms of impugned Notification. Pursuant to Court Notices, comments were filed on behalf of the respondents, wherein, an objection was raised with regard to maintainability of the petition on the point of jurisdiction, as according to respondents, the matter pertains to Collectorate of Customs (Gwadar), Customs House at Quetta and the subject vessel of the petitioner has also reached at Gwadar Port, which is beyond the territorial jurisdiction of this Court. On such objection as to territorial jurisdiction of this Court, the learned counsel for the petitioner requested for time to satisfy this Court as to maintainability of instant petition, on the next date of hearing. Thereafter, matter was fixed in Court on several dates and the stay continued in favour of the petitioner, however, the objection regarding maintainability of instant petition remained pending. During pendency of instant petition, petitioner filed an application for encashment of Bank Guarantee submitted by the petitioner with the Nazir of this Court towards sales tax liability in respect of vessel M.T. Sundance, which application was allowed vide order dated 26.11.2013, in view of no objection given by the learned counsel for the respondent No.3 and the interim order passed earlier was modified accordingly. Thereafter, the amount of sales tax was directed to be

released in favour of the respondent No.3 towards final settlement of sales tax liability of the petitioner in respect of the aforesaid vessel. On 22.4.2014, when the matter was fixed in Court for hearing, learned counsel for the petitioner, under instructions, submitted that the petitioner will not press any of the prayers except, challenge to the legality of SRO 140(I)/2013 dated 26.02.2013. It was argued by the learned counsel for the petitioner that the SRO 140(I)/2013 dated 26.02.2013 was issued at the time when caretaker government was formed, whereas, per learned counsel, the said SRO was not placed before the National Assembly in terms of Section 53(3) of the Income Tax Ordinance, 2001, hence, the same was of no legal consequence. Learned counsel for the respondent, however, raised an objection with regard to maintainability of instant petition on the point of territorial jurisdiction, as well as on the ground that identical petition i.e. Constitutional Petition No. 636/2013, with similar relief in respect of the same Vessel which arrived at Gwadar Port, has been filed by the same petitioner before the Hon'ble Balochistan High Court, wherein, the legality of SRO 140(I)/2013 dated 26.02.2013 has also been challenged. While confronted with hereinabove factual and legal position, learned counsel for the petitioner requested for further time to ascertain such factual position and to seek instructions from his client in this regard.

4. On 19.09.2014, when the matter was taken up for hearing in Court, learned counsel for the petitioner requested for time to file the amended petition by pressing only such prayer clause, which according to learned counsel for the petitioner will not be pressed before the Balochistan High Court. Two weeks' time was granted to do the needful, however, subject to just exception and objections, if any, by the learned counsel for the respondents. At this juncture, learned counsel for the respondents, under instructions submitted that the controversy agitated through instant petition has already been decided by the Balochistan High Court in similar petitions, however, requested for time to place on record copy of such order passed by the Balochistan High Court in this regard.

5. On 29.09.2014, petitioner filed the amended petition by adding respondent No.3 "Chief Commissioner Inland Revenue, RTO, Karachi" as one of the respondents, however, with the following prayer:-

- a. *Declare that the SROs viz. 140(1)/2013 dated 26.02.2013 is of no legal effect.*
- b. *Grant a permanent injunction, thereby suspending the operation of the impugned SRO 140(1)/2013 dated 26.02.2013 and/or restraining the respondents, its Officers, its agent, servants, assignees from demanding any income tax on the vessel "MT SUNDANCE" ex TRISTAR DUBAI of the Petitioner in excess of 1% as provided in Part II of the Second Schedule of the Income Tax Ordinance 2001.*
- c. *Grant costs of the petition.*
- d. *Any other and or better relief that this Honourable Court may deem appropriate in the circumstances of the case."*

6. Thereafter, instant matter was adjourned from time to time, however, learned counsel for the petitioner could not submit any explanation with regard to maintainability, hence issue regarding maintainability of instant petition remained pending, whereas, on 30.04.2015, on the request of the learned counsel for the petitioner in presence of petitioner, Vakalatnama of M/s. Kamal Azfar & Associates was discharged and their names were directed to be erased from the file cover. The petitioner present in Court, requested for time to engage another counsel. On 13.01.2016, when the matter was fixed, the petitioner and his counsel were called absent without intimation and the matter was dismissed on account of non-prosecution in the following terms:-

" On 30.04.2015, this Court had discharged the vakalatnama of Mr. Kamal Azfar, the proprietor of the petitioner was present in Court and requested for time to engage a counsel. It appears that thereafter no counsel has been engaged by the petitioner despite having knowledge that the vakalatnama of Mr. Kamal Azfar has been discharged by the Court. In the circumstances, it appears that the petitioner is not interest to pursue the matter. The petition is, therefore, dismissed for non-prosecution."

7. Pursuant to dismissal of instant petition in terms of order dated 13.01.2016 as referred to hereinabove, petitioner filed an application [Misc. No. 1334/2016] seeking restoration of the petition to its original position by recalling the order dated 13.01.2016. Notice of such application was issued to the respondents, who did not oppose the restoration of petition while granting listed application, which was accordingly allowed, and the petition was restored to its original position as on 13.01.2016. However, record shows that even after restoration of instant petition, the petitioner and his counsel did not remain vigilant to proceed with the matter, which was adjourned from time to time and remained pending disposal without any useful progress. On 13.04.2017, when the matter was fixed in Court for hearing at katcha peshi stage, learned counsel for the respondent pointed out that controversy agitated through instant petition has already been decided by Balochistan High Court in the case of petitioner, therefore, petition is liable to be dismissed.

8. On 18.10.2017, learned counsel for the petitioner was again confronted as to maintainability of instant petition, whereas, following order was passed:-

*“ Learned counsel for the respondent has drawn the attention of the Court to an objection with regard to maintainability of instant petition on the point of jurisdiction, in view of the fact that consignment of petitioner has reached at the Gwadar Port, falling within territorial jurisdiction of Collector of Customs (Gwadar), Customs House, Gadani, and also for the reason that petitioner has filed similar petition before the Balochistan High Court in respect of the same subject controversy. In support of his contention, learned counsel for the respondent has placed reliance in the case of Sandalbar Enterprises (Pvt.) Ltd v. Central Board of Revenue and others reported as **PLD 1997 SC 334**.*

In response to such objection raised by the learned counsel for the respondent, learned counsel for the petitioner has drawn the attention of this Court to order dated 14.05.2017 passed by the Balochistan High Court in the case of petitioner in C.P.No.637 of 2013, whereby,

according to learned counsel for the petitioner, petitioner has withdrawn Prayer Clause 'a' and 'c', which relates to challenge to the vires of SRO 140(I)/2013 dated 26.02.2013 before the Balochistan High Court, therefore, submits that instant petition before this Court relating to challenge the vires of aforesaid SRO is maintainable.

Learned counsel for the respondent submits that even the challenge to the vires of the aforesaid SRO is misconceived as it has already been decided in favour of the Revenue Authorities, however, requests for time to obtain the copies of such decisions and to place the same on record before the next date of hearing.

Learned counsel for the petitioner also requests for time to ascertain such fact and to assist this Court as to maintainability of instant petition.

*Keeping in view the facts and circumstances of the instant case and the legal position emerged in view of the decision of the Hon'ble Supreme Court in the case of Sandalbar Enterprises (Pvt.) Ltd v. Central Board of Revenue and others [PLD 1997 SC 334], we are of the tentative view that instant petition filed by the same petitioner before this Court in addition to one filed before the Balochistan High Court, is not maintainable. However, in order to provide complete opportunity to the learned counsel for the petitioner, we are adjourning this matter to **16.11.2017** when learned counsel for the petitioner is directed to satisfy the maintainability of instant petition and also to seek instructions from his client as to whether the petitioner still wants to press instant petition before this Court or not.*

We may clarify that if this Court reaches to the conclusion that instant petition is not maintainable and has been filed in duplication of the proceedings before the Balochistan High Court in respect of same subject consignment of the petitioner, whereas, the petitioner has chosen to agitate the levy of sales tax and income tax in respect of the same subject consignment before two different Courts and has also obtained stay from both the Courts, which are operating since 2013, whereas, adjournments have been sought on behalf of petitioner's counsel from time to time for seeking instructions. If instant

petition is dismissed, petitioner is put on notice on this account, we may also impose cost on the petitioner.

*To come up on **16.11.2017**. No further adjournment will be granted.”*

9. On 16.11.2017, when the matter was fixed in Court, learned counsel for the petitioner was directed to assist on the point of maintainability of instant petition, keeping in view the preliminary legal objection raised on behalf of the respondents, as well as the order of this Court as referred to hereinabove. In response to above objection as to maintainability, learned counsel for the petitioner argued that vires of any SRO issued by the Federal Government can be challenged before any High Court in Pakistan, irrespective of the fact, as to whether the cause of grievance has not accrued to the petitioner, within the territorial jurisdiction of a particular High Court. Learned counsel for the petitioner contended that it is the option of the aggrieved person to seek partial relief from one Court and the remaining relief from another Court, particularly when vires of any law, rule or notification is challenged by the petitioner. On the other hand, learned counsel for the respondent has vehemently opposed such contention of the learned counsel for the petitioner, for being misconceived and contrary to law and the decision of the Hon'ble Supreme Court in the case of Sandalbar (Supra). It has been contended by the learned counsel that, even if such contention of learned counsel for the petitioner with regard to choice of forum available to an aggrieved person is accepted to the extent of challenge to the vires of any law, rule or SRO by approaching any of the High Courts in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, then such option according to learned counsel, could have been availed at the first instance by approaching such High Court under Article 199 of the Constitution, while claiming entire relief, including the challenge to vires of SRO and release of the consignment of the petitioner. However, according to learned counsel for the respondent, once the aggrieved person exercises such option of choice of the forum, thereafter, such person cannot be allowed to agitate the same grievance before another Court. It has been further contended by the learned counsel for the

respondent that the conduct of the petitioner in the instant matter has remained dubious, whereas, material facts were concealed from this Court by the petitioner, and it was only on the pointation of the counsel for the respondent, the petitioner sought amendment in the pleadings to the extent of challenge to the vires of SRO 140(1)/2013 dated 26.02.2013, and thereafter, similar amendment in pleadings was made before Balochistan High Court, in an attempt to mislead the Hon'ble Court and to justify the maintainability of instant petition before this Court. It has been further argued by the learned counsel for the respondent that when the petition filed by the petitioner before the Balochistan High Court, along with other connected petitions, was dismissed in respect of same subject Vessel, which admittedly reached at Gwadar Port beyond the territorial limits of Province of Sindh and the jurisdiction of this Court, the petitioner attempted to agitate the similar relief from this Court, even without disclosing the fact that petition filed by the petitioner in respect of same Vessel i.e. MT Sundance has already been dismissed. In support of his contention, learned counsel for the petitioner has placed the copy of reported decision of a Divisional Bench of Balochistan High Court in the case of ***Muhammad Rafiq and others v. Federation of Pakistan and others (2014 PTD 1881)***, whereby, according to learned counsel for the respondent, plea of the petitioner alongwith other petitioners of connected petitions relating to challenge of vires of SRO 243(I)/2013 dated 26.03.2013 and SRO 140(1)/2013 dated 26.02.2013 (which is subject matter of instant petition) had been declined vide combined judgment on 17.04.2014. However, according to learned counsel for the respondent, such fact was deliberately concealed by the petitioner in order to justify the maintainability of instant petition, whereas, petitioner enjoyed the benefit of interim order passed in the instant matter. Learned counsel for the respondent has also referred to the decision of the Hon'ble Supreme Court in the case of ***Sandalbar Enterprises (Pvt.) Ltd v. Central Board of Revenue and others reported as PLD 1997 SC 334*** and contended that under similar circumstances the Hon'ble Supreme Court was pleased to hold that an aggrieved party can seek relief from the High Court within whose jurisdiction the person performing affairs of the

Federation is discharging his functions and not from the Court, who has no jurisdiction over the case of an aggrieved party. It has been prayed that instant petition is not maintainable before this Court, hence liable to be dismissed with special cost, as according to learned counsel, petitioner concealed material facts from this Court, and inspite of caution by this Court vide order dated 18.10.2017 insisted upon maintainability of instant petition, which remained pending before this Court for more than four (04) years, whereas, adjournments were sought from time to time on behalf of the petitioner to linger on the matter unnecessarily, inspite of the fact that legal issue was already decided in the case of the petitioner by the Hon'ble Balochistan High Court in the aforesaid reported judgment.

10. We have heard the learned counsel for the parties, perused the record with their assistance, which reflects that admittedly, the vessels "MT-SUNDANCE" reached at Gwadar Port Balochistan, where the dispute with regard to levy of sales tax/ income tax in terms of SRO 243(1)/2013 dated 26.03.2013 and SRO 140(1)/13 dated 26.02.2013 arose between the petitioner and the officials of Customs Collectorate, Gwadar at Balochistan, pursuant to which petitioner filed instant petition before this Court on 06.06.2013 seeking release of the consignment, however, challenged the vires of both the aforesaid SROs. During pendency of instant petition, it transpired that petitioner filed another Constitutional Petition i.e. C.P.No.637 of 2013 before the High Court of Balochistan, at Quetta on 09.09.2013 in respect of the same subject Vessel "MT-SUNDANCE" with similar relief, however, such fact was not disclosed by the petitioner either to this Court or before the Balochistan High Court until an objection was raised by learned counsel for the respondent to this effect. Accordingly, an objection was raised with regard to maintainability of instant petition on the point of jurisdiction as well as in view of the fact that once the petitioner has already filed a Constitutional Petition before the proper Court of territorial jurisdiction with similar relief, then how instant petition before this Court can be entertained. Several adjournments were sought on behalf of the petitioner to satisfy the Court as to maintainability of petition, whereafter, the learned counsel representing the petitioner, sought permission for withdrawal of his

Vakalatnama, which was granted, and thereafter, petitioner engaged another counsel to pursue instant matter, who was also put on notice to satisfy the Court regarding maintainability of instant petition. While confronted with objection on the maintainability of petition and duplication of proceedings, the petitioner filed application for seeking amendment in pleadings and filed amended petition on 26.09.2014, whereby, petitioner restricted the relief claimed to the extent of challenging the vires of SRO 140(1)/2013 dated 26.02.2013, however, in respect of the same subject Vessel "MT-SUNDANCE", which admittedly reached at Gwadar Port, Balochistan. It was submitted by the learned counsel for the petitioner that petitioner will not press the relief relating to legality of SRO 140(1)/2013 dated 26.02.2013 pertaining to levy of income tax before the Balochistan High Court, at Quetta, therefore, instant petition may be decided to the extent of legality of SRO 140(1)/2013 dated 26.02.2013. However, during pendency of instant petition before this Court, the petitioner did not disclose the fact that petition filed by the petitioner before the Balochistan High Court, alongwith other connected petitions on the same subject controversy had already been dismissed vide combined judgment dated 17.07.2014, whereby, the Hon'ble Divisional Bench of Balochistan High Court was pleased to uphold the vires and legality of both the aforesaid SROs, including SRO 140(1)/2013 dated 26.02.2013, which the petitioner continued to press in the instant petition before this Court. On 18.10.2017, when the learned counsel for the petitioner was once again confronted as to maintainability of instant petition in view of hereinabove defects relating to territorial jurisdiction of this Court, as well as the commonality of the relief sought by the petitioner relating to same subject Vessel and SROs, learned counsel for the petitioner could not submit any reasonable explanation as to why two High Courts were approached by the petitioner in respect of same Vessel and the SROs as referred to hereinabove. Dispute regarding the correct jurisdiction of a High Court under whose jurisdiction a public functionary performing function on behalf of the Federation, came up before the Hon'ble Supreme Court in the case of **SANDALBAR ENTERPRISES (PVT) LTD.,**

V. CENTRAL BOARD OF REVENUE AND OTHERS [PLD 1997 SC 334], wherein, the Hon'ble Supreme Court was pleased to hold as under:-

“6. The learned Judges of the Division Bench have pointed out the language originally employed in Article 98(2)(a)(i) of 1962 Constitution prior to the incorporation of clause (c) by the First Amendment Act, 1963, for distinguishing the case of *Asghar Hussain v. Election Commission of Pakistan etc.*, PLD 1968 SC 387. The view found favour with the learned Judges of the Division Bench in the case in hand seems to be in consonance with Articles 199(1)(a) (i) and (ii) of the Constitution of the Islamic Republic of Pakistan, 1973, hereinafter referred to as the Constitution. A perusal of the above sub-clause (a)(i) of the above Article indicates that a High Court has power to issue a direction to a person performing within its territorial jurisdiction functions in connection with the affairs of the Federation, a Province or a local authority to refrain from doing anything he is not permitted by law to do or to do anything he is required by law to do. Similarly, under sub-clause (a)(ii) a declaration without lawful authority or of no legal effect can be given by a High Court in respect of any act done or proceeding taken within its territorial jurisdiction by a person performing functions in connection with the affairs of the Federation, a Province or a local authority.

7. The petitioners' prayer was for a direction to the Customs Authorities at Karachi not to levy the regulatory duty. The above relief could have been granted by the High Court of Sindh within whose jurisdiction the person performing the affairs of the Federation is discharging his functions.

8. We may observe that it has become a common practice to file a writ petition either at Peshawar, or Lahore, or Rawalpindi or Multan etc, to challenge the order of assessment passed at Karachi by adding a ground for impugning the notification under which a particular levy is imposed. This practice is to be depreciated. The Court is to see, what is the dominant object of filing of the writ petition. In the present case, the dominant object was not to pay the regulatory duty assessed by a Customs

official at Karachi. We are, therefore, not inclined to grant leave. Leave is refused.”

11. From perusal of hereinabove facts and circumstances of instant case, it is clear that the dominant object of filing instant petition before this Court as well as before the Balochistan High Court was not to pay the income tax and sales tax liability, pursuant to SROs 140(I)/2013 dated 26.02.2013 and 243(I)/2013 dated 26.03.2013 to the Customs officials at Gwadar Port, Balochistan in respect of vessel i.e. “M.T. Sundance” ex-Tristar Dubai imported by the petitioner. The vessel arrived at Gwadar Port, Balochistan, whereas, the petitioner was required to make payment of income tax and sales tax to the Customs Authorities at Gwadar. However, the petitioner for the reasons never disclosed to this Court in pleadings, chose to file two constitutional petitions in respect of the same Vessel i.e. “MT-SUNDANCE” before the two High Courts, while claiming same relief, however, such fact was never disclosed by the petitioner to this Court, until an objection was raised by the learned counsel for the respondent, whereafter, the petitioner, in order to justify filing of instant petition before this Court, in duplication of a petition filed before the Balochistan High Court, amended the relief to the extent of challenging the legality of SRO 140(I)/2013 dated 26.02.2013. It is further pertinent to note that during pendency of instant petition, the petition filed by the petitioner alongwith other connected petitions, whereby, legality of both the SROs was under challenge before the Balochistan High Court was dismissed vide judgment dated 17.07.2014 passed by the Balochistan High Court in the case of *Muhammad Rafique and others v. Federation of Pakistan and others* [2014 PTD 1881], whereby, the Balochistan High Court has been pleased to dismiss such constitutional petitions. However, such fact was never disclosed by the petitioner, who instead of issuing any instructions, was obliged to change his counsel during pendency of instant petition, whereafter, subsequent counsel pleaded ignorance regarding above facts. The petitioner and his counsel were specifically confronted as to maintainability of instant petition with a note of caution that if this Court reaches to the conclusion that instant petition is not maintainable and has been filed in duplication of the proceedings already

decided by the Balochistan High Court in respect of same subject consignment i.e. MT-SUNDANCE of the petitioner, instant petition will be dismissed with cost. However, learned counsel for the petitioner choose to proceed with the matter and contended that, since legality or vires of any SROs can be challenged by an aggrieved person before any High Court. The Hon'ble Supreme Court in the aforesaid case, while dealing with similar situation, has been pleased to hold that *it has become a common practice to file a writ petition either at Peshawar, or Lahore, or Rawalpindi or Multan etc. to challenge the order of assessment passed at Karachi by adding a ground for impugning the notification under which a particular levy is imposed, is to be depreciated. The Court is to see, what is the dominant object of filing of the writ petition.*

12. In view of hereinabove facts and circumstances of the case, while applying the ratio of the judgment of the Hon'ble Supreme Court as referred to hereinabove, we are of the considered opinion that instant petition filed by the petitioner in duplication of the petition filed before the Balochistan High Court in respect of the same subject Vessel "MT-SUNDANCE" seeking similar relief, while concealing this material fact to this Court, is not maintainable. Accordingly, instant petition was dismissed vide our short order with cost of Rs.25,000/- {Rupees Twenty Five Thousand Only} to be deposited in the account of High Court Clinic and these are the reasons of our such short order.

JUDGE

JUDGE