THE HIGH COURT OF SINDH, KARACHI

Suit No. 42 of 2020

[Syed Zain ul Abideen versus Federal Board of Revenue & others]

Plaintiff	:	Syed Zain ul Abideen through Mr. Taimur Ali Mirza, Advocate.
Defendant 1	:	Federal Board of Revenue through Mr. Hussain Bohra, Assistant Attorney General.
Defendant 2	:	Deputy Commissioner Inland Revenue, Initiating Officer-II, Anti-Benami Initiative, Zone-III, Karachi, through Mr. Muhammad Aqeel Qureshi, Advocate.
Defendants 3-5	:	Nemo.
Date of hearing	:	21-02-2020.
Date of decision	:	16-04-2020.

O R D E R

Adnan Iqbal Chaudhry J. – By this suit the Plaintiff has challenged the attachment of his bank accounts under the Benami Transactions (Prohibition) Act, 2017.

2. Per the plaint, the Plaintiff received a summon dated 22-10-2019 under section 16 of the Benami Transactions (Prohibition) Act, 2017 in relation to an inquiry of a benami transaction; that the Plaintiff appeared before the concerned officer who informed him that he will need to answer certain questions in due course in relation to a certain property held by the Plaintiff; but, thereafter the Plaintiff did not receive any further notice of the inquiry; that on 09-01-2020 the Plaintiff learnt from his banks that his bank accounts have been attached pursuant to the impugned attachment letters dated 26-12-2019 issued by the Defendant No.2, Deputy Commissioner Inland Revenue acting as Initiating Officer under the Benami Transactions (Prohibition) Act, 2017. The prayer in the suit is to declare the impugned attachment letters as void *abinito*, and for a permanent injunction to restrain action on the basis thereof. By CMA

No. 290/2020 the Plaintiff also prays for suspension of the impugned attachment letters.

3. The scheme of the Benami Transactions (Prohibition) Act, 2017 (hereinafter 'the Act') is as follows.

(i) Per section 2(7) of the Act, 'benami property' means any property that is the subject matter of a benami transaction and also includes the proceeds from such property. A 'benami transaction' is prohibited by section 3(1) of the Act. The entering into a benami transaction or holding a benami property is also an offence (sections 3(2) and 51). Any property subject matter of a benami transaction is liable to confiscation by the Federal Government (section 4).

(ii). The Authorities for the purposes of the Act are: (a) the Initiating Officer; (b) the Approving Authority; (c) the Administrator; and (d) the Adjudicating Authority (section 15). Under section 2(3) of the Act, the 'Approving Authority' is the Commissioner Inland Revenue as defined in the Income Tax Ordinance, 2001. Under section 2(19), the 'Initiating Officer' is the Deputy Commissioner Inland Revenue appointed under the Income Tax Ordinance, 2001. The 'Adjudicating Authority' comprises of a Chairman and at least two other members appointed by the Federal Government (section 6). The Authorities under the Act are vested with certain powers of a civil court (section 16).

(iii). The Initiating Officer, after approval of the Approving Authority, is empowered to conduct an inquiry or investigation in respect of matters under the Act (section 21). Under section 22(1) of the Act, and subject to the conditions therein, the Initiating Officer may issue notice to a suspected benamidar to show cause as to why the property should not be treated as benami property; and under sub-section (3) of section 22, the Initiating Officer may with the prior approval of the Approving Authority, provisionally attach the property for a period not exceeding 90 days from the date of the show-cause notice.

(iv). Sub-section (4) of section 22 of the Act then requires that within 90 days of the show-cause notice, the Initiating Officer shall make enquiries, call for such evidence as he deems fit, and pass an order either to continue the provisional attachment till decision by the Adjudicating Authority, or to revoke the same. Where the Initiating Officer has not made a provisional attachment earlier, then within 90 days of the show-cause notice he shall decide whether to attach the property or not. On the continuation or passing of any attachment order under sub-section (4) of section 22, the Initiating Officer shall within 60 days make a reference to the Adjudicating Authority under sub-section (5) of section 22 of the Act.

(v). On receiving a reference from the Initiating Officer, the Adjudicating Authority issues notice to the persons concerned, and after considering replies, making enquiries, calling for evidence and providing a hearing, the Adjudicating Authority decides whether the property is benami property (section 24). If the reference is decided in the affirmative, then a further proceeding is conducted for confiscation of the benami property (section 25).

(vi) The order of the Adjudicating Authority is appealable to the Federal Appellate Tribunal (sections 28 and 44). The order of the Appellate Tribunal is executable by it as a decree of a civil court (section 38). The order of the Appellate Tribunal is appealable to the High Court on a question of law (section 47). For the trail of an offence under the Act, the Sessions Court is designated as a Special Court (section 48).

(vii) Section 56 of the Act is an non-obstante clause giving the Act overriding effect, while section 43 of the Act is an ouster clause which reads:

> "**43. Bar of jurisdiction of civil courts.-** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which any of the authorities, or the Tribunal is empowered by or under this Act to determine, and no injunction shall be granted by any court or other forum in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act".

4. The provisions above show that the Benami Transactions (Prohibition) Act, 2017 is special law which creates special rights and liabilities and provides a special forum with exclusive jurisdiction to determine those rights and liabilities. Hence, vide order dated 20-01-2020, certain questions were raised by this Court as to the status of the proceedings against the Plaintiff under the Act, and as to the jurisdiction of this Court to entertain this suit.

5. Heard the learned counsel and perused the record.

6. With regards to the ouster clause in section 43 of the Benami Transactions (Prohibition) Act, 2017, Mr. Taimur Mirza, learned counsel for the Plaintiff relied primarily on the case of *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) to submit that while interpreting a similar ouster clause in section 217(2) of the Customs Act, 1969, the Supreme Court of Pakistan has held that the words 'civil court' therein, are not applicable to the High Court of Sindh at Karachi when it exercises jurisdiction to try civil suits. Thus, learned counsel submitted that section 43 of the Benami Transactions (Prohibition) Act, 2017, which too ousts the jurisdiction of a 'civil court', is no bar to the instant suit before the High Court of Sindh at Karachi.

7. In the case of *Searle IV Solution (supra)*, the question before the Supreme Court of Pakistan was to the exercise of jurisdiction by the single Judge of the High Court of Sindh at Karachi in civil suits to interfere in orders passed by assessing authorities under taxing statutes, which statutes expressly ousted the jurisdiction of civil courts. In the first instance, the Supreme Court of Pakistan reiterated the well-established exceptions to the ouster of the plenary jurisdiction of a civil court, viz., that the jurisdiction of a civil court to examine orders/acts of an Authority or Tribunal is not ousted (a) where the Authority or Tribunal was not validly constituted under the statute; (b) where the order/action of the Authority or Tribunal was *malafide*; (c) where the order/action passed/taken was such which could not have been passed/taken under the law that

conferred exclusive jurisdiction on the Authority or Tribunal; and (d) where the order/action violated the principles of natural justice. It was also held that the burden to prove that a case attracted any of the said exceptions was on the plaintiff of the suit.

8. On a related question, it was further held in *Searle IV Solution* that even when the High Court of Sindh at Karachi exercises jurisdiction in civil suits, it was nonetheless a High Court and could not be equated with an ordinary civil court; and thus the words 'civil court' in section 217(2) of the Customs Act were not intended by the legislature to include the High Court of Sindh at Karachi when dealing with civil suits. However, that surely did not mean to say that notwithstanding the availability of a special forum provided by a special law, the remedy of a civil suit before the High Court of Sindh at Karachi under section 9 CPC remains unrestricted. That much is clear from the fact that in some of the appeals before it (in *Searle IV Solution*), which emanated from suits filed in the High Court of Sindh at Karachi, the Supreme Court held that the contentions raised did not fall within the ambit of the established exceptions to the ouster of jurisdiction, and thus those appellants could not have resorted to civil suits to escape the hierarchy of the grievance-redressal mechanism provided in the Customs Act, 1969. It was further observed that though a civil suit before the High Court of Sindh at Karachi was not barred by reason of the ouster clause in section 217(2) Customs Act, but such jurisdiction should be exercised only sparingly.

9. Thus, the *ratio decidendi* of *Searle IV Solution* is that even though an ouster clause in a special statute barring the jurisdiction of a 'civil court' did not apply to the High Court of Sindh at Karachi dealing with civil suits, there was nonetheless an 'implied' bar to jurisdiction as contemplated under section 9 CPC, arising as a consequence of special law which envisaged exclusive jurisdiction by a special forum, which implied bar could only be circumvented if the plaintiff demonstrated that the case attracted one of the established exceptions to the ouster of jurisdiction highlighted in para 7 above.

10. The legal theory behind the said 'exceptions' to the ouster of jurisdiction of civil courts is that when the legislature creates a special tribunal to deal with a civil matter, the jurisdiction committed to such special tribunal is in fact carved out from the general jurisdiction of the civil courts. It is therefore for the civil court to decide the true construction of the statute which defines the area of a tribunal's jurisdiction to see that the tribunal keeps itself within the limits of its special jurisdiction, for if it does not, then it trespasses onto the general jurisdiction of the civil courts[1].

11. Applying the ratio of *Searle IV Solution* to the case in hand, while the jurisdiction of this High Court of Sindh at Karachi to entertain a suit in respect of matters under the Benami Transactions (Prohibition) Act, 2017 may not be barred by reason of the ouster clause in section 43 of the Act, there is nonetheless an implied bar within the meaning of section 9 CPC when the said Act provides for a special mechanism and a special forum to determine matters arising under the said Act. That implied bar to jurisdiction can only be circumvented if the Plaintiff demonstrates that his case attracts one of the established exceptions to the ouster of jurisdiction highlighted in para 7 above, failing which the Plaintiff will have to resort to the hierarchy of the special fora provided under the Benami Transactions (Prohibition) Act, 2017. In a nutshell, this Court will exercise its jurisdiction only if the impugned action suffers from a jurisdictional defect. Having said that, the suit does confine it's challenge on jurisdictional grounds only.

12. Mr. Taimur Mirza, learned counsel for the Plaintiff submitted firstly that, under the Benami Transactions (Prohibition) Act, 2017 the power to provisionally attach a property is provided by section 22(3) of the Act, whereas the impugned attachment letters have been issued under section 22(4)(a)(i) of the Act where under a further attachment can follow only if there is a previous attachment under section 22(3) of the Act. However, even though the attachment letters read that the

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[1] See *Bahadur v. Umar Hayat* (PLD 1993 Lah 390); and *Begum Syeda Azra Masood v. Begum Noshaba Moeen* (2007 SCMR 914).

attachment is in exercise of section 22(4)(a)(i) of the Act, those letters also state that the attachment is being made 'provisionally' and 'for ninety (90) days', which are the very terms of an attachment under section 22(3) of the Act. In other words, the attachment in the impugned letters is intended under section 22(3) of the Act. Therefore, the argument of Mr. Taimur Mirza is actually to say that even though the Initiating Officer had the power to make the attachment, but while exercising such power he cited the wrong provision of the Act. Such an error hardly constitutes an act without jurisdiction and is in any case protected by section 59 of the Benami Transactions (Prohibition) Act, 2017 which provides:

> "59. **Notice, summons, order, document or other proceeding, not to be invalid on certain grounds.-** No notice, summons, order, document or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid, or shall be deemed to be invalid merely by reason of any mistake, defect or omission in the notice, summons, order, document or other proceeding if the notice, summons order, document or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

Section 59 of the Act is the embodiment of the following legal principle reiterated in the very case of *Searle IV Solution* relied upon by learned counsel:

> "Even otherwise, the precedent laid down in *Badrul Haque Khan's* case (supra) with regard to an action/order being beyond jurisdiction, is that it will be going too far to say that every little breach of a rule would constitute an act 'without lawful authority'. So far as the nature of the act/action was such that it can be said to be made within the powers given to it (the authority passing the order or taking the action) for determination/assessment under the Statute, it cannot be said to be beyond jurisdiction."

13. The other ground urged by Mr. Taimur Mirza for attacking the exercise of jurisdiction by the Initiating Officer, and one that was the mainstay of his case, was that the impugned attachment was made without the requisite show-cause notice under section 22(1) of the Benami Transactions (Prohibition) Act, 2017, and thus the Plaintiff

was denied the opportunity to show cause against the attachment of his bank accounts. However, during the course of the hearing, Mr. Aqeel Qureshi Advocate entered appearance for the Defendant No.2 (Initiating Officer). He submitted that the Plaintiff had suppressed true facts, and he placed on record the show-cause notice dated 23-12-2019 issued by the Initiating Officer to the Plaintiff under section 22(1) of the Act.

14. Mr. Aqeel Qureshi, learned counsel for the Defendant No.2 (Initiating Officer), relied on various notices sent to the Plaintiff under section 16 of the Benami Transactions (Prohibition) Act, 2017 to submit that the Plaintiff had repeatedly sought adjournments in the inquiry against him which adjournments were granted vide notices dated 25-10-2019 and 01-11-2019, both of which were also copied to the Plaintiff's counsel who had sought the adjournments; that vide notice dated 11-12-2019 the Initiating Officer called upon the Plaintiff to record his statement on oath but again the Plaintiff sent a letter through his counsel requesting for another adjournment; that by notice dated 23-12-2019, the Initiating Officer gave a final notice to the Plaintiff under section 16 of the Act; that on the same day, i.e. on 23-12-2019, the Initiating Officer also issued the requisite show-cause notice dated 23-12-2019 to the Plaintiff under section 22(1) of the Act categorically stating that the Initiating Officer has reason to believe that the subject bank accounts in the name of the Plaintiff are benami property and calling upon him to show cause by 28-12-2019 why those bank accounts should not be attached under section 22 of the Act; and that in the meanwhile, since the Initiating Officer suspected that the bank accounts may be operated, he issued the attachment letters on 26-12-2019. Along with his written statement, the Defendant No.2 also filed a copy of a courier receipt dated 23-12-2019 to show that the show-cause notice was duly sent to the Plaintiff. Per the written statement, a reference under section 22(5) of the Benami Transactions (Prohibition) Act, 2017 had recently been filed by the Initiating Officer before the Adjudicating Authority where the matter will now proceed for determination under section 24 of the Act.

15. On being confronted with the above mentioned notices sent to the Plaintiff under section 16 of the Benami Transactions (Prohibition) Act, 2017, and the show-cause notice dated 23-12-2019 issued under section 22(1) of the Act, though Mr. Taimur Mirza did not deny receipt of notices dated 25-10-2019 and 01-11-2019 under section 16 of the Act, but he denied that the Plaintiff had ever received the show-cause notice dated 23-12-2019 under section 22(1) of the Act. He contended that the said show-cause notice appears to have been made afterwards and back-dated, and he also disputed the courier receipt by which the show-cause notice is said to have been sent to the Plaintiff. Given the chronology of events discussed in para 14 above, and the fact that in the plaint the Plaintiff had previously denied receiving any notice but one dated 22-10-2019, which is no longer the case, the allegation that the show-cause notice was made afterwards does not inspire confidence. But ignoring all of that for the present, the argument that the show-cause notice was made-up afterwards is an allegation of *malafides*-in-fact on the Initiating Officer as distinct from *malafides*-in-law. That was not the case of the Plaintiff to begin with. Apart from a vague allegation of *malafides*, the plaint does not specifically allege that the actions of the Initiating Officer were colored or motivated for extraneous reasons, or that he was biased against the Plaintiff. It is settled law that before the allegation of *malafides* can be allowed to be proved, *malafides* have to be pleaded with particularity, and till such time, a presumption of correctness attaches to official acts[2].

16. The matter as it presently stands is that a reference against the Plaintiff under the Benami Transactions (Prohibition) Act, 2017 is pending determination before the Adjudicating Authority under section 24 of the Act, which determination will also decide the fate of the attachment of Plaintiff's bank accounts. No issue has been raised by the Plaintiff to the exercise of that jurisdiction by the Adjudicating Authority. Section 24(3) of the Act expressly provides the Plaintiff a right of hearing before the Adjudicating Authority. Not only is the Adjudicating Authority empowered to receive evidence, but under

[2] See *Tabassum Shahzad v. I.S.I.* (2011 SCMR 1886), and Order VI Rule 4 CPC.

section 22(5) of the Act it is also empowered to attach a related property. Therefore, I do not see how the Plaintiff can claim to have been prejudiced.

17. The upshot of the above discussion is that the plaint does not raise any ground that constitutes an exception to interfere in the exercise of jurisdiction by the special *fora* prescribed under the Benami Transactions (Prohibition) Act, 2017. Consequently, the implied bar to the jurisdiction of this Court that arises by reason of the existence of special *fora* to determine matters arising under the Benami Transactions (Prohibition) Act, 2017, remains intact. Therefore, the plaint is rejected under Order VII Rule 11(d) CPC and CMA No. 290/2020 stands dismissed accordingly.

JUDGE

Karachi:
Dated: 16-04-2020