

IN THE HIGH COURT OF SINDH AT KARACHI

Before: **Mohammad Junaid Ghaffar and Agha Faisal, JJ.**

CP D 2933 of 2014 : Lucky Cement Limited vs.
Federation of Pakistan & Others

For the Petitioners : Mr. Hussain Ali Almani, Advocate

For the Respondents : Mr. Kafil Ahmed Abbasi
(Deputy Attorney General)
Ms. Masooda Siraj, Advocate
(for respondents 3 and 4)

Date of hearing : 03.11.2020.

Date of announcement : 16.11.2020

JUDGMENT

Agha Faisal, J. The petitioner has impugned before us a recovery notice¹, for recovery of duties and taxes, issued in pursuance of an order² of the honorable Supreme Court. It is considered illustrative to reproduce the determinant order of the august court and the notice impugned before us in seriatim herein below:

SC Order

"Having argued the case at some length, learned counsel for the review petitioner submits on a second thought that he would not press this petition provided he is permitted to avail the departmental remedy. Learned counsel for the respondents on Court query submits that the petitioners shall be issued a notice of recovery and they can contest that as mandated in law.

2. In view of the fair stand taken by the learned counsel for the parties, this petition is disposed of in terms noted above."

Recovery Notice

"RECOVERY OF SHORT PAID DUTY AND TAXES AMOUNTING TO RS.942.11 MILLION UNDER SECTION 202 OF THE CUSTOMS ACT, 1969 AND SURCHARGE AMOUNTING TO RS.33,9-3 MILLION UNDER SECTION 202-A OF THE CUSTOMS ACT, 1969.

Please refer to this Collectorate's letter C. No.SI/MISC/WP/116/95-Law(A) dated 25.05.2011 on the subject:

2. The honorable Supreme court of Pakistan vide the orders dated 20.05.2014 (*sic*) has disposed of the instant case. In light thereof, you are requested to deposit the recoverable amount of duties and taxes amounting to Rs.942.11 million and surcharge amounting to Rs.33,903 million calculated till this date (final surcharge will be calculated on the day of depositing of the amount).

3. It is highlighted that the subject amount are pending against M/s Lucky Cement Ltd. for the **last twenty (20 years)**. Non-payment of state revenues for this much longer time is unwarranted therefor you are advised to deposit the same within 07 days from the issuance of this notice, failing which appropriate action as warranted under the law would be initiated against you."

¹ Recovery Notice dated 23.5.2014 issued by the Model Customs Collectorate Karachi ("Recovery Notice").

² Order of the honorable Supreme Court dated 08.05.2014 in CRP No.132 of 2009 in Civil Appeal No.1945 of 2000 ("SC Order").

2. Briefly stated, the petitioner, being a cement manufacturer, had imported its plant and machinery in 1995. The import was stated to have been covered by tax / duty concessions³, the benefit whereof was denied thereto. Notwithstanding the fact that the imported plant and machinery arrived at the Karachi port, a writ petition⁴ challenging the denial of concession and the claim of duties and taxes, was filed before the honorable Peshawar High Court. Vide interim orders⁵ the imported plant and machinery was directed to be released on furnishing of indemnity bonds. The final judgment⁶ in the aforesaid proceedings was rendered in favor of the petitioner, however, the same was set aside by the honorable Supreme Court⁷. The petitioner preferred a review application in respect of the aforementioned judgment and the same was determined vide the SC Order. The Recovery Notice was then served upon the petitioner, who, in turn, has challenged the same before this Court.

3. The petitioner's case⁸ is predicated on the premise that before initiating any recovery proceedings adjudication by the department is necessary⁹; a recovery notice without issuing a show cause and adjudication is illegal¹⁰; provision of notice to a person, who is being proceeded against, has to be read into every statute¹¹; in the absence of an adjudicated *mens rea* no surcharge can be imposed¹²; no discriminatory treatment can be accorded to persons in the same genre¹³; noting on a goods declaration is not a speaking order, hence, not appealable¹⁴; and that the High Court can convert one type of proceedings into another¹⁵, hence, the petitioner would have no cavil if the present petition would be converted into departmental proceedings and remanded accordingly. It was thus concluded that service of the Recovery

³ The concession was claimed pursuant to SRO 484(I)/92 dated 14th May, 1992 read with SRO 978(I)/95 dated 4th October, 1995.

⁴ Writ petition 583 of 1995.

⁵ Interim orders dated 31.05.1995 and 18.09.1995 rendered by the honorable Peshawar High Court in Writ Petition 583 of 1995.

⁶ Judgment dated 03.02.2000 of Peshawar High Court, reported as *PLD 2001 Peshawar 7*.

⁷ Judgment announced on 28.07.2009 in *Collector of Customs Karachi vs. Lucky Cement Limited & Others (Civil Appeal 1945 of 2000)*.

⁸ Articulated by Mr. Hussain Ali Almani, Advocate.

⁹ *Sohail Jute Mills Limited vs. Federation of Pakistan* reported as *PLD 1991 SC 329*.

¹⁰ *S. Sana Enterprises vs. Federation of Pakistan* reported as *2013 PTD 438*; *GMH Traders & Manufacturers vs. Deputy Director Investigation Officers* reported as *2009 PTD 1894*; *Exide Pakistan Limited vs. Deputy Collector* reported as *2004 PTD 1449*; *Assistant Collector Customs vs. Khyber Electric Lamps* reported as *2001 SCMR 838*; *Moon Elite Enterprises vs. M C Lyallpur* reported as *1991 CLC 796*.

¹¹ *Commissioner Inland Revenue vs. Ranipur CNG Station* reported as *2017 PTD 1839*; *Combine Products vs. SME Leasing Limited* reported as *2015 CLD 1188*; *Ashfaq Ahmed Khan vs. Deputy Commissioner of Income Tax* reported as *2012 PTD 35*.

¹² *Muhammad Waheed vs. Customs Appellate Tribunal* reported as *2016 PTD 35*; *NICON (Private) Limited vs CIR RTO* reported as *2016 PTD 2748*; *Commissioner of Income Tax vs. Habib Bank Limited* reported as *2007 PTD 901*; *DG Khan Cement Company Limited vs. Federation of Pakistan* reported as *2004 PTD 1179*.

¹³ *Collector of Customs, Central Excise & Sales Tax vs. Novartis* reported as *2002 PTD 976*.

¹⁴ *Engro Elengy Terminal (Private) Limited vs. Federation of Pakistan* reported as *2017 PTD 959*.

¹⁵ *Muhammad Anis & Others vs. Abdul Haseeb* reported as *PLD 1994 SC 539*; *Ikramullah vs. District Officer Revenue* reported as *2007 PLS(GS) 1091*; *Muhammad Akram vs. DCO Rahim Yar Khan* reported as *2017 SCMR 56*.

Notice upon the petitioner was untenable in law or premature in the very least, hence, ought to be set aside.

4. Ms. Masooda Siraj, Advocate¹⁶ submitted at the very outset that the Recovery Notice was predicated upon the SC Order, therefore, the present petition is misconceived. It was submitted that the petitioner has already obtained the release of its plant and machinery and the relevant manufacturing facility has been functioning ever since, however, the obligation to pay the due taxes and the duties to the public exchequer have been avoided for over 25 years. It was argued that the petitioner is not honoring its statutory duty and has also violated the terms of the indemnity bonds pursuant whereof its plant and machinery was released. Learned counsel relied upon the *Fauji Cement judgment*¹⁷ to demonstrate that the petitioner's plea for a departmental adjudication was even otherwise superfluous since the honorable Supreme Court had already determined the controversy in favor of the department. Learned counsel stressed that the statutory hierarchy of dispute resolution was eschewed by the petitioner itself and after having avoided its due liability for over 25 years the petitioner is now seeking to initiate the entire process from naught and the same could not be sanctioned by this Court.

The stance postulated by the learned Deputy Attorney General was at variance to that of the departmental counsel and it was argued that since the Recovery Notice was not preceded by a show cause notice, therefore, it would be just and proper for the same to be set aside and a *de novo* process be initiated by issuance of a show cause notice so that the petitioner may be able to avail the departmental hierarchy of dispute resolution¹⁸.

5. We have appreciated the arguments of the respective learned counsel and have also considered the law to which our attention was solicited. It is apparent that the petitioner elected to abjure the departmental hierarchy of dispute resolution and sought amelioration of its grievance in the constitutional jurisdiction and the said adjudication went all the way up to the honorable Supreme Court. Post the final judgment of the honorable Supreme Court, the petitioner further availed the opportunity of review and the determination thereof, vide the SC Order, speaks for itself. It does not behove this Court to

¹⁶ Representing the department.

¹⁷ *Fauji Cement Company Limited vs. Government of Pakistan & Others* reported as 2014 SCMR 994; followed in *Collector of Customs vs. D G Khan Cement Company Limited* reported as 2016 SCMR 1448, review in respect whereof was dismissed vide order dated 28.02.2017 in *Civil Review Petition 347 of 2016 & connected matters*.

¹⁸ Albeit by securing the claim vide a bank guarantee.

enter into a deliberation upon the findings of the Supreme Court or to interpret¹⁹ the verbiage of the order thereof. Therefore, the only question to be determined by us is whether the Recovery Notice suffers from any infirmity meriting interference in writ jurisdiction at this juncture.

6. The scope of writ jurisdiction, in fiscal matters, is settled law and interference may only be warranted in cases of manifest want of jurisdiction; abuse of process; and / or demonstrable *mala fide* and / or injustice.

In the matter under scrutiny there is no cavil to the jurisdiction of the respondent department in so far as the issuance of the impugned notice is concerned. No case for abuse of process, *mala fide* and / or injustice is borne from the record, especially since the Recovery Notice has been issued in pursuance of the SC Order, delivered post exhaustion of entire remedial process elected by the petitioner of its own volition.

7. It is apparent that the petitioner had elected to avoid the departmental hierarchy of dispute resolution from the very onset²⁰ of its grievance. The settled principles of the *doctrine of election*²¹ denote that the election to commence and follow an available course, from concurrent avenues, vests with a suitor, however, once an option is exercised then the suitor is precluded from re-agitating the same *lis* in other realms of competent jurisdiction. The august court has illumined that providing an option to elect a remedial recourse does not frustrate or deny the right to choose any remedy, which best suits under the given circumstances. However, the *doctrine of election* has been evolved by courts to curb successive / multiple adjudication processes in respect of a singular impugned action. As long as a party does not avail of a remedy before a forum of competent jurisdiction all such remedies remain open to be invoked, however, once the election is made then the party may not be allowed to hop over and shop for one after another coexistent adjudication process. The *TCP judgment* distilled the wisdom of a myriad of commonwealth authority²² and concluded that after exhausting a remedial course a suitor may not be allowed to venture upon another remedial

¹⁹ As the same is the prerogative of the honorable Supreme Court itself.

²⁰ Circa 1995.

²¹ Per *Mushir Alam J* in *Trading Corporation of Pakistan vs. Dewan Sugar Mills Limited & Others* reported as *PLD 2018 Supreme Court 828*.

²² *Fehmida Begum vs. Muhammad Khalid & Others* reported as 1992 SCMR 1908 – “Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy”; *Behar State Co-operative Marketing Union Limited vs. Uma Shankar Sharan & Another* reported as [(1992) 4 Supreme Court Cases 196] – “Validity of plural remedies, if available under the law, cannot be doubted. If any standard book on the subject is examined, it will be found that the debate is directed to the application of the principle of election, where two or more remedies are available to a person. Even if the two remedies happen to be inconsistent, they continue for the person concerned to choose from, until he elects one of them, commencing an action accordingly”.

avenue for the same malady, which though available was not invoked, as permitting the same would be an abuse of the process of law, which cannot be approved.

In the present facts and circumstances, the petitioner's plea for invocation of the department adjudication process, albeit twenty five years belated and post exhaustion of the remedial course elected to have been pursued, appears to be impeded by the *doctrine of election*.

8. In so far as the concession of the learned Deputy Attorney General is concerned, conceding to a departmental recourse quite literally a generation after the petitioner itself elected to avoid the same, we find ourselves unable to subscribe to the argument advanced. In any event the petitioner's counsel, in rebuttal, rejected the said concession on the ground that securing the demand, even if a departmental adjudication process was directed, would be prejudicial to the interests of the petitioner.

9. In the petitioner's case, the august Court held²³ that the departmental hierarchy of dispute resolution was available to the petitioner at the very onset of its grievance, however, the same was elected to be avoided. While allowing the appeal the august Court did not issue any directions for a departmental adjudication²⁴, commencing vide a show cause notice or otherwise. The petitioner filed a review²⁵ and specifically pleaded²⁶ the issue of the absence of the departmental adjudication process in the demand made there against. However, the SC Order, delivered in the presence of the petitioner's counsel, contemplates the issuance of a notice of recovery²⁷. The case law cited by the petitioner, in addition to the pleas articulated before us, was available thereto during the successive proceedings before the august Court, however, it is manifest that the judgment²⁸ and the SC Order have been delivered regardless thereof. It is in this context that we are constrained to observe that the authority cited appears to be distinguishable in the present facts and circumstances and does not augment the petitioner's case.

²³ Vide its judgment announced on 28.07.2009 in *Collector of Customs Karachi vs. Lucky Cement Limited & Others (Civil Appeal 1945 of 2000)*.

²⁴ Unlike the case in *Collector of Customs vs. Bestway Cement Limited (and other connected matters)* reported as 2012 SCMR 409.

²⁵ CRP No.132/2009 in Civil Appeal No.1945/2000.

²⁶ *Inter alia* in paragraphs 7(b) and 7(g) of the Memorandum of application filed by the petitioner in CRP No.132 of 2009.

²⁷ As opposed to a show cause notice, now being sought by the petitioner.

²⁸ Judgment announced on 28.07.2009 in *Collector of Customs Karachi vs. Lucky Cement Limited & Others (Civil Appeal 1945 of 2000)*.

10. In view of the reasoning herein contained, we find that the present petition is devoid of merit, hence, the same (along with pending application/s) is hereby dismissed.

JUDGE

JUDGE