

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1682 of 2014

[Pakistan Petroleum Ltd. v. Pakistan & another]

Plaintiff : Pakistan Petroleum Limited through Mr. Sagar Ladhani, Advocate.

Defendant No.1 : Pakistan through Secretary Revenue Division through Mr. Anwar Kamal, Assistant Attorney General for Pakistan.

Defendant No.2 : Deputy Commissioner of Inland Revenue, Karachi through Mr. Ameer Bakshsh Metlo, Advocate.

Date of hearing : 03-02-2021

Date of decision : 23-02-2021

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 6872/2016, an application for rejection of the plaint under Order VII Rule 11 CPC moved by the Defendant No.2.

2. By this suit, the Plaintiff has challenged a show-cause notice dated 04-09-2014 issued under section 172(5) of the Income Tax Ordinance, 2001, requiring the Plaintiff to show cause why it should not be declared a representative of a non-resident company under section 172(3) of the Ordinance for tax year 2103. The show-cause notice reads as under :

“Subject: NOTICE UNDER SECTION 172(5) READ WITH SECTION 172(3)(f) OF THE INCOME TAX ORDINANCE, 2001
- OPPORTUNITY OF BEING HEARD.

Please refer to the above.

2. *M/s Pakistan Petroleum Limited acquired entire assets and liabilities/working interest/exploration rights held in Pakistan and Yamen by M/s MND E&P A.S (NTN 4026267-7) having address at 807/6 Uprkova, Hodonin Czeck Republic vide the agreement that took place on 30.08.2012 between M/s PPL and MND E&P A.S. By virtue of the transaction entered into, you have encountered business connections with a non-resident person in accordance with the provisions of Section 172(3) which is reproduced as under:*

Quote

“(3) Subject to sub-sections (4) and (5), where a person is a non-resident person, the representative of the person for the purposes of this Ordinance for a tax year shall be any person in Pakistan-

(a) who is employed by, or on behalf of the non-resident person;

(b) who has any business connection with the non-resident person:

Explanation. – In this clause the expression “business connection” includes transfer of an asset or business in Pakistan by a non-resident;

(c) from or through whom the non-resident person is in receipt of any income, whether directly or indirectly;

(d) who holds, or controls the receipt or disposal of any money belonging to the non-resident;

(e) who is the trustee of the non-resident person; or

(f) who is declared by the Commissioner by an order in writing to be the representative of the non-resident “ Unquote

3. *In view of the above, the undersigned intends to declare your company as ‘representative’ of M/s MND E&P A.S. (NTN 4026267-7) a non-resident person in accordance with provisions of Section 172 of the Income Tax Ordinance, 2001.*

4. *You are requested to please show cause u/s 172(5) as to why you may not be declared the representative of M/s MND E&P A.S. a non-resident company in terms of Section 172(3)(f) of the Income Tax Ordinance, 2001 for the year 2013.*

5.

6.

*(.....)
Deputy Commissioner IR”*

3. The facts as per the plaint are that a non-resident company registered in the Czech Republic namely, MND E&P A.S., had held shares in a company registered in the U.K., formerly named MND E&P Plc (presently named ‘PPL, Europe’); that by agreement dated 30-08-2012, the non-resident company sold its shares in the U.K. company to the Plaintiff; and that the Plaintiff was issued a lower rate certificate by the department, whereafter the Plaintiff withheld/deducted income tax under section 152 of the Income Tax Ordinance on the payment made by it to the non-resident company and deposited the same in the treasury. The Plaintiff apprehends that pursuant to the show-cause notice the department intends to recover from the Plaintiff the tax owed by the non-resident company.

4. It is averred in the plaint that the show-cause notice is irrational when the department itself had issued to the Plaintiff a

lower rate certificate to withhold/deduct tax under section 152 of the Income Tax Ordinance, 2001 on the payment made to the non-resident; that the show-cause notice is not for any of the reasons stipulated in clauses (a) to (e) of sub-section (3) of section 172 of the Ordinance, and hence the conditions for invoking section 172(3) do not exist; that in the absence of said conditions, the power to declare a person a representative of a non-resident under clause (f) of sub-section (3) of section 172 of the Ordinance is completely arbitrary and unconstitutional; that the Explanation clause in sub-section (3)(b) of section 172 of the Ordinance cannot be relied upon as it was inserted by the Finance Act, 2013, whereas the transaction with the non-resident took place in 2012; that the Deputy Commissioner IR was not competent to issue the show-cause notice as the order to declare a person a representative under section 172(3)(f) can only be passed by the Commissioner IR.

5. The Defendant No. 2 prays for rejection of plaint under Order VII Rule 11 CPC on the ground that the suit is barred by section 227(1) of the Income Tax Ordinance, 2001, and by section 9 of the CPC in view of the special *fora* and remedies provided under the Income Tax Ordinance. On the other hand, learned counsel for the Plaintiff relied on *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) to submit that the ouster clause of section 227(1) of the Income Tax Ordinance, 2001 was no bar to a suit before the High Court of Sindh at Karachi.

6. Heard the learned counsel and perused the plaint.

7. From the show-cause notice the Plaintiff apprehends that the department may declare the Plaintiff a representative of a certain non-resident person for a certain tax year under section 172(3) of the Income Tax Ordinance, 2001, and thereafter proceed under section 173(1) and (2) of the Ordinance to hold the Plaintiff responsible for the tax obligation of such non-resident person. It is to be noted that an order passed under section 172(3)(f) of the Ordinance, declaring a person a representative of a non-resident person, is appealable

before the Commissioner (Appeals) under section 127(1) of the Ordinance.

8. At the time the suit was filed, the ouster clause in section 227(1) of the Income Tax Ordinance, 2001 read as follows¹:

“227. Bar of suits in Civil Courts. – (1) No suit or other legal proceeding shall be brought in any Civil Court against any order made under this Ordinance, and no prosecution, suit or other proceedings shall be made against any person for anything which is in good faith done or intended to be done under this Ordinance or any rules or orders made thereunder.”

9. Learned counsel for the Plaintiff had submitted that after *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) it is settled that the words ‘civil court’ in an ouster clause of a special statute do not apply to the High Court of Sindh at Karachi in dealing with civil suits. In the *Searle* case 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 brought to challenge orders passed by authorities under taxing statutes, which statutes expressly ousted the jurisdiction of civil courts. The Supreme Court first 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. On a related question, it was further held by the Supreme Court 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 finding was

¹ Subsequently amended by the Finance Act, 2018.

not to say that the remedy of a civil suit before the High Court of Sindh at Karachi under section 9 CPC remains unrestricted notwithstanding the availability of a special forum under special law. That was made clear in *Searle*, and therefore in some of the appeals before it, which emanated from suits filed in the High Court of Sindh at Karachi, the Supreme Court held that the case did not fall within the ambit of 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.

Thus, the *ratio decidendi* in *Searle* 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 demonstrates that the case attracted one of the established exceptions to the ouster of jurisdiction.

10. Applying the ratio of *Searle (supra)* to the instant suit, while the jurisdiction of this High Court of Sindh at Karachi to entertain the suit is not barred by reason of the ouster clause in section 227(1) of the Income Tax Ordinance, 2001, there is nonetheless an implied bar within the meaning of section 9 CPC when the Income Tax Ordinance provides for a special mechanism² and special *fora* to determine matters arising under the said Ordinance. That implied bar to jurisdiction can only be circumvented if the Plaintiff can demonstrate that its case attracts one of the established exceptions to the ouster of jurisdiction (highlighted in para 9 above), failing which the Plaintiff will have to resort to the hierarchy of the special *fora* under the Income Tax Ordinance, 2001. In a nutshell, this Court will exercise jurisdiction only if the impugned show-cause notice suffers from a jurisdictional defect that warrants intervention by a High Court.

² Sections 127, 131 and 133 of the Income Tax Ordinance, 2001.

11. The jurisdictional defects urged by the Plaintiff to challenge the show-cause notice are essentially two-fold. First, that the show-cause notice is not founded on any of the reasons listed in clauses (a) to (e) of sub-section (3) of section 172 of the Ordinance; and second, since the order envisaged under section 172(3)(f) of the Ordinance is to be passed by the Commissioner IR, it is he and not the Deputy Commissioner IR who was competent to issue the show-cause notice.

12. Regards the first objection, the show-cause notice for declaring the Plaintiff as a representative of a certain non-resident person is clearly premised on a transaction between the Plaintiff and that non-resident, which transaction, per the department, constitutes a 'business connection' within the meaning of section sub-section (3)(b) of section 172 of the Ordinance. The words 'business connection' were part of said provision even before the insertion of an Explanation clause in 2013. While the Plaintiff may have its own version of what the underlying transaction entails, and whether it could be termed a 'business connection', the factum of a transaction with that non-resident is not denied, rather it is admitted. Therefore, it is incorrect to say that the show-cause notice is unfounded, or that the conditions essential to the issue of a show-cause notice are absent.

13. As regards the second objection, while section 172(3)(f) of the Ordinance stipulates that the order to declare a person a representative of a non-resident person is to be passed by the Commissioner, but section 210 read with section 207(4) of the Ordinance also permits the Commissioner to delegate certain powers or functions to any officer of Inland Revenue sub-ordinate to him. The written statement pleads that in issuing the show-cause notice the Deputy Commissioner IR was exercising delegated powers under a certain Jurisdiction Order issued by the Commissioner. It has not been specifically pleaded by the Plaintiff that the power to pass an order under section 172(3)(f) of the

Ordinance cannot be delegated by the Commissioner under section 210 of the Ordinance. Be that as it may, in my view, the question to the competency of the Deputy Commissioner IR to issue the show-cause notice can also be raised before him while replying to the show-cause notice. For that proposition reliance can be placed on the cases of *Ocean Pakistan Ltd. v. Federal Board of Revenue* (2012 PTD 1374), and *Dr. Seema Irfan v. Federation of Pakistan* (PLD 2019 Sindh 516).

14. The contention that section 172(3) of the Ordinance cannot be invoked by the department after granting to the Plaintiff a lower rate certificate to withhold tax of the non-resident under section 152 of the Ordinance, goes to the liability of tax and not to the jurisdiction of the show-cause notice. Also, the prayer and the argument that the power to pass an order under section 172(3)(f) of the Ordinance, for declaring a person a representative of a non-resident, is arbitrary and unconstitutional, is premature when no such order has been passed as yet.

15. The plaint manifests that what the Plaintiff essentially seeks is a determination by this Court on the show-cause notice so as to bypass the special *fora* and remedies provided under the Income Tax Ordinance, 2001. Such practice has time and again been discouraged by the superior courts³. In *Dr. Seema Irfan v. Federation of Pakistan* (PLD 2019 Sindh 516) it was further observed by a learned Division Bench of this Court that:

“18. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice, the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. This Court ought to be careful when it passes an interim order to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and

³ *Commissioner of Income Tax v. Hamdard Dawakhana (Waqf)* (PLD 1992 SC 847); *Deputy Commissioner of Income Tax v. Punjab Beverage Company (Pot.) Ltd.* (2007 PTD 1347); and *Indus Trading and Contracting Company v. Collector of Customs (Preventive) Karachi* (2016 SCMR 842).

authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition. Abstinance from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule.”

16. The above *dictum* was applied also to a suit in the case of *Kirthar Pakistan BV v. Federation of Pakistan* (2020 PTD 1927) where a learned single Judge of this Court dismissed a similar suit against a show-cause notice under section 172(5) of the Income Tax Ordinance, 2001 while observing *inter alia* that where the plaintiff had yet to file a reply to the show-cause notice, and a determination thereon had yet to take place, the suit was pre-mature.

17. To conclude, 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 Income Tax Ordinance, 2001. Consequently, the implied bar to the jurisdiction of this Court that arises by reason of the special provisions of the Income Tax Ordinance, 2001, remains intact. Therefore, the plaint is rejected under Order VII Rule 11(d) CPC.

JUDGE

Karachi
Dated: 23-02-2021