# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No.212 of 1984**

[Mohammad Anwar ……v……Pakistan & others]

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| Date of Hearing | : | 01.10.2021 |
| Date of Decision | : | 09.06.2022 |
| Plaintiff through | : | Plaintiff present in person. |
| Defendants through | : | Nemo |

## JUDGMENT

**Zulfiqar Ahmad Khan, J:-**This suit has been filed by the plaintiff for recovery and damages.

2. The concise grievances of the plaintiff as depicted in the plaint are that plaintiff who is a sole proprietor, running an organization under the name and style of N.A. Industries, whose prime business being ship breaking. It is the case of the plaintiff that he opened a letter of credit No.75463 through Habib Bank Ltd, Foreign Exchange Branch, Karachi for the purchase of a scrap ship M.V. Marie ANN from M/s Manila Inter-Ocean Lines Incorporated. The vessel was not found in conformity with the agreement that was executed with the sellers. In the meantime the price internationally of vessel meant for breaking also fell from USD 110 to USD 50 per LDT. When this vessel arrived at Gadani beach for the purpose of breaking it struck against the rocks and capsized and started sinking. The plaintiff refused to take delivery and demanded refund of the balance amount from Habib Bank Ltd. that refused to do the needful. Ultimately, the plaintiff was compelled to take delivery of the capsized ship at a price of USD 1,50,000/-.

3. The Customs Officials refused to accept the renegotiated price and made an assessment against the Letter of Credit. The plaintiff paid the customs duty and sales tax under protest and started the salvage and scraping of the ship. The ship was also surveyed by M/s Bhomal & Company to ascertain the damage caused to the ship. The income Tax Department was informed about this difficult situation which the plaintiff was put into. The plaintiff has in the body of the plaint discussed further the amount that he recovered from the sale of the scrap and the loss that occurred to him. He has further alleged that 2100 metric tons of scrap remained under water and this was also brought to the notice of the Income Tax Appellate Tribunal which refused to accept that 2100 metric tons should be considered as a loss in the books of the plaintiff. Whilst this dispute with the Income Tax Department was going on, the I.T.O. issued a letter No.COS-CIRE-A-2/80-81/750 dated 24.01.1981 to the customs at Gadani wherein the Customs Department was instructed to stop the plaintiff from cutting, scrapping, removing and lifting the scrap from the capsized ship. Further by its letter dated 16.02.1981 the customs stopped all work including business of cutting and lifting and selling of scrap. According to the plaintiff, this action on the part of the Income Tax Department as well as customs of stopping the work resulting in the gradual sinking and collapsing of the ship. The scrap that was lying at the shore got rusty and deteriorated. The costly equipments maintained by the plaintiff at the beach was lost, destroyed or damaged due to non-use and stoppage by the Income Tax Department. It is further stated by the plaintiff that he went from pillar to post requesting officials to allow the plaintiff to

continue with the scrapping and breaking work but his request was turned down. The plaintiff having been aggrieved by the said actions of the defendants served a notice upon the defendants claiming damages for the loss sustained to him but could not succeed, hence he filed this suit for damages.

4. The Defendants contested the matter by filing written statements. Defendants in operating part of the written statement raised certain objections that the suit was not maintainable as well as barred by limitation as well as Section 162 of Income Tax Ordinance, 1979 (“**Ordinance, 1979**”) as any act of the Income Tax Department through their officers done in good faith or intended to be done cannot be questioned in any court. It is further averred in the written statement that the present lis being filed against the defendants in their official capacity, thus no damages can be claimed against the persons by name. The Defendants denied the assertions of the plaintiff in one way or the other. It is further alleged in the written statement that there was a dispute in respect of assessment of plaintiff’s business as he produced defective records/books of accounts and in that epoch the petitioner got substantial relief in appeal filed by the plaintiff before the learned Commissioner (Appeals) and the question of loss of 2100 metric tons of scrap was neither raised by the plaintiff before the Commissioner (Appeals) nor it was within his jurisdiction to evaluate the loss in the assessment. Lastly, the defendants, prayed for dismissal of the lis in hand filed by the plaintiff.

4. Upon scanning record & proceedings, it unfurls that on 10.09.2006, issues were framed and with mutual consent of the

parties, matter was referred to the learned Commissioner for recording evidence. The issues settled by this court are as under:-

> "1. Whether the suit is barred under Section 162 of the Income Tax Ordinance, 1979?
>
> 2. Whether the suit is barred by limitation?
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> 3. Whether the order passed by the defendants stopping the cutting, lifting and removing of the scrap by the plaintiff was illegal and without jurisdiction?
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> 4. Whether if the finding on issue No.3 is in the affirmative then whether the plaintiff has suffered any damages due to such acts of omission and commission, if so, to what extent?
>
> 5. Relief?"

5. Plaintiff in person being a senior citizen introduced on record his grievances at great length. Precisely, he submitted that action taken on 24.01.1981 by the Income Tax Officer along with Customs Officials which resulted in stoppage of his work owing to which the vessel started sinking at Gadani and he suffered irreparable loss. He further stated that the official defendants jointly and severally stopped him from cutting, scraping, removing and lifting scrap from the capsized ship and vide letter dated 16.02.1981, the defendants stopped all work including business of cutting, lifting and selling of scrap which act of the defendant is in disregard of the mutual agreement as well as the act of stopping business of the plaintiff in respect of collecting scrap of the vessel on the part of the defendant is illegal and unlawful, therefore, he is entitled to the damages as prayed through the lis in hand.

6. None appeared to set forth the case of the defendants. The case diaries reflect that the defendants on many occasions remained

absent despite sending intimation/notice to the respective counsel as well as defendants. Nonetheless, the Court is under duty to decide the suit taking into consideration the overall effects of the case meaning that material and evidence brought on the record is to be considered in order to decide the suit. Where the evidence of the plaintiff was recorded and from several issues framed burden of some was put on the plaintiff and side of the defendant was closed as they failed to bring their witnesses on the date of hearing, it became mandatory to examine the evidence brought rather than decreeing the suit straightaway without examination of evidence brought on record. The Apex Court in the case of ***Amanullah Khan v. Mst. Akhtar Begum reported in 1993 SCMR 504*** pleased to hold the similar principle

7. In my considerate view, the **Issue Nos. 1 & 2** are correlated and concomitant to the maintainability of the suit, therefore, would be thus discussed simultaneously, in the same breath.

8. An austere look to the substratum of the record and proceedings, it manifests that the Defendants in operating part of their stance/written statement challenged the very maintainability of the lis at hand on the ground that the suit is barred under Section 162 of Income Tax Ordinance, 1979 (**"Ordinance, 1979"**) as any act of the Income Tax Department through their officers done in good faith or intended to be done so cannot be questioned in any court. It is further averred in the written statement that the present lis filed against the defendants in their official capacity, hence no damages could be claimed against the persons by name. It is thus necessary to

have a glance at Section 162 of the Ordinance, 1979 to reach to a just conclusion of the issues under discussion.

> "162. Bar of suits in Civil Courts. No suit shall be brought in any Civil Court against any order made under this Ordinance and no prosecution, suit or other proceeding shall lie against any person for anything in good faith done or intended to be done under this Ordinance."

9. It is gleaned from a cursory look at the foregoing provision of law that the jurisdiction of this court is barred to entertain the present lis, however, the Apex Court in the case of Abbasia Cooperative Bank and another v. Hakeem Hafiz Muhammad Ghous and 5 others (**PLD 1997 S.C 3**) very succinctly summed up the law with regard to the effect of clauses ousting the jurisdiction of Civil Courts viz. "…***It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to***…." It is also well settled position that where the jurisdiction of the Civil Courts to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be seen that:-

> "(a) that the authority or the tribunal was validly constituted under the Act;
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> (b) that the order passed or the action taken by the authority or tribunal was not mala fide;
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> (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and

> (d) that in passing the order or taking the action, the principles of natural justice were not violated."

10. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statute which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order/ notice/action/show cause could be challenged before the Civil Court in spite of a provision in the statute barred the jurisdiction of Civil Court. Consequently, it remains to be examined whether the impugned notice issued by the defendants/Income Tax Officer suffers from any such defect as would, as per the formulation of the Honourable Supreme Court, allow the plaintiff to approach this Court for relief despite the bar contained in section 162 of the Ordinance,1979.

11. Apart from above, the plaintiff challenged the action of the defendants/Income Tax Officer owing to which the plaintiff had to stop his work of breaking the vessel and collecting its scrap at Gadani Beach which he was legally entitled to. Per plaintiff, the said action of the defendant/Income Tax Officer vide letter dated 24.01.1981 (Exh P-18 available at page 261 of the evidence file) is illegal and ultra vires. It is conducive to elaborate the doctrine of ultra vires at this juncture. The said doctrine envisages that an authority can exercise only so much power as is conferred on it by law. An action

of the authority is intra vires when it falls within the limits of the power conferred on it but, ultra vires if it goes outside this limit. To a large extent, the courts have developed the subject by extending and refining this principle, which has many ramifications and which in some of its aspects attains a high degree of artificiality. There are plethora of precedents of this Court in which this court reported to have held that when certain actions of the officials of Income Tax Department are called in question and they are found to be in excess of jurisdiction and tainted with malafide then the bar contained in Section 162 of the Ordinance, 1979 will not be attracted and a suit is held to be maintainable. This principle was also held in a recent verdict announced in the case of Al-Riaz Pvt. Ltd. v. Muhammad Ismail (2018 CLC 596) (authored by my reverend brother Mr. Justice Muhammad Faisal Kamal Alam). For a ready reference, the relevant excerpt is reproduced as under:-

> *"19. In his counter arguments, Mr. Arif Khan, Advocate, who represents Plaintiff No.1 (Al-Riaz [Pvt.] Limited), contended that the above mentioned statutory Bar will only be applicable where the officials, in the present case, Defendants Nos.1 and 2 would have acted lawfully while exercising their authority in a bona fide and reasonable manner, but the conduct of said official Defendants is tainted with sheer mala fide and highhandedness, as even after decision of the Federal Tax Ombudsman (FTO), these Defendants have not withdrawn / discharged the attachment order in respect of the subject property, which continues till date; this factual aspect has not been seriously disputed by the learned Assistant Attorney General. To further augment his arguments, the Plaintiff's counsel has relied upon the aforementioned reported Judgments of Asia Petroleum and Syed Rounaq handed down by this Court. The first Judgment is given in a tax matter, whereas, the second decision pertains to a land*

> *dispute under the Colonization of Government Lands Act. In the first case, it has been held by this Court that when certain actions of the officials of Income Tax Department are called in question and they are found to be in excess of jurisdiction and tainted with mala fide then the Bar contained in the aforementioned Section 162 will not be attracted and a suit is held to be maintainable.* ***By now it is a settled principle that a statutory Bar ousting the plenary jurisdiction of this Court as envisaged in Section 9 of the Code of Civil Procedure, 1908, has to be construed strictly and if it is found that Government Officials or the authorities mentioned under a particular statute, which is invoking a statutory Bar, has not acted fairly, justly and reasonably, then such Bar could not be pressed into service. This argument for Plaintiff side has substance. This principle is further fortified in Abbasia Co-operative case; PLD 1997 Supreme Court Page-03."***
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> [underline added for emphasis]

12. Mindful to the nitty-gritties of the case, I feel no reluctance to hold that this suit is maintainable, therefore, the **Issue No.1 & 2 answered accordingly**.

13. In my considerate view, the Issue Nos. 3 & 4 are inextricably linked based upon similar evidence and record, therefore, it would be advantageous to discuss these simultaneously, in the same breath.

14. The claim of Plaintiff is supported by the documentary evidence. Also the crux of the grievance of Plaintiff was not controverted in the evidence as despite providing many opportunities, the contesting official Defendants failed to cross-examine the Plaintiff. The penultimate issue before this Court is that whether the official defendants while issuing the notice dated 24.01.1981 (available at page No.261 of the evidence file) whereby the work of the plaintiff with respect to collection of scrap of the

vessel was stopped, acted lawfully? Plaintiff in person has argued by referring to various documentary evidence, which he has produced in his evidence that highhandedness of official Defendants started when they commenced assessment against the plaintiff while the Defendants had already cleared and permitted the plaintiff to start his work of cutting and breaking the imported vessel when it was berthed at the Gadani Beach, and in the intervening period the impugned notice of stopping of breaking and cutting the vessel imported by the plaintiff was handed out without issuing any show cause notice to the plaintiff. It is a settled principle of law that if any action is being taken against a party detrimental to the latter's interests by any official in its official capacity, he be issued a show cause notice in order to come to know former's version, but in this case neither the show cause notice was issued to the plaintiff prior issuing the impugned notice dated 24.01.1981 nor a right of hearing was provided to the plaintiff. The defence witness No.2 namely Syed Shakil Shah who is Assistant Collector of Custom by profession during his testimony introduced on record that no show cause notice was issued by the Customs Department prior to stoppage of scrapping of the vessel, the said admission of DW-2 is available at page No.651 of the evidence file. In our Constitution, right to fair trial is a fundamental right. This constitutional reassurance envisaged and envisioned both procedural standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe.

15. Reverting to the merits of the issues under discussion, having perused and analyzed the record and proceedings, it is quite

apparent that the procedure prescribed by law was never adhered to by the official Defendants while issuing the impugned letter dated 24.01.1981, thus, the impugned action of the defendants in respect of stopping breaking/cutting the subject vessel is without any legal justification and liable to be set at naught in this proceeding.

16. The whys and wherefores lead to the conclusion that the Plaintiff is entitled to the reliefs claimed. I accordingly declare that in respect of the subject vessel imported by the plaintiff for breaking and cutting, defendants illegally, wrongfully and by excessive use of power and authority stopped the breaking/cutting vide letter dated 24.01.1981, owing which the said vessel sunk at the Gadani Beach due to which the plaintiff suffered heavy losses.

17. In view of the reasoning and rationale herein contained, **Issues No.3 & 4 are answered as discussed in para-15 & 16**.

18. The only issue now remains is the relief of damages (**Issue No.5**) as claimed by the Plaintiff. There is no hard and fast rule to calculate the quantum of compensation, as well as there is also no yardstick to measure the sufferings. The plaintiff has claimed damages on account of huge present and future economic loss and on account of undergoing irreversible phase of perpetual mental torture and loss of reputation. It is fact that Mental shock, agony and torture imply a state of mind. Such state of mind can be proved only by a positive assertion of one who experiences the same. (**PLD 2021 Sindh 01 & 1996 CLC 627**). Plaintiff claimed that owing to the illegal act of the defendants jointly and severally he suffered mental shock and agony but he could not produce any medical record to bolster/

strengthen the said contention but on the other hand, in the memo of plaint he introduced on record that owing acts of the defendants whereby they directed the plaintiff to stop the work of breaking/ cutting the vessel which he was legally entitled to perform, he suffered a lot and detailed out the same in para-17 of the plaint. Quantum of damages would have been different if Plaintiff had produced medical record in support of his claim of damages on account of mental torture, but at the same time, it would be unjust if no damages are granted against officials Defendants, when their illegal acts tainted with mala fide and aggravated by their ex facie maladministration, has been proved as well as it is a celebrated principle of law that excessive use of lawful power is itself unlawful. No doubt, due to impugned action, the Plaintiff has been prevented at least to a certain degree, from use and enjoyment of the vessel which he imported.

19. In these circumstances, a reasonable compensation for Plaintiff would be Rs.15,00,000/- (Rupees Fifteen Hundred Thousand Only), which should be payable by the Defendants jointly and severally, considering the principle of vicarious liability. Through various judicial pronouncements, it is now a settled legal position that where government functionaries are guilty of committing illegality of such a degree, then they have to compensate the person wronged, in instance case, the Plaintiff. **The Issue No.5 is answered in the above terms**.

20. The upshot of the above is that the present suit is decreed in the following terms:-

(i). The Defendants are jointly and severally liable to pay damages to the tune of Rs.15,00,000/- (Rupees Fifteen Hundred Thousand), to Plaintiff.

(ii) The above mentioned decreetal amount shall carry a component of 10% [ten percent] mark-up from the date of filing of the suit till satisfaction of the decree.

(iii) Considering the peculiar facts of the case, the Plaintiff is also awarded costs of the proceeding.

JUDGE

Karachi.
Dated:09.06.2022

Aadil Arab