IN THE HIGH COURT OF SINDH, KARACHI

High Court Appeal No. 324 of 2024

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Mohammad Abdur Rahman

APPELLANT	:	**M/s. ARY Communications Limited** **Through Mr. Abid S. Zuberi, Advocate.**
RESPONDENT No.2	:	**Abdul Qadir Shaikh, Commissioner (Audit) Inland Revenue-III, CTO, Karachi through** **Mr. Ameer Baksh Metlo, Advocate along with Ms. Zakia Khan, Advocate.**
Dates of Hearing	:	**04.11.2024 & 11.11.2024**
Date of Announcement	:	**13.01.2025**

O R D E R

Muhammad Junaid Ghaffar, J :-- This High Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972 read with Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 has been preferred against an Order dated 30.08.2024, whereby, the plaint in Suit No.897 of 2022 filed by the present Appellant has been rejected under Order VII Rule 11 C.P.C.

2. Learned counsel appearing on behalf of the Appellant has contended that the learned Single Judge [on the original side] of this Court has erred in passing the impugned order as at best, the injunction application could have been dismissed, but the plaint could not be rejected summarily; that the present Appellant had specifically pleaded *malafides* on the part of the Respondents, as the impugned notices were issued for conducting audit of the tax affairs of the Appellant for consecutive years simultaneously; that the learned Single Judge has though rejected the plaint, but has not given any finding as to under what law it was barred; that the judgment of the Hon'ble Supreme Court of Pakistan in the case

reported as ***Allah Din Steel***[1] is not fully applicable on facts and, therefore, learned Single Judge has erred in placing reliance on the said judgment; that the plaint in the instant matter ought to have been read by the learned Single Judge as a whole and when there were several prayers regarding conduct of the Respondents, then it ought not to have been rejected; that time and again, Appellant has been subjected to discrimination by various departments of the Federal Government, as it runs a media house and as and when there is a change in the Government, the Appellant is singled out and discriminated for its independent and anti-government policy. In support of his submission, he has placed reliance upon various reported cases[2].

3. Conversely, learned counsel appearing on behalf of Respondent No.2 has contended that insofar as the impugned notices are concerned, no jurisdictional defect has been pointed out, therefore, the suit was incompetent; that pursuant to judgment in ***Searle IV Solution***[3] as directed by the Hon'ble Supreme Court of Pakistan, in fiscal matters a single judge on the original side of this Court has to exercise jurisdiction in such matters sparingly, and not as a matter of routine, therefore, any challenge to a notice of audit is impliedly barred under Section 227 of the Income Tax Ordinance 2001 ("**Ordinance**"); that a notice to conduct audit is by itself not an adverse order; rather it provides opportunity to a taxpayer to justify his self-assessment in respect of Annual Tax Return(s); that the impugned notices provide

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[1] Commissioner of Inland Revenue, Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others [2018 SCMR 1328]

[2] Commissioner of Inland Revenue, Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others [2018 SCMR 1328]; Messrs Zam Zam LPG (Pvt.) Limited through Attorney v. Federation of Pakistan through Secretary/Chairman Revenue Division and 3 others [2023 PTD 649]; Atlas Honda Ltd. through authorized Attorney v. Pakistan through Secretary Revenue and 3 others [2022 PTD 866]; Fairdeal Exchange Company (Private) Limited through Director of Company v. Federation of Pakistan through Ministry of Finance and 3 others [2023 PTD 919]; Rashid Ahmad and others v. Nazar Hussain and others [2022 SCMR 1842]; and Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) through Manager and another v. Hakeem Hafiz Muhammad Ghaus and 5 others [PLD 1997 SC 3].

[3] Searle IV Solution (Pvt.) Limited and others v. Federation of Pakistan and others [2018 SCMR 1444]

sufficient reasons to conduct audit and have been issued after thorough examination of the tax returns and, therefore, no *malafide* can be pleaded; that mere pleading *malafide* would not suffice, but specific attribution in alleging such *malafide* has to be stated in the plaint, which in the instant matter, is lacking; that notices are within limitation and have been issued by proper exercise of jurisdiction and, therefore, the impugned order is unexceptionable and instant appeal is liable to be dismissed. In support of his submission, he has placed reliance on various reported cases.[4]

4. We have heard learned counsel for the parties and perused the record. It reflects that the Appellant was issued separate notice(s) under section 177 of the Ordinance for conducting audit of its tax affairs for Tax Years 2017 to Tax Year 2021. The Appellant instead of submitting itself to the exercise of audit, has approached this Court by filing a Civil Suit under section 9 of the Civil Procedure Code before a learned Single Judge [on the original side] of this Court exercising original jurisdiction pursuant to Section 7 of the Civil Courts Ordinance, 1962 read with Sindh Amendment as applicable to the Districts of Karachi. It further appears that when no response was given and no documents were submitted pursuant to the notice(s) issued under section 177, ibid, Respondent issued further notice under section 176 of the Ordinance calling for various documents. However, immediately upon filing of instant Suit[5] an ad-interim order was passed by this Court on 09.06.2022 in the following terms: -

> *"3. Learned counsel for the plaintiff submits that defendant Nos.2 and 3 have issued notices under section 177 of the*

[4] Searle IV Solution (Pvt.) Limited and others v. Federation of Pakistan and others [2018 SCMR 1444]; Sophia Com. B.V. through Duly Authorized Officer v. Pakistan through Secretary Revenue and 2 others [2018 PTD 2208]; Messrs Pfizer Pakistan Limited v. Deputy Commissioner and others [2016 PTD 1429]; and Mujahid Oil Refinery (Pvt.) Limited v. Director I&I Inland Revenue and others [2015 PTD 2572].

[5] Suit No.897 of 2022

Income Tax Ordinance, 2001 to the plaintiff for the last five years in one go. These letters are available between pages 45 to 85. Counsel contends that the FBR's Circular bearing C.No.4(36)ITP/2002 dated 05.10.2009 (Page 415) itself bars issuing notice under section 177 for multiple years aimed to cause undue harassment. He further contends that this Hon'ble Court in numerous cases has passed orders declaring that such exercise of powers is arbitrary, malafide and discriminatory. In support of his contentions he has placed reliance on the judgments of this Court dated 29.11.2021 and 20.12.2021 passed in C.P No.D-4729 of 2021 and C.P No.D-5107 of 2021.

Issue notice to the defendants for 13.07.2022. In the meanwhile, operation of the impugned notices dated 31.05.2022 and 02.06.2022 (available at pages 45 to 85) to remain suspended till the next date of hearing."

5. Thereafter, the matter remained pending for a number of reasons and could not be taken up either for a final decision on the injunction application or the Suit for that matter. However, on 30.08.2024 the impugned order was passed in the following terms:

"This suit essentially seeks to assail selection for audit notices, under section 177 of the Income Tax Ordinance, 2001, ostensibly predicated upon specified reasons cited therein[1]. Ad interim orders subsist herein from the inception hereof, whereby the notices were suspended.

Learned counsel was confronted with respect to the maintainability hereof yesterday and per request the matter was adjourned till today. The counsel was specifically called upon to address the issue of maintainability in view of the Supreme Court judgment in Allahdin Steel. Respectfully, he remained unable to do so.

This is no case of first impression and the controversy appears to have been comprehensibly determined by the Supreme Court in Allahdin Steel, wherein it was held that once a taxpayer was selected for audit and till such audit was completed the taxpayer was provided ample and multiple opportunities at every step to defend his position, support his returns and offer explanations for the information provided and entries made in the tax returns. Even if a discrepancy was discovered taxpayer was provided yet another opportunity to explain his position before his assessment was revised. In summation, the honorable Supreme Court has held that such selection-is not per se illegal. A Division bench of this Court has earlier dismissed a similar claim in the Pfizer.

> *In pari materia circumstances another Division bench of this Court maintained in Dr. Seema Irfan that a mere notice seeking information is not necessarily adversarial and would not ipso facto give rise to an actionable cause. Similar findings were recorded by the august Supreme Court in the judgment in Jahangir Khan Tareen, approved recently in Judgment dated 15.09.2022 rendered in DCIR vs. Digicom Trading (CA 2019 of 2016). In consideration of the foregoing, it is observed that the plaintiff has failed to demonstrate an actionable cause of action.*
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> *As has been observed in the Allahdin case, audit proceedings provided a forum and opportunity for consideration of any reservation of the plaintiffs. If any adverse order was passed in pursuance thereof the same would be appealable. Default by the plaintiff in submitting to the statutory hierarchy could not be demonstrated to denude the statutory forum of its jurisdiction; or confer the same upon this court. Similar views were taken by learned Single judges in order dated 27.09.2022 rendered in Suit 855 of 2015 and the judgments in Azee Securities and PPL. Even otherwise, it is not apparent as to how this Court could assume jurisdiction in this matter in view of the binding judgments delineated supra.*
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> *In view hereof, and while applying the ratio articulated by the edicts delineated supra, the plaint herein is hereby rejected."*

6. From perusal of the aforesaid order, it reflects that the attempt of the present Appellant to assail its selection for audit under section 177 of the Ordinance has been deprecated by the learned Single Judge and the Appellant's Counsel was confronted with respect to maintainability of the suit in view of the judgment of the Hon'ble Supreme Court in ***Allahdin Steel*** *(supra)*. Though the learned Single Judge has observed that learned counsel for the appellant was unable to distinguish or assist the Court in any manner as to the above judgment, however, before us, learned counsel for the Appellant has seriously disputed this fact and has contended that various submissions were made as the said judgment is not relevant and there is an exception in the said judgment. This contention of the Appellant's Counsel cannot be adjudicated in these proceedings as for that a review of the said order is required for which it would be appropriate to approach the learned Single Judge. However, insofar as the impugned order is concerned, it appears that the learned Single Judge was of the

view that since in the case of ***Allahdin Steel*** *(supra)* it has been held that a mere notice of audit is by itself not an adverse order; rather it provides ample opportunities to a taxpayer at every step to defend his position and the claim in the tax returns, and even if any discrepancy is discovered, taxpayer is further provided another opportunity to explain his position; and lastly that such selection in *pari materia* circumstances is not illegal and, therefore, it is a case whereby the Suit cannot be maintained for a number of reasons, including the case of no cause of action. The learned Single Judge was also persuaded to follow the judgment in the case reported as ***Dr. Seema Irfan***[6] wherein it has been held that a mere notice seeking information is not necessarily adversarial and does not *ipso facto* give rise to an actionable cause. Finally, the learned Single Judge has been pleased to hold that in ***Allahdin Steel*** *(supra)* the Hon'ble Supreme Court has held that audit proceedings itself provide a forum and opportunity for consideration of any reservation of the taxpayers and if any adverse order to the interest of taxpayer is passed, same is always appealable, whereas any default of a taxpayer in submitting to the statutory hierarchy could not be demonstrated to denude the statutory forum of its jurisdiction; and even confer such jurisdiction on this Court. The learned Single Judge believed in these facts and circumstances of the case that the Court [on the original side] while exercising its civil jurisdiction cannot assume such jurisdiction in view of the binding judgment as noted in the impugned order and finally while concluding the order, plaint has been rejected suo moto under Order VII Rule 11 CPC.

7. Before us, there are two questions, which need to be addressed that whether in the given facts and circumstances of this case, mere dismissal of the injunction application would have sufficed on the basis of the judgment in the case of ***Allahdin Steel*** *(supra)* cited in the impugned order as alternatively

[6] Dr. Seema Irfan v. Federation of Pakistan [PLD 2019 Sindh 516]

contended by the Appellants Counsel; or whether it could have been held that the suit is barred in law, hence the plaint must be rejected.

8. Insofar as rejection of plaint within the contemplation of Order VII Rule 11 CPC is concerned, it is settled law that for that it is not mandatory that an application must always be filed for such purposes as the Court can always exercise such jurisdiction. The Court on its own can also, *suo motu,* reject a plaint if it concludes that the Suit is barred within the parameters provided under Order VII Rule 11 CPC. Therefore, the argument of Appellant's Counsel that the matter was not listed for any such purposes, including for rejection of plaint under Order VII Rule 11 CPC is misconceived and is unsustainable. It is pertinent to mention here that in view of Order VII Rule 11 C.P.C. it is the duty of the Court to reject the plaint if, on a perusal thereto, it appears that the suit is incompetent, the parties to the suit are at liberty to draw Courts' attention to the same by way of an application. The Court can, and, in most cases hear counsel on the point involved in the application meaning thereby that the Court is not only empowered but under obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under rule 11 of Order VII, C.P.C[7]. It is further settled that the opening words in Order 7 Rule 11 CPC indicate that it is mandatory on the court to reject the plaint if one or more of the four clauses is found to be applicable as this is made clear by the use of the word "shall" in the opening phase[8]. It may be noted that the legislative draftsman has gone out of his way not to use the more common phraseology and has instead used the word "appear" rather than "where it is established from the statements in the plaint that the suit is barred by any law" or, alternatively, "where it is proved from the statement in the plaint that the suit is

[7] Raja ALI SHAN V ESSEM HOTEL LIMITED (2007 SCMR 741)
[8] Haji ABDUL KARIM V FLORIDA BUILDERS (PVT) LIMITED (PLD 2012 SC 247)

barred by any law"; hence, an important inference can therefore be drawn from the fact that the word used is "appears"[9]. This word, of course, imports a certain degree of uncertainty and judicial discretion in contradistinction to the more precise words "proved" or "established"[10]. In other words, the legislative intent seems to have been that if prima facie the court considered that it "appears" from the statements in the plaint that the suit was barred then it should be terminated forthwith[11].

9. As to the injunction application in question, we are of the considered view that since it has been held by the Hon'ble Supreme Court in the case of ***Allahdin Steel*** *(supra)* that mere selection for audit is not *per se* illegal and is not in and of itself an adverse action or order, the basic ingredients for grant of an injunction under Order 39 Rule 1 & 2 CPC i.e. *prima facie* case, balance of convenience and causing of irreparable loss are not available; hence, to the extent of dismissal of the injunction application no exception can be drawn. It may be of relevance to note that in absence of objection as to the jurisdiction being exercised by the officer concerned who has issued the impugned notices, the Appellant was required to submit to such notice and contest the same before the hierarchy as provided under the Ordinance. There wasn't any question of seeking a restraining order against such proceedings. Therefore, as to grant of an injunctive relief, we do not see any reason as to how the Appellant could have succeeded in getting permanent injunction against the impugned notice. Therefore, we hereby hold that as to injunction application in question is concerned, the same was to be dismissed even if the plaint could not have been rejected. We accordingly dismiss the injunction application in question.

9 --do--
10 --do--
11 Haji ABDUL KARIM V FLORIDA BUILDERS (PVT) LIMITED (PLD 2012 SC 247)

10. Coming to the second issue that whether in view of the given facts and circumstances of the case the plaint itself could have been rejected or not, reference must be made to the case of ***Searle IV Solution*** *(supra).* This was a case before the Hon'ble Supreme Court of Pakistan wherein issue was that whether a civil suit is maintainable in respect of fiscal matters, including the Customs Act, 1969, Sales Tax Act, 1990 and so also the Ordinance in question, as all these taxing provisions contain an ouster clause, whereby, it has been provided that a suit is not maintainable. Though the matter which was dealt with by the Hon'ble Supreme Court pertained to an ouster clause under the Customs Act, 1969, but all the provisions are *pari materia*. It would be advantageous to refer to Section 217 of the Customs Act, 1969 and Section 227 of the Ordinance, which reads as under: -

> ***CUSTOMS ACT, 1969***
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> ***217 Protection of action taken under the Act.--*** *[(1)] No suit, prosecution or other legal proceeding shall lie against the [Federal Government] or any public servant for anything which is done or intended to be done in good faith in pursuance of this Act or the Rules [and notwithstanding anything in any other law for the time being in force no investigation or enquiry shall be undertaken or initiated by any governmental agency against any officer or official for anything done in his official capacity under this Act, rules, instructions or directions made or issued thereunder without the prior approval of the [Board]].*
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> *[(2) No suit shall be brought in any civil court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act.]*
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> ***INCOME TAX ORDINANCE, 2001***
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> *"**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 [or any notice issued] 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 [or notices issued] thereunder.*

> *[Explanation.--For the removal of doubt, it is clarified that Civil Court includes any court exercising power of the civil court.]*
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> *[(2) Notwithstanding anything contained in any other law for the time being in force, no investigation or inquiry shall be undertaken or initiated by any governmental agency against any officer or official for anything done in his official capacity under this Ordinance, rules, instructions or direction made or issued thereunder without the prior approval of the Board.]*

11. The above provision provides that no suit or legal proceeding shall be brought in any Civil Court against any order made [or any notice issued] 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 [or notices issued] thereunder. Explanation provides that for the removal of doubt, it is clarified that Civil Court includes any court exercising power of the civil court. It is also relevant to note that such an ouster clause is also found in various laws and the consistent view of the Courts has been that such bar of a Suit and the ouster clause is not absolute. The Courts have further held that the jurisdiction of a Civil Court under Section 9 CPC is still available despite an ouster clause if the act of the executive or administrative officer or quasi-judicial or judicial tribunal is without jurisdiction and illegal; that Civil Courts jurisdiction cannot be taken away with respect to mala fides; that statutes ousting jurisdiction of Courts of general jurisdiction should be construed very strictly and unless the case falls with letter and spirit of barring section, no effect should be given thereto; that such provisions barring jurisdiction of Civil Court were only attracted when impugned action was found to be within four corners of a statute under which it has been taken and did not suffer from taint, mala fides or absence of jurisdiction[12]. Having said that, it is also

[12] Abdul Rauf and others v. Abdul Hamid Khan and others (PLD 1965 SC 671), Mr. Muhammad Jamil Asghar v. The Improvement Trust, Rawalpindi (PLD 1965 SC 698), Abbasia Cooperative bank (Now Punjab Provincial Cooperative Bank Ltd.) through Manager and another v. Hakeem Rafiz Muhammad Ghaus and 5 others (PLD

of relevance to observe that despite all such judgments and precedents, the Hon'ble Supreme Court of Pakistan in ***Searle IV Solution*** *(supra)* has dealt with this issue regarding taxing statutes and the ouster clause(s), more specifically in relation to the original civil jurisdiction exercised by a Single Judge of this Court in terms of Section 7 of the Civil Courts Ordinance, 1962 and the relevant findings are as under: -

> *"15. Obviously, a literal interpretation of section 217(2) would lead to the conclusion that only "civil courts" are barred from taking cognizance of civil suits arising out of disputes regarding the claim of entitlement to exemption from tax duties under the Customs Act. Had it been the intention of the Legislature to bar the cognizance of any court exercising civil jurisdiction, the language of the said provision would have used the words "civil original jurisdiction" and not simply used the term "civil courts". This approach can be grasped better when looked at with the rich history of this exercise of civil jurisdiction by the Single Bench of the High Court, an overview of which has been beautifully encapsulated in the judgment of **Haji Razzaq's case** (supra); the Legislature was aware of such exercise of special jurisdiction and thus had its intention been to place a complete bar on cognizance by any court exercising such jurisdiction, it would have used language that clearly reflected its intent. The question of the status of the Single Bench of the Sindh High Court at Karachi, stands conclusively decided in the judgment of Province of Sindh v. Haji Razaq judgment (supra) which relies almost entirely on Justice Waheeduddin Ahmed, J's judgment in Firdous Trading Corporation v. Japan Cotton and General Co. Ltd. (supra) wherein he had in unequivocal words stated that:*
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> > *"I have not the slightest doubt on the language of section 3 of Sindh Act, 1926 and the definition of "District" in section 2(4) of the Civil Procedure Code, that it was exercising District Court jurisdiction in contradistinction to the ordinary original civil jurisdiction of the High Court. In my opinion the mere fact that the Sindh Chief Court later*

1997 SC 3), Mansab Ali v. Amir and 3 others (PLD 1971 SC 124), Messrs K.G. Traders and another v. Deputy Collector of Customs and 4 others (PLD 1997 Karachi 541), Messrs Falaknaz Builders v. Karachi Building Control Authority and others (2001 YLR 2542), Messrs Saleem Impex v. Central Board of Revenue through Chairman, Government of Pakistan, Islamabad and 2 other (1999 MLD 1728), Central Board of Revenue through Chairman, Government of Pakistan, Islamabad and 2 others v. Messrs Saleem Impex through Proprietor Muhammad Saleem Qureshi Hyderabad (1999 YLR 190), Messrs Saman Diplomatic Bonded Warehouse Proprietorship concern v. Federation of Pakistan through Secretary, Ministry of Commerce, Islamabad and 3 others (2003 PTD 409), Federation of Pakistan and others v. Messrs Saman Diplomatic Bonded Warehouse (2004 PTD 1189), Messrs World Trade Corporation v. C.B.R. and others (1999 PTD 2341), Messrs Chemitex Industries Ltd. V. superintendent of Sales Tax and 3 others (1999 PTD 1184), Arif Majeed Malik and others v. Board of Governors Karachi, Grammer School (2004 CLC 1029), Collectorate of Central Excise, Karachi and another v. Syed Muzakkar Hussain and another (2006 PTD 219), Mian Muhammad Latif v. Province of West Pakistan through the Deputy Commissioner Khairpur and another (PLD 1970 SC 180), Hamid Husain v. Government of West Pakistan and others (1974 SCMR 356)

> *on was included within the definition of High Court under section 219 of the Government of India Act, did not change the nature of this jurisdiction."*

This view, being the conclusive view of this Court ever since Haji Razzaq's case (supra) as the settled law on the matter shall prevail. We therefore hold that the High Court of Sindh, is a 'High Court' and Art for reason, the Single Bench of the Sindh High Court was correct in for this res suits of the appellants to be maintainable. A statutory provision must be interpreted within the meaning that is attributed the by the language and specific words used by the Legislature, and the principles of law dictate that redundancy cannot be attributed to any word used therein. Section 217(2) therefore, only bars the cognizance of suit filed under the civil jurisdiction exercised by the civil courts, and this bar cannot be extended to include the exercise of the same jurisdiction by the Single Bench of the Sindh High Court at Karachi. As for the question regarding whether, Article 25 of the Constitution can be said to have been violated by allowing such special jurisdiction to the Sindh High Court while the same is not available to other Provinces is concerned, suffice it to say that such jurisdiction has been exercised by the Sindh High Court at Karachi as far back as the pre-partition era. Striking a careful balance between the fundamental right to be treated in accordance with the law under Article 4 of the Constitution and Article 25 thereof, the principles of justice would require that the litigants in Sindh High Court at Karachi are not deprived of this forum of grievance redressal which is limited to only Karachi, as this right to approach such forum has accrued to them over decades and the law mandates certainty in the judicial administration system.

III. Whether the appellants are entitled to the relief sought?

16. In the present appeals, the appellants have successfully been able to obtain interim injunctions some of which date back to as long as ten years ago, thus in the process the Federal Exchequer has been deprived of tax money worth millions of rupees. When this situation was pointed out to the learned counsel for the parties, the appellants counsel Mr. Khalid Anwar, was quick to respond and stated that in terms of monetary gains, filing of writ petitions and approaching the courts in fiscal matters is in fact more expensive for importers/appellants than it is to pay the required tax applicable under the law. However, he stated that if he were to today take a pebble and throw it at the Custom House/Department at Karachi, there is an 80% probability that it will hit a corrupt official. Corruption has become a plague in the Custom House/Department and no one has any faith in its officials. Secondly he submitted that as opposed to the High Court in Lahore where writ petitions are heard by a Single Bench, in Karachi writ petitions are heard by Division Benches and there are only two Division Benches hearing tax related matters. If a uniform system is introduced and more Division Benches of the High Court at Sindh start hearing tax matters, the civil jurisdiction of Single Bench of the Sindh High Court at

> *Karachi will no longer be invoked by parties. If the same cannot be done, in the alternative those aggrieved by the orders of tax authorities under taxing statutes such as the Customs Act should be allowed to continue to approach the Single Bench at Karachi in its civil jurisdiction with a guideline given to the same to dispose of tax disputes expeditiously within a period of a year or less. While the real picture may not be as grim as painted by the counsel for the appellant to advance his case, the counsel for the respondents could offer no concrete argument to refute such claims of prevailing corruption. In order to grow economically, it is imperative that even the ugliest truths be acknowledged in order to commence the journey of curbing, correcting and reducing this unfortunate menace that not only our country, but all of South Asia faces.*
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> *17. Keeping in view the alarming allegations made above, it is directed, that while the Single Bench of the Sindh High Court at Karachi may still take cognizance of any suit arising out of an action/order of the tax authorities/Customs Officers, such jurisdiction must be sparingly exercised by the Single Bench and the suits must be expeditiously decided within the period of one year or less so that these suits are not used by aggrieved parties as a means to deprive the Public Exchequer of 1 the taxes due for years on the basis of interim injunctions. Furthermore, as a guiding principle, to bring some certainty and uniformity in the treatment of such suits, the suits filed and those that have already been filed must only be entertained on the condition that a minimum of 50% of the tax calculated by the tax authorities is deposited with the authorities as a goodwill gesture, so that on conclusion of the suit, according to the correct determination of the tax due or exempt (as the case may be), the same may be refunded or the remaining balance be paid."*

12. From perusal of the above observations, it reflects that Hon'ble Supreme Court has held that insofar as the bar contained in taxing statutes is concerned, it only bars cognizance of suit filed under civil jurisdiction by the Civil Court, and it cannot be extended to include the exercise of the said jurisdiction by a Single Bench of Sindh High Court at Karachi. At the same time while observing that the bar is not absolute insofar as the original civil jurisdiction exercised by Sindh High Court is concerned, the Hon'ble Supreme Court has directed that in respect of fiscal matters, even where mala fide is pleaded, while taking cognizance of any suit the Court must exercise ***such jurisdiction sparingly*** and the suit must be decided expeditiously. It has been further held that as a guiding principle, to bring some certainty and

uniformity in the treatment of such suits, the suits filed and those that have already been filed must only be entertained on the condition that a minimum of 50% of the tax calculated by the tax authorities is deposited with the authorities as a goodwill gesture, so that on conclusion of the suit, according to the correct determination of the tax due or exempt *(as the case may be)*, the same may be refunded or the remaining balance be made. In Paragraph-18 of above referred case, there are further directions as to the exercise of such jurisdiction. On overall perusal of the said judgment, it reflects that though the jurisdiction of learned Single Judge [on the original side] of this Court has not been barred or excluded, but the use of the words ***"sparingly"*** is of utmost importance and must not be ignored by the single judge of this Court while exercising original civil jurisdiction in respect of fiscal matters. It is not that such jurisdiction must always be exercised; rather it is the other way round that it shall be exercised with care and restraint. All suits so filed on the original side must not be entertained as a matter of routine. The judge must see that whether such jurisdiction has to be exercised in the given facts and circumstances or not. The specific observation of the Supreme Court in Para 17 of the judgments as above that "it is directed, that while the Single Bench of the Sindh High Court at Karachi may still take cognizance of any suit arising out of an action/order of the tax authorities/Customs Officers, ***such jurisdiction must be sparingly exercised by the Single Bench***.." is of utmost relevance and has to be followed by a Single Judge of this Court strictly and does not leave any further room to enlarge its jurisdiction. The Single Judge of this Court is not required to mandatorily exercise such jurisdiction in fiscal matters on the Original Side of this Court in terms of Section 9 CPC read with Section 7 of the Civil Courts Ordinance, 1962. When the matter is of exercising discretion by the Court, then the Court is not bound to grant such relief merely because it is otherwise lawful to do so. Besides this, even otherwise, if at all a Suit is maintainable, even

then a direct challenge to an audit Notice without availing remedy under the Ordinance has also been deprecated by the Courts, as this Court is not required to decide the controversy in hand, which apparently relates to an issue which at best can only be decided by the forum provided under the Ordinance, whereas admittedly it is not a case of any jurisdictional defect or the competency of the concerned officer. If at all, even if a legal question is raised, it is not mandatory upon the Court to entertain a Civil Suit in all run of a mill cases; rather, the discretion vested in the Court has to be exercised with restraint and not as a matter of routine. We may also clarify that for the present purposes we are not dealing with a situation wherein the deposit of 50% of the amount has not been made as in the instant matter, the impugned order has not dealt with this issue; and therefore, our finding in this matter is only in respect of a situation wherein even without deposit of the said amount, the plaint in a Suit can be rejected or not.

13. The Hon'ble Supreme Court has been pleased to hold in ***Allahdin Steel*** *(supra)* that mere issuance of notice under section 177 of the Ordinance, by itself is not a cause of action, hence, the very maintainability of the Suit in question must be gauged keeping in view the said dicta. Therefore, if there is no cause of action accruing based on a mere notice under section 177 ibid, the Suit otherwise fails as to the test of its maintainability and even plaint can be rejected under Order VII Rule 11(a) CPC. At the same time, the plaint in the instant matter also appears to be barred by law [s.227 of the Ordinance read with the dicta laid down by the Supreme Court in ***Searl IV Solution*** (Supra)]. To counter this argument, though the learned counsel for the Appellant has contended that once *malafide* has been pleaded, then a plaint cannot be rejected, and a plaintiff must be given reasonable opportunity to lead evidence. However, this principle of pleading *malafides* on the part of a defendant for maintaining an ordinary Suit under Section 9 CPC, may be correct to some extent, but in the instant matter

the said principle will not apply *stricto sensu*. Here, we have an authoritative judgement[13] of the Supreme Court in respect of a challenge to an audit notice under Section 177 of the Ordinance, read with the interpretation[14] of an ouster clause[15] in taxing statutes. Therefore, it is in this context that we must see whether in the peculiar facts and circumstances of this case, can still a Suit be maintained before the Original Side of this Court. We may not reiterate that the Supreme Court in ***Allahdin Steel*** (Supra) has settled the issue with a detailed opinion and has come to the conclusion that selection for audit through random or parametric balloting is provided under the law and such selection for audit does not cause an actionable injury to the taxpayer as the reason and objective for an audit under the self-assessment scheme is to check the accuracy and truthfulness of tax returns filed by the taxpayers which are required to be supported with requisite documents. The Hon'ble Supreme Court has further observed that when a person is selected for audit, he is called upon to explain his case and furnish documents and in case he satisfies the department to the effect that his tax returns are truthful, it will be the end of the proceedings and no tax liability would be enhanced as according to the Hon'ble Supreme Court, mere selection for audit by itself is not a complete process; rather it is the beginning of a process which may or may not culminate in any amendment of the assessment order enhancing the tax liability. The Hon'ble Supreme Court has further held that after selection for audit, the taxpayer has ample and multiple opportunities at every step to defend his position and support his tax return. As to the authority and power to select persons or classes of persons for the purpose of audit under the Ordinance, and even under other tax laws (Sales Tax Act, 1990 and Federal Excise Act, 2005), the Hon'ble Supreme Court has observed that these powers are adequately

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[13] Allahdin Steel (supra)
[14] Searl IV Solutions (Supra)
[15] Section 227 of the Ordinance.

and sufficiently available and there cannot be any exception as the letter of law is clear, unambiguous and explicit and therefore, leaves no room to interpret it in a manner that expands or shrinks its scope, meaning and tenor, whereas, only exception being mala fides and blatant discrimination. The relevant findings of the Hon'ble Supreme Court in this case are as under:-

> "10. We have heard the learned counsel for the parties, examined the judgments of the fora below and gone through the records before us. It is common ground between the parties that the Board has the power to conduct audit under the provisions of the Ordinance, the Act of 1990 and the Act of 2005. However, the Taxpayers challenged selection for audit with respect to Tax Year, 2014 and the Audit Policy of 2015 which has been formulated to undertake the exercise of audit. The power to select for audit through random or parametric balloting is provided under the law. We have repeatedly held that mere selection for audit does not cause an actionable injury to the Taxpayer. The reason and objective for conducting an audit under a scheme of self assessment, which is the regime provided by the Ordinance, is to check the accuracy, truthfulness and veracity of the returns filed by the Taxpayers. These are required to be supported by the requisite documentation and records. When a Taxpayer is selected for audit, he is called upon to explain his case where explanation is required and furnish the documents which support such explanation. In case, he satisfies the authorities that the tax returns submitted by him are truthful, reliable and supported by the necessary documentation, it may not culminate in further proceedings or in an amendment in the returns and enhanced tax liability may not be the outcome. This is so because mere selection for audit by itself is not a complete process. This is the beginning of a process which may or may not culminate in revision of assessment, enhanced tax liability or other adverse legal consequences. It may also be noted that once a Taxpayer is selected for audit and till such audit is completed the Taxpayer is provided ample and multiple opportunities at every step to defend his position, support his returns and offer explanations for the information provided and entries made in the tax returns. Further, even if a discrepancy is discovered he is provided yet another opportunity to explain his position before his assessment is revised. It must therefore be emphasized that the process of audit is in essence an exercise of re-verification of the truthfulness, accuracy and veracity of the returns filed by a Taxpayer in a regime of self assessment where the State reposes confidence in the Taxpayer, gives him a freehand and provides him the option to undertake his own assessment of the quantum of tax that he is liable to pay. His return automatically takes the form of a final assessment order unless it is reopened and re-examined in the circumstances provided in the law itself.
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> 11. The Taxpayers have challenged the selection process through random ballot on the ground that it is discriminatory as certain classes of Taxpayers have been ran excluded from the ballot which has numerically increased their chances of selection. We have examined the provisions of section 214C of the Ordinance, section 72B of the Act, 1990 and section 42B of the Act, 2005 and find that these adequately and sufficiently empower the Board to select persons or classes of persons for audit through a computer ballot. This selection can either be random or parametric. It is therefore clear and obvious that a power vests in the Board to select persons or classes of persons for the purpose of ballot. There is no real controversy to that extent. The argument of the learned counsel for the Taxpayers that random ballot means that the entire body of Taxpayers must be included in the ballot is misconceived and based upon an erroneous and incorrect reading and understanding

of the law. The same is repelled. The law explicitly empowers the Board to select "persons" or "class of persons". Where the letter of law is clear, unambiguous and explicit there is no room to interpret it in a manner that expands or shrinks its scope, meaning and tenor. The only exception being mala fides and blatant discrimination which has neither been alleged nor evident from the facts, circumstances and record before us.

12. We find that the process of balloting was conducted from amongst a pool of persons objectively determined by the Board in accordance with a transparent policy, uniformly applied in accordance with law. The process was undertaken through an automated computer aided selection process. Nothing has been placed on record that may even remotely indicate that there was any bias, arbitrariness or partiality on the part of the Board or that certain sets or classes of Taxpayers were targeted to the exclusion of others. We therefore do not subscribe to or agree with the argument of the learned counsel for the Taxpayers that there was any legal or procedural defect or error in the process of random selection undertaken by the Board.

13. It has further been argued that audit for the Tax Year, 2014 was carried out without framing rules as required by the DHA Judgment. We have examined the DHA Judgment and find that it deals with parametric selection for audit and therefore proceeds on a totally different set of facts and circumstances. Random and parametric selection are two different methods of selection and the principles and rules applicable to one cannot be applied to the other. As such, the said judgment is not strictly applicable or relevant to the present case. The cases before us arise out of random ballot which as the term suggests is a random selection out of a broad class of taxpayers and is not risk based. Further, in order to conduct the audit, an Audit Policy was framed to regulate the process of audit, rationalize it, provide guidelines and streamline the process. No elaborate rules were required to be framed in this case being a pure and simple computer aided random selection. The ballot was carried through an automated process and no serious objection regarding the same has been raised. Further, we are not convinced that any elaborate regime of rules needed to be framed as all necessary regulatory requirements including methodology, standards and objectives were incorporated in the Audit Policy of 2015. There is no evidence that the Policy guidelines were ignored or departed from in any material manner. We are therefore inclined to agree with the finding recorded by the learned Appellate Bench that there was no real requirement for framing of specific rules for conducting the aforesaid audit and the Audit Policy provided adequate and efficient guidelines regarding the scope, parameters and methodology to be adopted and followed.

15. The learned counsel for the Taxpayers laid much stress on the Performance Evaluation Indicators given in part-5 of the Audit Policy. It was argued that a plain reading of the Audit Policy clearly spelt out the intention of the Board in conducting audit which unmistakably was revenue collection. It was, therefore, submitted that where Auditors and Tax Officers had to comply with and come up to the Performance Evaluation Indicators, they were bound to focus more on revenue collection rather than ensuring compliance with tax laws. Having considered the argument of the learned counsel, we find that the real purpose of conducting audit and laying parameters for the same was to ensure that uniform standards were put in place in the interest of consistency in the process of audit, the manner in which the audit is to be conducted, the standards which the Audit Officers are required to follow and consistently apply. These factors are clearly within the exclusive domain of the Board. However, in doing so, the requirements of law and due process must not be ignored.

16. A perusal of the statutory landscape makes it clear that the provisions of sections 177 and 214 of the Ordinance; section 25 of the Act, 1990 and section 46 of

> the Act, 2005 provide a mechanism and roadmap which is required to be followed by the Taxation Officer/Auditor. In terms of section 177 of the Ordinance, the Commissioner can call for the record or documents for conducting the audit of the tax affairs of a person, provided he furnishes reasons to do so. Such reasons must be communicated to the Taxpayer. He can also seek explanations from the Taxpayer on issues raised during the audit in terms of section 177 of the Ordinance. It is only if he is convinced that the explanation furnished by the Taxpayer is not satisfactory, he may proceed to amend the assessment under section 122 of the Ordinance, after giving the Taxpayer an opportunity to defend him. We are therefore of the view that the statutory framework together with the overarching umbrella of constitutional guarantees furnish adequate and sufficient safeguards to the Taxpayer where there is a possibility of overstepping by the Tax authorities."

14. It is also pertinent to mention that Appellants Suit it is not a simple Suit against the defendant(s) wherein *malafide* has been pleaded specifically against a particular act of a defendant; nor any damages for such act of *malafides* have been claimed. Time and again, it is stated in the plaint that the act of Respondents is *malafide*, illegal and without lawful authority. As already noted, this is not a case of any lack of jurisdiction on the part of the Respondents in issuing the impugned notices. In fact, a mere allegation of an act being illegal does not by itself is lack of jurisdiction. If that would have been the case, then the contention of Appellant's Counsel may have had some weightage. However, for the present purposes it is not a simple suit between two parties, but it is in respect of a notice under section 177 of the Ordinance in respect of which it has already been held that same is not an adverse action and does not give any cause of action to maintain a suit against the department. There is no cavil to the proposition that where an order passed is without jurisdiction or it abundantly appears to be illegal or is a result of mala fide then under such circumstances a Civil Court is competent to look into the legality and propriety of such order or act challenged in the suit[16]. Any illegality in an order, passed by any forum or Tribunal, does not ipso facto becomes mala fide[17]. In order to prima facie show an act of mala fide a party is required to give specific

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[16] Mst Qadri Begum v Province of Sindh (1999 CLC 2023)
[17] --do--

instances of such mala fide[18]. Mere wild allegations of said nature would not establish mala fide of the defendants[19]. It is requirement of the Order VI, Rule 4, C.P.C. that particular instances and other details of fraud and misrepresentation should be disclosed in the pleadings[20]. A mala fide action is an action in bad faith, motivated by personal malice, or for collateral purposes unauthorized by law. Such action must have been done maliciously to harm someone for personal gain, constituting a colorable exercise of power or fraud upon law. It is further settled that a mere allegation of mala fide is insufficient as it must be substantiated with specific particulars to warrant any further steps and inquiry by the Court. A mala fide action is an act which is taken in bad faith out of malice to derive personal gain or benefit or to cause personal loss to the person against whom it is taken[21]. In order to establish a case of mala fide, some such specific allegation is necessary, and it must be supported by some prima facie proof to justify the Court to call upon the other side to produce evidence in its possession[22]. It is necessary, therefore, for a person alleging that an action has been taken mala fide to show that the person responsible for taking the action has been motivated by any one of the considerations mentioned above[23]. A mere allegation that an action has been taken wrongly is not sufficient to establish a case of mala fides, nor can a case of mala fides be established on the basis of universal malice against a particular class or section of the people[24]. A detailed perusal of the plaint reflects that there is nothing of that sort so pleaded in respect of specific allegations of *malafides*; rather reliance has been placed on some circular of 2009 and a judgment of the learned Islamabad High Court in support thereof. Not only this, even in the prayer clause there is no claim of damages based on any such alleged act of *malafide*;

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[18] --do--
[19] --do--
[20] --do
[21] Pir Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738)
[22] Federation of Pakistan v. Saeed Ahmad Khan (PLD 1974 SC 151)
[23] --do--
[24] --do--

nor, barring a general expression, any specific act of *malafide* is prayed for against any Respondent / Defendant. The entire crux of the plaint and the prayer clause is that the impugned notices are illegal.

15. We need not reiterate the fact and the settled proposition of law in respect of audit notices issued under Section 177 of the Ordinance, as time and again in numerous cases it has been held that a notice for conducting audit of tax affairs is not an adverse order by itself. A learned Division Bench of this Court in the case of ***Pfizer Pakistan***[25] while dealing with the provisions of Sections 177 and 214C of the Ordinance, 2001, to the extent that whether the Commissioner had any powers to select a taxpayer for audit in view of the powers vested in FBR under Section 214C ibid, has been pleased to observe that:--

> 6. The power to impose tax vests in the State. A taxpayer is accountable to the State for his incomes so that the leviable tax can be collected. State has every right to ensure that tax is properly calculated and paid. This obligation of a person to pay correct amount of tax means that a vested right has accrued to the State to examine the account books of a taxpayer. Audit of accounts is the most effective mode of determining the correct liability of tax. Right to conduct audit being absolute, it is hard to imagine that such a right could be left mainly to chance i.e. computer balloting or as and when the Board decides. The power of the Board to choose persons for audit is a general power which is in addition to the power of the Commissioner under Section 120(IA). How then could we hold that when the Commissioner wants to select a specific person to conduct audit, he does not have the discretion to do so under any provision of the Income Tax Ordinance, 2001. If the Commissioner is unable to select a person to conduct audit under Section 120(IA) then there would be no other provision in the Income Tax Ordinance, 2001, which would facilitate the taxing authority to examine a tax return and if circumstances suggest conduct person specific audit. If we accept the interpretation of petitioner's counsel then a person specific audit can never be possible even though a tax return may be required by the taxing authority to be scrutinized in detail. It may be true that frequent audit of the same person at times become a nuisance for him but to make such an effective tool to determine correct income inoperative just because Section 214C exists cannot be accepted. The Commissioner then would never be able to select a particular person for conducting audit though circumstances may exists where such a decision has to be taken. This can never be the intention of the legislature. Such an interpretation of Section 214C would make the provisions of Section 120(IA) utterly redundant.

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[25] Pfizer Pakistan Ltd. v. Deputy Commissioner and others (2016 PTD 1429)

16. A full bench of the Islamabad High Court in the case of ***Pakistan Telecommunication Company Ltd***[26] (so heavily relied upon by the Appellants Counsel) has been pleased to hold as under:--

> "27. In the context of further appreciating the powers of the Commissioner under section 177, it would be relevant to examine the consequences flowing from conducting an audit. Is audit in itself an adverse action and order, or a necessary tool to safeguard the interests of the exchequer, particularly in the context of a universal self-assessment scheme. The mere conducting of an audit may not even cause inconvenience if the taxpayer has fulfilled the statutory duty of maintaining the record prescribed under the Ordinance of 2001 or any other law. As already noted above, the scope of audit is restricted to two categories of records, documents etc. If a taxpayer has maintained the records, documents etc prescribed under the Ordinance, 2001 or under any other law at the time being enforced, the latter is not exposed to the consequences stipulated in subsection (2) of section 177. The failure on the part of a taxpayer to fulfil the statutory obligation of maintaining the prescribed record would empower the Commissioner to exercise powers envisaged under section 177(2). The legislature has, therefore, struck a balance and has provided a mechanism to safeguard the rights of both the taxpayer as well as the exchequer. The mere conducting of an audit does not create any liability or in any manner adversely effects the return treated as an assessment order under section 120. The completion of an audit has no effect whatsoever on the assessment order deemed to have been passed under section 120, as it can only be amended in the manner prescribed under section 122. In this regard the legislature has prescribed a stringent procedure and pre-conditions. Section 122 provides for the mechanism and the safeguard for amending an assessment order.

17. As to placing reliance by the learned Counsel for the Appellant regarding certain observations of the Hon'ble Supreme Court regarding *malafide* in the case of ***Allahdin Steel*** *(supra),* again we are of the view that such observation is not akin to the facts of the Appellant case as we have already observed that even *malafides* have not been pleaded specifically but only in general terms; hence, no case to that extent is otherwise made out. Finally, as to maintaining a Suit in fiscal matter(s), the same has to be read in juxtaposition with the observations of the Hon'ble Supreme Court in the case of ***Searle IV Solution (supra)***. Once it has been held that original jurisdiction of this Court vested in it in terms of Section 7 of the Civil Courts Ordinance, 1962, must be exercised sparingly, then more stringent view is to be taken by the Court. In our considered view,

[26] Pakistan Telecommunication Company Ltd. v. Federation of Pakistan (2016 P T D 1484)

this is a fit case to hold that such jurisdiction has been rightly exercised in a sparing manner by the learned Single judge while passing the impugned order, whereas the strict principle of pleading *malafides* to maintain a Suit otherwise in not by itself sufficient in this case. Moreover, the Appellant has not claimed any damages in the plaint, therefore, the Suit cannot be maintained to that extent as well. The impugned cause of action based on which the suit has been filed by the present Appellant is a notice under section 177 of the Ordinance. We have perused all such notices, and it reflects that justifiable reasons have been mentioned independently in all such notices for different tax years pointing out various discrepancies and shortcomings in the tax returns of the Appellant. The Appellant, at the very outset has been given an option to assist them to reconcile the said discrepancies in the tax returns. Since, sufficient reasons have been stated in the respective notices, therefore, such notices are valid in law and the Appellant ought to have responded to such notices and joined audit proceedings, as the Appellant can always justify the figures in its tax returns and convince the Respondent as to their reconciliation and if not, then further proceedings would take place in terms of section 177, ibid read with Section 122 of the Ordinance. Finally, the Appellant, if so aggrieved, can always seek further remedy as provided under the Ordinance. The case of the present Appellant firstly, is of no accrual of a cause of action, coupled with it being barred by law as declared and interpreted by the Supreme Court in ***AllahDin Steel*** (Supra) read with section 227 of the Ordinance.

18. In view of hereinabove facts and circumstances of this case, no exception can be drawn to the impugned order and the plaint has been correctly rejected under Order VII Rule 11 CPC by following the binding precedent of the Hon’ble Supreme Court of Pakistan in the case of ***Searle IV Solution (supra)*** read with the

case of ***Allahdin Steel (supra)***. Accordingly, the Appeal is hereby ***dismissed***.

Dated: 13.01.2025

J U D G E

J U D G E

Farhan/PS