IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A. NO.152 & 153 of 2009

PRESENT: MR. JUSTICE NADEEM AKHTAR, &
MR. JUSTICE MUHAMMAD IQBAL KALHORO

Appellant	:	M/s. National Transmission & Despatch Company, through Mr. Badar Alam, advocate.
Respondents	:	Pub Corporation & another, through Mr. Abbas Ali, advocate for respondents.
Date of hearing	:	10th and 19th December 2014.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J: This common judgment shall dispose of the captioned appeals filed against judgment and decree dated 24.11.2008 passed by the learned Single Judge of this Court, whereby Suit No.1556/1997 instituted by the respondent/M/s. Pub Corporation against the appellant for recovery of Rs.1,00,00,000/- was decreed with costs and suit No 1135/1998 instituted by the appellant against the respondents for recovery of Rs.72,36,934/- was dismissed with costs.

2. The brief facts in Suit No.1556/1997 are that M/s Pub Corporation (herein referred as the respondent) being octroi contractor was allotted a contract pertaining to octroi collection on the goods being brought in Union Council Gadap, District Malir for the period commencing from 1.7.1995 to 30.6.1996 and from 1.7.1996 to 30.6.1997. During currency of the above period, the appellant brought various electrical equipments within the jurisdiction of the Union Council for which the respondent at toll-post demanded octroi tax but the appellant instead asked the

respondent to submit the bills as the octroi amounts in question were heavy and large and further undertook to pay all the bills later on. On such assurance, the respondent let in the equipments. After wards the demands of octroi duty were made but nothing was paid by the appellant hence the respondent stopped the importation of the electrical equipments in the jurisdiction of Union Council, which led the appellant to approach the Deputy Commissioner Malir through a complaint for resolution of the dispute. The Deputy Commissioner got seized with the matter and decided *inter alia,* that a cheque of Rs.10,00,000/- would be accepted by the respondent in lieu of blocked payments and for remaining balance the Chief Engineer WAPDA would give an undertaking coupled with the schedule of its payment. In spite of above decision, the appellant failed to make any payment towards octroi tax which had meanwhile swollen up to Rs.1,07,22,579/-. Subsequently after the stipulated time frame, a sum of Rs.14,42,202/- was paid by the appellant in three installments. Thereafter on the persistent request of the respondent to settle outstanding dues, the appellant sent a cheque of Rs.3,00,000/- but ignored to pay the remaining amount of Rs.89,80,377/-. Setting out these facts in the plaint, the respondent made the following prayers:-

a) to pass a judgment and decree against the Defendants in the sum of Rs.39,80,377/- being the total outstanding on the date of filing of this present suit with reasonable return thereon upto the date of payment;

b) to also pass a judgment and decree against Defendants to pay damages / compensation on account of loss that has been caused to the Plaintiff due to devaluation / money value parity / inflation, in the sum of Rs.1,019,623/- or as on the date of payment.

c) to award the cost of the suit

and

d) any other / further orders / decrees which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

3. In the written statement, the appellant pleaded itself to be statutory body that was carrying on its function for and on behalf of Government of Pakistan and claimed further that its properties vest in the Federal Government thus were exempted from levy of octroi tax. The Inter-Provincial Coordination Division was formed in the Cabinet Secretariat Government of Pakistan to build cooperation and coordination between the four provinces of Pakistan and Federal Capital area of Islamabad. The said Committee, while Senior Minister Government of Pakistan at its chair, decided *inter alia,* in the meeting held on 11.04.1993 that Provincial Government would exempt WAPDA from payment of property tax and octroi on its equipments and materials, in lieu whereof WAPDA would charge electricity tariff on streetlights and drinking water schemes under its purview throughout the country on domestic rates. Replying to the factum of decision by the Deputy Commissioner Malir, the appellant stated that it was *corum non judice,* without any legal effect and was not binding upon it. The payments towards octroi tax were made mistakenly and wrongly, which were liable to be returned to the appellant. The appellant also denied that the alleged amount or for that matter any sum was legally due against it or it was bound to pay any amount. Lastly, the appellant prayed to dismiss the suit with costs.

4. In Suit No.1135/1998 instituted for recovery of Rs.7.236.934,671/-, the appellant reiterated the same facts as mentioned supra. It was additionally stated that the continuous charging of octroi tax by the respondent from the appellant on its goods was illegal. Moreover, the officer of WAPDA concerned in ignorance of the fact that WAPDA's equipments and materials were

exempted from levy of octroi tax, and in order to avoid delay in the completion of the project that was of national importance, had wrongly and mistakenly made various payments to the respondent amounting to Rs. 7.236.934,671/-. The respondent in the written statement stuck to the same claim made already in its suit. Furthermore, it was supplicated that in C.P. No.D-660/1986, the Division Bench of this Court had held that WAPDA was liable to pay octroi tax, which judgment had attained finality on the subject issue, as no appeal was preferred against it.

5. Out of the pleadings in Suit No.1556/1997, following issues were framed:

1. Whether the suit as framed is not maintainable?

2. Whether the plaintiffs have no cause of action?

3. Whether the defendant No.1 by any law and / or Act of Government of Sindh, exempted from payment of octroi for their goods brought within the territory in question? If not to what effect?

4. Whether the defendants at any point of time during the subsistence of the plaintiffs contracts and/or in Joint meeting before the D.C. & SDM Malir, denied or disputed their liability to pay the octroi on the grounds of alleged exemption? If not to what effect?

5. Whether the Electric equipment, electrical towers, conductors and insulators brought by the defendant NO.1 within the area of Union Council Gadap were meant for the development words and not for utilization and consumption for trade and business, if so its effect?

6. Whether the assurance, promise and undertaking by defendants 2 and 3 were made by them without approval of competent authority of Defendant No.1 and the same were subject jto the legal entitlement of the plaintiff to demand the octroi tax on the properties of Federal Government & the same were not binding on the defendant NO.1?

7. Whether the part payment made towards to the liability were made by mistake and does not amount to acknowledgement of liability?

8. What should the decree be?

6. Whereas in Suit No.11135/1998, the issues framed by the trial Court are as under:

(1). Whether the plaintiff is not liable to pay octroi on its Machineries & equipments brought by it within the territory in question?

(2). Whether the assurance given, commitments made and undertaking executed for due payment of outstanding octroi were not binding on the plaintiff as alleged?

(3). Whether the part payment made towards the liability were made by mistake and does not amount to acknowledgement of liability?

(4). Whether the plaintiff is entitled to recover the part payment/the amounts claimed in suit from the defendants?

(5). What should the decree be?

7. The record reflects that during pendency of above suits the appellant filed two miscellaneous applications. One under section 151 CPC for consolidation of both suits and the other one under Order XIV Rule 2 CPC requesting the trial Court to determine first of all the legal issue **"Whether these suits are maintainable under the law**" prior to deciding the remaining issues, as answer to it would be sufficient for disposal of both suits. By order, dated 24.1.2006 the two suits were consolidated. Thereafter parties on the ground that no factual controversy was involved in their dispute voluntarily agreed not to lead any evidence. The claim of damages was already withdrawn by the learned counsel for the respondent in Suit No.1156/1997 thorough a statement. Hence, the learned Single Judge proceeded to decide the legal issue in respect of maintainability of the suits under the law. Through the impugned judgment, learned Single Judge has decreed the suit of the respondent to the extent of prayer clause (a) with costs, whereas the suit of appellant has been dismissed with costs. Feeling aggrieved by

the impugned judgment, the appellant has filed these two separate appeals.

8. Mr. Badar Alam, learned counsel for the appellant argued that the learned Single Judge did not decide the legal issue in respect of maintainability of the suits in accordance with law but proceeded to delve into factual controversy, which was unlawful, as admittedly the parties had led no evidence. He contended that the levy of octroi tax upon the appellant was illegal which was so held by this Court in a case reported in PLD 1998 Karachi 209. According to him, the decision of the Inter-Provincial Coordination Division was binding upon the respondent whereby WAPDA stood exempted from payment of octroi tax as an acceptance to concessions it had extended to the Provinces. He left no stone unturned to emphasize that the learned Single Judge relied upon the case laws in his judgment which were irrelevant to the controversy in hand, hence inapplicable. In his arguments, he also referred to Section 72 of the Contract Act, 1872 to prove that the payments made under mistake could be retrieved lawfully as the person to whom money was paid by mistake was liable to repay or return it. Per learned counsel, the learned Single Judge fell in error to hold that since the appellant had made part payment towards the octroi tax, it could be asked for paying the remaining part thereof. He did not conclude his arguments before pointing out that the alleged meeting between the representatives of the appellant and respondent with the Deputy Commissioner concerned and their admissions before him were of no legal consequences hence not binding upon the appellant. In support of his arguments, he relied upon 2005 SCMR 487, PLD 1993 S.C. 109, PLD 1998 SC 64, PLD 1992 Peshawar 146 and PLD 1989 SC 749.

9. Point of view urged by Mr. Abbas Ali counsel for the respondents 1 and 2 in his arguments was quite contrary to the abovementioned line of arguments. He contended that appellant had failed to point out any illegality or infirmity in the impugned judgment. Per learned counsel, the Economic Coordination Committee had no legal sanctity and its decision could not be attached any importance under the law. He also stated that the appellant was not entitled for any exemption from payment of octroi tax and in terms of Sindh Local Government Ordinance, 1979 even the Government had no power to grant such exemption to the appellant. He maintained that the controversy in hand stood already decided by this court in CP No. D 660 of 1986 (WAPDA through Shamsdin Shaikh versus Government of Sind and others). Concerning the case of the appellant, he argued that as per provisions of section 230 of the Contract Act, 1872 the suit in presence of principal was not maintainable against the agent. Explaining the same he stated that the respondent was mere a contractor working on behalf of Union Council Gadap in the capacity of its agent, therefore unless the Union Council was made party by the appellant, the suit only against the respondent was not competent. He further contended that even on merits the appellant had failed to prove its case, as it had not mentioned any date of payment to the respondent nor filed any receipt of payment in the suit as a proof for recovery of alleged money. He lastly in support of his arguments relied upon case-laws reported in 2009 SBLR 1102, PLD 1991 Karachi 372, PLD 1988 Karachi 38, 1997 SCMR 1228, 1997 SCMR 642, 2005 SCMR 487, PLD 1992 Peshawar 166, 1992 SCMR 1652 and 1993 SCMR 468.

10. We heard the opposing contentions of the parties as above and thoroughly perused the record including the case laws cited at bar. The case of the appellant set up in both the appeals for claiming exemption from octroi tax is mainly based upon (i) the decision of Inter-Provincial Coordination Committee and (ii) the case of WAPDA versus Government of Sindh and others reported in PLD 1998 K 209. As per decision of the Committee, the Provincial Governments were asked to exempt WAPDA from payment of property and octroi tax as an acknowledgment to WAPDA charging electricity tariff on streetlights and drinking water schemes under its purview throughout the country on domestic rates. In the course of trial, the parties decided not to lead any evidence, as according to them, there was no factual controversy involved in the matter. The Learned Single Judge agreed with that proposition and proceeded to decide the same, which resulted in pronouncement of the impugned judgment. The facts relating to importing electrical articles by the appellant within the precincts of Union Council Gaddap and the sum calculated by the respondent towards octroi Cess on those articles stand not contested. What the appellant has vehemently urged is that it is carrying on its functioning for and on behalf of Government of Pakistan, hence its properties vest in the Federal Government and are exempt from levy of octroi tax. It is also claimed that since electric articles imported in the area were meant for development work and not for business purpose, any demand by the respondent to pay octroi tax is illegal. While examining the facts and relevant law, we have come across several judgments of superior Courts wherein repeatedly the stated controversy has come to be examined. The respectful glance into such cases would not be out of place to reach a proper conclusion here. As a first reference, the observations of this

Court in C.P No. D-660 of 1986 (WAPDA through Shamsdin Shaikh versus Government of Sind and others) are replicated herewith.

> "The first contention of the petitioner is that they are not liable for payment of octroi tax on the goods and material brought within the limits of Union Councils, Bholari, Jamshoro, Pipri and Hyderabad Corporation as it is meant for use in two new Grid Stations constructed by them which is a public work. Firstly, it is an admitted position in the above cases that since 1982 the petitioner's contractor who are carrying on construction work of two Grid Stations situated within the limits of Bholari and Jamshoro Union Council has been paying octroi tax on building material brought within the limit of these Union councils. This fact is admitted in the agreement executed between the petitioner and its contractor which is filed along with the counter affidavit of respondent No.4 in Petition No. 660/86. It is also established from Annexure 'D' to the above petition that the petitioner had entered into an agreement for payment of octroi charges on the articles imported for use in the construction of Grid Station within the limits of Union Council Bholari and this agreement was signed by the petitioner and chairman of Union Council Bholari and also on behalf of Local Government Department Kotri."

While examining the notification No SO II-I (23)/79 Karachi dated 3rd December 1980 granting exemption to the petitioner from payment of octroi tax on the construction material for "public works", challenged in the said petition, the Division Bench of this Court has held that "**the building material imported by the petitioners for use in the two Grid Stations situated within the limits of Union Councils Bholri and Jamshoro is not entitled to exemption under the aforesaid notification".** In the succeeding paras declared further that "**Learned counsel is unable to point out any provision either in the Sind Local Government Ordinance,**

1979 or in any other law for the time being in force which allowed such exemption to the petition." In the present case, also the claim of exemption from octroi duty propounded by the appellant is not based on any provisions of law or Constitution. Rather, the same is founded on presumption and notion that the properties of WAPDA belong to and are owned by Government of Pakistan hence not liable to any duty. We do not find ourselves inclined to accept this view. However in order to appreciate the same, reference can be had to Article 165 of the Constitution. For ready reference, the same is reproduced herewith.

> **"165 Exemption of certain public property from taxation.**
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> (1) The Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of Provincial Assembly and, subject to clause (2), a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of [Majlis-e-Shoora (Parliament)] or under Act of the Provincial Assembly of any other Province.
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> (2) If a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, that Government may, in respect of any property used in connection with that trade or business or any income arising from that trade or business, be taxed under Act of [Majlis-e-Shoora (Parliament)] or under Act of the Provincial Assembly of the Province in which that trade or business is carried on.
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> (3) Nothing in this Article shall prevent the imposition of fees for services rendered."

A bare perusal of the above article has led to a firm view that the case of the appellant does not cover the atypical design legislated therein either. It deals with the properties and income of Federal and Provincial Governments and enunciates that the Provincial Assembly shall not be competent to levy tax on the properties and income of the Federal Government and no property of

the Provincial Government can be liable to tax either by the Parliament or by any other Provincial Assembly. However, if the provincial Government carries out any trade or business outside its territory, it can be taxed in respect of such trade or business by the Parliament or by the Provincial Assembly within whose jurisdiction the activity is carried on. None of the situations is in existence here. Emphasis has been laid down by the learned counsel that because appellant's properties are considered to be that of the Federal Government, it is not liable to pay octroi tax. The learned counsel though repeatedly iterated the said contention vehemently but when asked to rationalize the same on the touchstone of legal plane, nothing was referred to except the decision of the Committee. We in the light of Article 165 of the Constitution as well as the referred decision examined the case of the appellant but found nothing encouraging for the appellant. Merely because of a decision by a Committee, the importance of which under the law is yet to be established, the object of any law cannot be overlooked or marginalized. The Honourable Supreme Court, seized with the same question in a case of WATER AND POWER DEVELOPMENT AUTHORITY through General Manager and Project Direct and another versus ADMINSTRATOR, DISTRICT CIUNCIL, SWABI and 5 others reported in (2005 SCMR 487) has scholastically observed as under:-

> **"6. The crux of appellant's case as argued before us is that WAPDA, due to executing a project of and on behalf of the Federal Government, its properties and income etc. is exempt from taxation under Article 165 and 165-A of the Constitution. Let us see how far, in the circumstances of the present case aforesaid provisions of the Constitution are attracted.**

7. Starting with sub-article (1) of Article 165, it pertains to the properties owned by and the income, as such, of the Federal Government and the Provincial Governments. It simply lays down that no tax can be levied on the properties and income of the Federal Government by Provincial Legislatures and no property of Provincial Government can be subjected to tax either by the Parliament or by any other Provincial Assembly. This sub-article does not cover the peculiar situation in hand.

8. Sub-article (2) of Article 165 provides that if a trade or business of any kind is carried on by or on behalf of the Government of Province outside that Province, the Government carrying on such trade or business can be taxed under Act of Parliament or under Act of Provincial Assembly of the Province in which that trade or business is carried on. In the present case no trade or business is carried on by Government of one Province outside that Province. Here Ghazi Barotha Hydropower Project is executed on behalf of the Federal Government and hence sub-Article (2) of Article 165 is also not applicable. The advantage of working on behalf of some Government is available only in this sub-Article (2) of Article 165, which, as remarked earlier is not attracted in the instant claim.

9. Coming to Article 165-A, it undoubtedly provides that the Parliament has power to make a law to provide for the levy and recovery of a tax on the income of corporation, company or other body etc. This categorically deals with the levy of income-tax. Whereas, in the instant case the tax is being levied on the export of produce which are located within the limits of a District Council. Not dealing with the question of income tax in the present case, Article 165-A is also not applicable."

11. In the above case the question of exemption to WAPDA from payment of tax with reference to Article 165 and 165-A of the Constitution has been thoroughly dealt with by the Honourable Apex Court on the ground of it working on a project of and on behalf the Federal Government. Yet the WAPDA, as is clear from above intellectual discourse, has not been found entitled to any such concession on that ground. In presence of such decision given by the Honourable Supreme Court on the issue, we need not follow the case of WAPDA versus GOVERNMENT OF SINDH and others reported in PLD 1998 Karachi 209. The object of levying octroi tax was to strengthen the local Government to be able to generate finances for the uplift of rural areas. Such purpose, essential to the survival of local Government, could not have been allowed to be compromised in absence of some specific command of law. In the case of ZILA COUNCIL, JHANG, DISTRICT JHANG through administrator and others versus Messer DALWOO CORPORTION, KOT RANJEET SHEIKHUPURA through Director Contract and others reported in (2001 SCMR 1012), the Honourable Supreme Court while elucidating the object and purpose of levying tax by the District Councils has held as under:-

> **"A Zila Council cannot be deprived of or restrained from levying or collecting such taxes from the companies/corporations on the ground that it was being run or managed by Government or certain percentage of share pertained to Government. The local Government can only be survived if free hand is given to impose such taxes to generate finance subject to just legal exceptions as it is the only source to develop the rural areas and it is the only way to keep the local Government alive otherwise it may collapse because the District Council is**

responsible for the construction and maintenance of the roads, management of common places, lighting, health and sanitation, water supply, registration of births and deaths, holding of cattle-fares and exhibitions, animal husbandry, prevention of disease, promotion of primary education, scholarship of needy students, and various emergent functions pertaining to social welfare. The finances of District Council are derived from taxes, fees cess, remunerative projects and grants by the Federal and Provincial Governments to achieve abovementioned objects."

12. In terms of section 62 of The Sind Local Government Ordinance, 1979 the Provincial Government was empowered to direct any Council "to levy any tax, rate, toll or fee which the council was competent to levy under the Ordinance; to increase or reduce any rate, tax, toll or fee to such extent as may be specified and to suspend or abolish the levy of any tax, rate, toll or fee". In the wake of such directions, the Chief Executive of Council was bound to issue a notification to that effect and not later than the date specified by Government in this behalf. There was however no provision in the Ordinance, 1979 which gave powers to Government to grant exemption from payment of any tax to a company/corporation on the pretext of it being run or managed by Government. Moreover, such is not the case of the appellant nor does it state that Government had abolished or suspended the levy of octroi tax as such imposed by the respondent on the import of electrical articles within limits of subject Union Council. We therefore need not traverse into this uncharted arena concerning the present case. We also did not find any force in the contention of learned counsel that payments by the appellant to the octroi tax were made under mistake that could be recovered under the law, inasmuch as the burden to prove said assertion was

on the appellant, but it chose not to lead any evidence to support such plea thereby forgoing any right to agitate the same subsequently.

13. As regards the decision of Inter-Provincial Coordination Committee, it may be stated that aside from the well-said intentions and the objectives it had been created for, the Committee had no other force in the eyes of law. Its decision could not override the explicit scheme or scope of law that has been discussed above. For the implementation of decisions made by the Coordination Committee, the laws regulating the controversy in hand ought to have been synchronized with the prayed relief to achieve the aimed purpose. The provisions of the West Pakistan Municipal Committee Octroi Rules, 1964 could not have been rendered redundant on the basis of a decision coming from any Committee howsoever high it was, unless it was so recognized under the law.

14. The instant appeals in view of what has been discussed above are found to be without any merits, and are dismissed accordingly without any order as to costs.

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