

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 539 of 2000

Al-Riaz (Pvt.) Limited and another
Versus
Muhammad Ismail and others

Date of hearing : 30.05.2017

Date of Decision : 14.07.2017

Plaintiff No.1 : Al-Riaz (Pvt.) Limited, through Mr. Arif Khan,
Advocate.

Defendant No.4 : Government of Pakistan, through Mr. Masood
Hussain Khan, Assistant Attorney General.

Nemo for Plaintiff No.2 and Defendants No.1 to 3.

Case law cited by the Plaintiff's counsel

- 1. 1999 PTD Page-1313**
*(Asia Petroleum Limited through Kh. Izz Hamid, Managing Director
Versus Federation of Pakistan through Secretary Finance, Ministry
of Finance, Government of Pakistan, Pak Secretariat, Islamabad
and 3 others).*
- 2. 1994 CLC Page-317 [Karachi]**
*(Syed Raunaq Raza Versus Province of Sindh through The Senior
Member, Board of Revenue, Government of Sindh, Hyderabad and
two others).*
- 3. PLD 2006 Supreme Court Page-432**
(Niaz and others Versus Abdul Sattar and others).
- 4. PLD 2012 Supreme Court Page-80**
(Abdul Majeed Khan Versus Tawseen Abdul Haleem and others).
- 5. 1997 SCMR Page-1543**
*(Basharat Ali Versus Director, Excise and Taxation, Lahore and
another).*

Case law relied upon by Defendants' counsel

Other Precedents:

- (1). **PLD 1997 SC Page-03**
(*Abbasia Cooperative Bank [Now Punjab Provincial Cooperative Bank Ltd.] through Manager and another Versus Hakeem Hafiz Muhammad Ghaus and 5 others*)
- (2). **PLD 1999 Supreme Court Page-1026**
(*Federation of Pakistan and others Versus Shaukat Ali Mian and others*).
- (3). **1993 SCMR Page-1533 [Supreme Court of Pakistan].**
(*Independent Newspapers Corporation [Pvt.] Ltd. and another Versus Chairman, Fourth Wage Board and Implementation Tribunal For Newspaper Employees, Government of Pakistan, Islamabad and 2 others*). [**Independent Newspapers Case**].
- (4). **2009 SCMR Page-1005**
(*Karachi Transport Corporation Versus Muhammad Hanif*)

Law under discussion:

- (1). Income Tax Ordinance, 1979.
- (2). The Code of Civil Procedure, 1908.
- (3). Qanoon-e-Shahadat Order, 1984.
- (4). Law of Torts.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Plaintiff No.1 is a Private Limited Company and has filed the present proceeding through its Director-Shahid Ishtiaq Khan, *inter alia*, primarily against the order of attachment (*impugned*) passed by Defendants No.1 and 2 in their official capacity as officials of Income Tax Department. Following relief is sought_

“It is therefore, prayed by the Plaintiff that this Hon’ble Court may be pleased to allow the following relief/reliefs: -

- i) *Allow permanent injunction.*

- ii) *Declare that the immovable property bearing No.2K-28C, Trans Lyari, Near P.I.B Colony, Karachi is exclusively owned by the Plaintiff.*
- iii) *Declare that the Defendants No.1 and 2 in collusion with Defendants No.3 have, in a deceitful manner, capriciously declared / treated the immovable properties No.2K-28C, Trans Lyari, Near P.I.B. Colony, Karachi and No.2072, P.I.B Colony, Karachi as owned by the Defendant No.3.*
- iv) *Declare that the Defendant No.3 has no proprietary rights or interest in respect of immovable properties bearing No.2K-28C, Trans Lyari, Near P.I.B. Colony, Karachi and No.2072, P.I.B. Colony, Karachi.*
- v) *Declare that the notices of attachment issued under Section 93 of Income Tax Ordinance, 1979, issued by Defendant No.1 on the instructions of Defendant No.2 are fraudulent, illegal and without jurisdiction.*
- vi) *In the facts and circumstances allow damages of Rs.50,00,000/-.*
- vii) *Allow costs.*
- viii) *Allow any other relief/reliefs as this Hon'ble Court in the facts and circumstances deem fit."*

2. Summons were issued and Defendants filed their respective pleadings / Written Statements. The contesting Defendants are the Income Tax Officials, who are arrayed as Defendants No.1 and 2, namely, (Muhammad Ismail and Akhtar Jamil Khan) respectively, who at that relevant time, were posted as Assistant Commissioner of Income Tax, Circle D-22, Zone-D and Commissioner of Income Tax, Zone-D,

respectively. The Defendant No.3 (Muhammad Aqil) has acknowledged the claim of Plaintiffs, whereas, by order dated 29.03.2004, the Defendant No.4 (Mst. Nisar Begum) who has agitated somewhat the same grievance with regard to her house (property) bearing No.2072, P.I.B. Colony, Karachi, was transposed as Plaintiff No.2.

3. To untie certain factual intricacies, it is necessary to give a brief background of the proceeding.

4. Originally the Bank Al-Falah Limited was also impleaded as Defendant No.5, but by the order dated 09.03.2001, the erstwhile counsel for Plaintiff did not press the present suit against the Defendant No.5 (Bank Al-Falah Limited), which was deleted from the array of Defendants. Similarly, by the orders dated 29.03.2004 and 12.05.2004, the present Plaintiff No.2 (Mst. Nisar Begum) was transposed as Plaintiff No.2 who was originally impleaded as Defendant No.4, whereas, Federal Government was impleaded as Defendant No.4, as it is a controlling authority of Defendants No.1 and 2 (Income Tax Officials). Ad-interim injunction granted vide order dated 17.09.2001 to the extent that no coercive action against the suit property should be taken, was subsequently confirmed by the order dated 29.03.2004 and consequently CMA No.2652 of 2000 filed by Plaintiff stood disposed of.

5. By the order dated 21.04.2003, subject controversy as mentioned in the said order was referred to Federal Tax Ombudsman (FTO), who handed down his findings vide a decision dated 12.08.2003, which was filed in this case and was taken note of in the afore said order of 29.03.2004, while reproducing a relevant portion of the FTO decision.

6. On 22.02.2010, the Court has settled the following Issues_

- “1. *Whether the suit is maintainable in law and on facts?*
2. *Whether the suit is barred by any law?*
3. *Whether the Plaintiff is entitled to the relief sought for?*
4. *What should the Judgment be?”*

7. By consent, Syed Iqbal Rizvi, Advocate was appointed as learned Commissioner for recording the evidence.

8. Admittedly, except Plaintiff No.1 (Al-Riaz [Pvt] Limited), neither Plaintiff No.2 (Mst. Nisar Begum) nor Defendants led any evidence despite affording them ample opportunities and eventually this Court vide its order dated 13.09.2013 closed the side of Plaintiff No.2 (Mst. Nisar Begum) and Defendants to lead the evidence, while detaching another Suit No.635 of 2000 from instant *lis*.

9. The record of the proceeding is evident of the fact that since last few years, no one was representing the Defendants till 05.04.2017, when on the pointation of this Court, Mr. Saleemuddin Patoli, learned Assistant Attorney General undertook to represent Defendant No.4 (Government of Pakistan) and direct notices were issued to Defendants No.1, 2 and 3. But on subsequent dates too no one appeared on behalf of Defendants No.1, 2 and 3.

10. It is also necessary to clarify that after conclusion of the evidence and what is mentioned in the preceding paragraphs, the controversy now has been narrowed down to only one property claimed by Plaintiff No.1, viz. Plot No.2K-28C Trans Lyari, near P.I.B. Colony at Subzi Mandi, Karachi, together with construction there upon (*the subject property*).

11. Findings on the above Issues are as under:-

ISSUE NO.1 In Negative.

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|-------------|---------------|
| ISSUE NO.2 | In Negative. |
| ISSUE NO.3. | As under. |
| ISSUE NO.4 | Suit decreed. |

ISSUES NO.1 AND 2.

12. Both these Issues are legal and pertain to maintainability of present proceeding, therefore, should be addressed first.

13. The grievance of Plaintiff No.1 is that it has purchased the above subject property for setting up a Cold Storage and the same was leased out to the Plaintiff by the competent authority-Karachi Municipal Corporation (**KMC**). As averred, the subject property was purchased through auction by Plaintiff No.1 from Karachi Municipal Corporation (**KMC**) and after granting of license agreement dated 24th April, 1971 (Exhibit P/2), subsequently, a 99 years ownership lease was also executed by Karachi Municipal Corporation (**KMC**) in favour of Plaintiff No.1, which the witness of Plaintiff No.1 (PW-1)-Shahid Ishtiaq Khan has produced in his evidence as **Exhibit P/3**. The grievance of Plaintiff No.1 is that Defendant No.1 under the instructions of his Commissioner, the Defendant No.2 and in collusion with private Defendant No.3, attached the subject property by purportedly exercising powers under Section 93 of the erstwhile Income Tax Ordinance, 1979 (**the Tax Law**). It has been further claimed that the attachment order was passed in respect of the subject property, by treating the same as property owned by private Defendant No.3, as there was some tax liability (allegedly) was outstanding against the said Defendant No.3. This attachment order, which the Plaintiff No.1 has impugned in the present proceeding was issued to previous Defendant No.5 (Bank Al-Falah Limited) and to the concerned Sub-Registrar T-Division-11, City Court, Karachi and thus putting a clog on the ownership of Plaintiff No.1 vis-à-vis the subject property, though out of mala fide and as a result of unlawful

exercise of power and authority by official Defendants. The impugned attachment order dated 03.11.1998, the PW-1 has produced in evidence and has been marked as **Exhibit-13**, which was addressed to the concerned Sub-Registrar and a subsequent order dated 16.10.1999 to the Bank Al-Falah Limited is exhibited as Exhibit 12. In the impugned attachment order, the concerned Sub-Registrar has been requested to keep the transfer of the subject property 'in abeyance' till the receipt of clearance certificate of Income Tax dues.

14. Official Defendants No.1 and 2 have taken a stance in their Written Statement that Defendant No.3 (Muhammad Aqil) was an assessee of Circle D-15, Zone-D and since the Defendant No.3 (Muhammad Aqil) has declared the subject property as one of his assets, therefore, the subject property was treated as that of Defendant No.3 and in pursuance of a proceeding initiated against the Defendant No.3 by Defendants No.1 and 2 under the **Tax Law**, the subject property was attached. Similarly, it was further pleaded by the said official Defendants that the present Plaintiff No.2 (Mst. Nisar Begum) was/is the mother of Defendant No.3 (Muhammad Aqil) and owns the House-Property No.2072, P.I.B. Colony, Karachi, which was the second property, and was also attached, as allegedly, the afore referred second property was in fact a benami and was actually owned by Defendant No.3.

15. The pleading of Defendant No.3 besides that of Defendant No.1 and 2 is also taken into account merely to reach a just and fair conclusion and to decide the Issues at hand effectively and completely; notwithstanding the fact that pleadings / written statements of Defendants have to be discarded, as their pleadings do not carry evidentiary value because these Defendants failed to lead evidence. In his Written Statement, the said Defendant No.3 (Muhammad Aqil) has categorically stated that the subject property

regarding which the Plaintiff No.1 is asserting his ownership rights, does not belong to or owned by the said Defendant No.3 who further termed the proceeding against him under the Tax Law, as unlawful. The said Defendant No.3 acknowledged the ownership of Plaintiff No.1 in respect of the subject property.

16. From the pleadings of Defendants, it also transpire that the proceeding in respect of the income tax assessment was pending in the Hon'ble Supreme Court of Pakistan.

17. Mr. Masood Hussain Khan, Assistant Attorney General has argued that in terms of Section 162 of the Tax Law, the present *lis* is barred. He further stated that Plaintiff No.1 should have availed its remedy as provided in the Tax Law.

18. To a query, it has been fairly stated by learned Assistant Attorney General that against the decision / order dated 12.08.2003 passed by the Federal Tax Ombudsman (FTO), which has been produced in the evidence also, the official Defendants did not prefer any Representation (appeal), as provided under Section 32 of the Federal Tax Ordinance, 2000, before the President of Pakistan.

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 No.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 Land 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*.

20. A reasonable approach in the present case by the official Defendants would have been to withdraw their impugned attachment orders, particularly, when the Defendant No.3 has filed his Written Statement and has admitted the ownership claim of Plaintiff No.1 vis-à-vis the subject property. More so, after the decision of learned Federal Tax Ombudsman (FTO), which was never appealed against by the Defendants, latter should have taken remedial steps, but they did not. Ex-facie, it is evident from the conduct of officials Defendants that they were / are not ready to even reconsider their impugned actions relating to the impugned attachment order. Hence, it is clear that Defendants have not only acted illegally, but,

also mala fide, therefore, their actions cannot be termed as done or undertaken in good faith, which is a basic requirement for invoking Section 162-the Barring provision.

21. Secondly, Section 93 of the Tax Law under which the officials have exercised their powers for issuing the impugned attachment order, in clear terms provides that such power of attachment can only be issued against an assessee. Admittedly, Plaintiff No.1 is neither an assessee nor any tax liability was outstanding against it when the impugned attachment order was passed. The impugned actions of official Defendants is nothing, but, abuse of the authority. It is also an undisputed fact that Karachi Municipal Corporation (KMC) as well as concerned Sub-Registrar have written back to official Defendants in response to their inquiry letter dated 28.04.2001, *inter alia*, confirming the ownership / proprietary rights of Plaintiff No.1 in respect of the subject property. The replies of officials, viz. Director Land KMC and the Sub-Registrar have been produced in evidence by Plaintiff No.1 as Exhibits 10 and 11 and the same were obviously remained unchallenged. **Therefore, Issues No.1 and 2 are answered in Negative and against the Defendants and in favour of Plaintiff**, by holding that present proceeding as instituted is maintainable in law.

ISSUES NO.3 AND 4.

22. The claim of Plaintiff No.1 has supported by the documentary evidence and particularly the registered lease deed issued by Karachi Municipal Corporation (KMC) in favour of Plaintiff No.1 (Exhibit P/3), which is also a public document under Article 85 and therefore, presumption of genuineness is attached to it in terms of Article 92 of the Qanoon-e-Shahadat Order, 1984. Similarly, the crux of the grievance of Plaintiff No.1 was not controverted in the evidence as despite providing

many opportunities, the contesting official Defendants failed to cross-examine the Plaintiff No.1. The claim of Plaintiff No.1 was further fortified by the afore referred decision of F.T.O, who has taken into account the rival pleadings and arguments of parties hereto, while handing down the findings against official Defendants No.1 and 2. The relevant portion whereof would be advantageous to reproduce hereunder_

9. “From the facts stated above, it may be observed that the action taken by the department in issuing notice under Section 93 of the Income Tax Ordinance, 1979, was contrary to law, illegal, arbitrary, unreasonable, perverse and based on irrelevant grounds. It also demonstrates negligence, inattention, inefficiency and ineptitude in discharge of duties by the tax functionaries.

10. This finding be forwarded to the Registrar High Court of Sindh, Secretary Revenue Division and the parties to the complaint.”

23. Mr. Arif Khan, Advocate, representing the Plaintiff No.1, has also argued by referring to various documentary evidence, which he has produced in his evidence that highhandedness of official Defendants No.1 and 2 started when they placed a public notice in Dailies ‘Jang’ and ‘Dawn’ in their issues of March 4, 1996 for sale of the subject property through auction, regarding which the Plaintiff No.1 preferred objection dated March 9, 1996, *inter alia*, explaining the correct picture of the subject property and the ownership rights of Plaintiff No.1 with regard there to. Then after five years, the said official Defendants obtained information about the subject property from Director Land KMC and Bank Al-Falah Limited. As already mentioned in the preceding paragraphs that Director Land KMC, which is principal lessor of the subject property has in clear terms confirmed the

ownership of Plaintiff No.1 with regard to the subject property, yet official Defendants proceeded further and finally attached the subject property vide their impugned attachment letters (orders), as stated hereinabove. Public notices have been exhibited as Exhibits 4 and 5, whereas, objections thereto by the Plaintiff No.1 is Exhibit 6. All these documents in evidence produced by PW-1 remained unchallenged.

24. After perusal of Section 93 of the Tax Law, it is quite apparent that the procedure mentioned therein was never adhered to by the official Defendants while passing the impugned attachment order in respect of the subject property, thus, the impugned attachment order in respect of the subject property is without any legal justification and liable to be set at naught in this proceeding.

25. The above discussion leads to the conclusion that the Plaintiff No.1 is entitled to the reliefs claimed to the extent mentioned in following paragraphs. I accordingly declare that the subject property-Plot No.2K-28C Trans Lyari, near P.I.B. Colony at Subzi Mandi, Karachi, was / is owned by Plaintiff No.1, and Defendants No.1 and 2 illegally, wrongfully and by excessive use of power and authority have attached the subject property.

26. The only issue now remains is the relief of damages as claimed by the Plaintiff No.1.

27. Although the entire evidence of Plaintiff No.1 remains unchallenged, but that does not mean that Court is bound to award damages as claimed. Quantum of damages would have been different if Plaintiff No.1 had led evidence about the losses it sustained, including the opportunity loss, on account of the impugned attachment order, 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 mal-administration, has been proved. No doubt, due to impugned action, the Plaintiff No.1 has been prevented at least to a certain degree, from use and enjoyment of the subject property. It is not necessary that there should be a physical taking over a property or actual dispossession of its owner, in order to justify that an owner has been prevented to use and enjoy the same, but if his ability to use and enjoy his property is obstructed, even that can be termed as expropriation of property. In this view, I am guided by the Judgment handed down by the Hon'ble Supreme Court in **Shoukat Ali Mian case** (supra) relevant portion whereof would be beneficial to reproduce herein below_

“The above treatise and the judgment of the US Supreme Court indicate that taking over of property may take place even though there is no physical taking over but the property is damaged or impaired which either prevents its use or reduces its usefulness to a level which may become non-profitable to an extent unbearable as a normal risk of the subject-matter involved.”

28. The reported decisions of Hon'ble Apex Court (ibid), cited by Mr. Arif Khan, Advocate also provides an answer to this issue. In these cases, the Hon'ble Supreme Court has expounded the principle of tortious liability primarily in the context of malicious prosecution, but, dicta is applicable to the facts of present *lis*, which though is not strictly a case of malicious prosecution, but persecution, that too by the Government functionaries. The Defendant No.4 (**Secretary Finance**), at least, should have addressed the grievance of Plaintiffs after the decision of Federal Tax Ombudsman (FTO) against the official Defendants No.1 and 2. The gist of dicta of the Apex Court's decision is that general damages can be awarded to compensate the injured. In the **Niaz and others case** (supra) the scope of

tortious liability has been further developed by the Hon'ble Supreme Court, while holding that even if the prosecution is not entirely mala fide but continuance of such prosecution after it was discovered that the facts upon which it was based were not true, may give rise to claim for damages. This is what happened in this case; Defendants even if have had issued the impugned attachment order because of some confusion or error, could have easily withdrawn the same after getting confirmation from the officials, viz. Karachi Municipal Corporation (KMC) and Sub-Registrar (Properties), that the subject property is owned by Plaintiff No.1 and private Defendant No.3 has no nexus with the same. Not only this, the said private Defendant No.3 (Muhammad Aqil) in his Written Statement has categorically acknowledged the claim of Plaintiff No.1, which was further clarified in the above referred Order of the learned Federal Tax Ombudsman (FTO). It is a case of bad governance also, on the part of Defendant No.4-Secretary Finance (Government of Pakistan). The acts and conduct of the official Defendants are oppressive, though the latter claimed to have exercised their authority under the Tax Law. The pronouncement of a celebrated decision of Hon'ble Apex Court in the **Independent Newspapers Case** (Supra) is applicable in the present case, wherein it was held, that, "*excessive use of lawful power is itself unlawful.*"

There is another inescapable aspect of the case. In terms of Section 121 of the Tax Law, an owner of a property is exposed to criminal prosecution if the latter attempts to frustrate an attachment order, inter alia, by disposing of the property. In the same way, the official Defendants are also saddled with an implied obligation in the nature of a public duty, that they shall act in a fair, just, reasonable and diligent manner and not callously, as they have acted. Thus, official Defendants should also be held liable for their impugned acts of wrongfully attaching the subject property in the manner discussed herein above.

29. In these circumstances, a reasonable compensation for Plaintiff No.1 would be Rs.15,00,000/- (Rupees Fifteen Hundred Thousand Only), which should be payable by official Defendants No.1, 2 and 4 (Government of Pakistan). Defendant No.4 is also held liable, 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 No.1.

In the case of *Karachi Transport Corporation (supra)*, it is inter alia, **held**, that employer is always vicariously liable for acts of its employees performed in course of duties. The Issue No.3 is answered in the above terms.

30. The upshot of the above is that the present suit is decreed in the following terms_

- (i) I hold and declare that the Plaintiff No.1 is a lawful owner of the subject property viz. Plot No.2K-28C Trans Lyari, near P.I.B. Colony at Subzi Mandi, Karachi, together with construction there upon.
- (ii) Impugned act of official Defendants No.1 and 2 to attach the subject property was / is illegal and void ab-initio, hence, set aside and the impugned attachment order in respect of the subject property stands removed/withdrawn.
- (iii) The Defendant No.4-Secretary Finance is directed to initiate disciplinary proceeding against the said Defendants No.1 and 2 forthwith.
- (iv) The Defendants No.1, 2 and 4 are jointly and severally liable to pay damages to the tune of Rs.15,00,000/- (Rupees Fifteen Hundred Thousand), to Plaintiff No.1.

- (v) Considering the peculiar facts of the case, the Plaintiff No.1 is also awarded costs of the proceeding.

Dated: _____

JUDGE

M.Javid.PA