IN THE HIGH COURT OF SINDH AT KARACHI.

C.P No. D-71 of 1994

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Muhammad Iqbal Kalhoro

Gul Ahmed Textile Mills Ltd. _____ Petitioner

Versus

The Collector of Customs,
(Appraisement) & 2 others _____Respondents

Dates of hearing:	**21.09.2015, 30.11.2015, 07.03.2016, 13.03.2017 & 26.03.2018.**
Date of Judgment:	**19.07.2018.**
Petitioner:	**Through Mr. Rashid Anwar along with Habib Qazi Advocates.**
Respondents No.1 & 2:	**Through Ms. Masooda Siraj Advocate.**
On Court Notice:	**Mr. Asim Mansoor Khan Deputy Attorney General & Mr. Muhammad Yousuf AAG.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This Full Bench has been constituted pursuant to Orders dated 25.08.2005 passed by the then Hon'ble Chief Justice of this Court, on a reference made by a learned Division Bench of this Court through Order dated 01.12.2003, wherein, the learned Division Bench was unable to concur with the decision reported as ***Rahat Hussain v. Collector of Customs (Prev.) Customs House Karachi and 2 others*** **(2003 CLC 1860)**, in which

it has been held that failure to join Federation of Pakistan in a Constitutional Petition renders it to be defective and liable to be dismissed. The learned Division Bench in its aforesaid order dated 1.12.2003, in view of the case reported as ***Multiline Associates v. Ardeshir Cowasjee*** **(PLD 1995 SC 423)**, made a reference for constituting a full bench to resolve the issue as according to the learned Division Bench they intended to differ from the view ordained in the case of ***Rahat Hussain (supra).***

2. Precisely the facts are that Petitioner imported a consignment of gas generating sets from USA for its Textile Unit, which at the relevant time was exempted from all sorts of custom duties including *Iqra Surcharge* pursuant to SRO 854(I)/91 dated 26.08.1991. Thereafter through SRO 483(I)/93 dated 14.06.1993 the exemption of *Iqra Surcharge* was withdrawn by making an amendment in SRO 854(I)/91. Subsequently SRO 560(I)/03 dated 04.07.1993 was issued through which the exemption from levy of *Iqra Surcharge* on machinery as provided in SRO 854(I)/91 was restored in the manner; that consignments of which Bill of Entry for Home consumption or Ex-bond was filed between 14.06.1993 and 30.06.1993, would be entitled to such exemption from the levy of *Iqra Surcharge*, whereas, the Petitioner filed its Bill of Entry on 28.06.1993, in terms of Section 79(2) of the Customs Act, 1969, which caters a situation permitting filing of Bill of Entries before presentation of Import General Manifest (IGM). However, the IGM in this case was filed / received subsequently on 26.07.1993, hence the exemption to the extent of *Iqra Surcharge* was denied and instant Petition was filed by only impleading the Collector of Customs and Deputy Collector of Customs (Appraisement), where, Federation of Pakistan was not made a party.

3. Learned Counsel for the Petitioner has contended that the action impugned is of Collector of Customs independently, and therefore, Federation of Pakistan was not required to be mandatorily impleaded as a Respondent; that in fact FBR/Federation of Pakistan had already issued a Notification in favour of the Petitioner, whereas, Collector of Customs had misinterpreted the same, hence instant Petition was filed; that provisions of Section 79 CPC or for that matter Article 174 of the Constitution, are not strictly applicable under the Constitutional Jurisdiction and it is not necessary that in each and every Petition, the Federation be arrayed as a Respondent; that the case of ***Rahat Hussain (supra)*** is not a good law, as in that matter, reliance was placed on a Judgment of Hon'ble Supreme Court, which in fact pertains to a Civil Suit and not a Constitutional Petition; that in the judgment reported as ***Ardeshir Cowsjee v. Province of Sindh*** (**2002 CLC 684)**, which is earlier in time, a contrary view was taken, which has not been considered in the case of ***Rahat Hussain (supra)***, and therefore, it is *per incuriam*; that at the most with the permission of the Court, the Federation can be jointed as a party but on this account, Petition cannot be dismissed; that in terms of Section 120 CPC, the provisions of CPC are not strictly applicable on a High Court; that powers of a Constitutional Court are not restricted in these type of situations; that discretion vests with this Court, which must be exercised in dispensation of justice and a party must not be non-suited on technical grounds, and therefore, in view of these submissions, learned Counsel prayed to answer the reference by holding that instant Petition is maintainable and case of ***Rahat Hussain (supra)*** is not a good law.

4. On the other hand, learned Counsel for Respondents No.1 & 2 has contended that since exemption is being sought, Federation was a necessary party and its non-impleadment makes the petition incompetent, which must be dismissed; that belatedly and after constitution of this Full Bench even permission cannot be granted to implead Federation; that all orders of this Court under the Constitutional Jurisdiction are to be honoured and implemented by the Federation, therefore, it is mandatory that Federation be impleaded as a Respondent in all Constitution Petitions and in support she has relied upon the cases of ***Rahat Hussain (supra)***, ***Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi and others*** (**2010 SCMR 115**) ***and Narahari Mohanti and others v. Ghanashyam Bal and others*** **(AIR 1963 Orissa 186)**.

5. Learned Deputy Attorney General, on Court notice, has contended that in the given facts the main grievance of the Petitioner is only confined against the Collector of Customs and not the Federation of Pakistan, therefore, in his view the Petition is maintainable and it is not mandatory to implead the Federation as a Respondent in each and every constitutional Petition; that in terms of Serial No.21, Clause 7 and Serial No.35, Clause 5 of Schedule-II to the Rules of Business 1973, the Revenue Division is permitted to be represented by its own appointed advocates through Ministry of Law and Justice Division, and therefore, in cases pertaining to and against Revenue Division, a Petition is competent without impleading the Federation of Pakistan as a Respondent; that in terms of Article 199 and the definition of **"Person"** therein, when an aggrieved person seeks direction for enforcement of any law against any Officer, who falls

within the definition of **"Person",** then it is not necessary that Federation is impleaded as a Respondent and it is only in cases, wherein, the orders and/or actions of the Government have been questioned, the Federation is to be impleaded as a Respondent. In support he has relied upon the case reported ***Abdul Aziz and others v. Sardar Muhammad Latif Khan and others*** (**PLD 1968 (AJ & K) 7),** ***Narahari Mohanti and others v. Ghanashyam Bal and others*** **(AIR 1963 Orissa 186)**, ***Rasheed Ahmad v. Federation of Pakistan*** **(PLD 2017 SC 121)** ***Noorul Hassan v. The Federation of Pakistan*** **(PLD 1955 Karachi 200),** ***Muhammad Ismail Chaudhry v. The Federation of Pakistan ANI*** (**PLD 1954 Sindh 273),** ***Messrs Bana Agencies through Proprietor v. Secretary Revenue Division Federal Board of Revenue, Islamabad*** **(2008 PTD 742),** ***Ardeshir Cowsjee v. Province of Sindh*** (**2002 CLC 684),** ***Divisional Superintendent Post Offices Gujrat V. Rehman Khan Ex-Sub-Postmaster*** **(PLD 1994 SC 647),** ***Khurshid Ashraf v. Aftab Ashraf*** **(2018 MLD 65),** ***(Vidur Impex and Traders v. Tosh Apartments*** **(2013 SCMR 602)** **&** ***Collector of Sales Tax v. Muhammad Tahir*** **(2005 SCMR 1091).**

6. We have heard all the learned Counsel as well as learned DAG and perused the record. The facts have been discussed hereinabove precisely, and it appears that the primary grievance of the Petitoner is only to the extent that Collector of Customs is misinterpreting the amending SRO No. 560(I)/1993 dated 4.7.1993 by denying benefit of exemption from *Iqra Surcharge* for which bill of entry, has though been filed on 28.6.1993 i.e. within the stipulated time as provided in the said SRO; but on the ground that the IGM of the said bill of entry was filed subsequently on 26.07.1993. Since we are not supposed to decide

the entire merits of the case, therefore, it is not necessary to appreciate the entire facts in detail. However, in short, the Petitioner's case is that in the given circumstances, Federation of Pakistan was not a necessary party and therefore, its non-impleadment does not render instant Petition as incompetent. It appears that while hearing this Constitution Petition a learned Division Bench of this Court as reflected from its order dated 1.12.2003, was confronted by the Counsel for Collector of Customs with the judgment in the case of ***Rahat Hussain (supra)*** wherein, the another learned Division Bench of this Court dismissed the Petition on the ground that Federation of Pakistan was not joined as a Respondent. The relevant finding of the learned Division Bench in the case of ***Rahat Hussain (supra)*** is as under:-

> "Apart from the above defect, this Constitutional petition is also defective on another ground. The petitioner has challenged the order of Wafaqi Mohtasib which required to join Federation of Pakistan as one of the respondents in the petitioner. Failure of the respondent to join Federation of Pakistan as a respondent had rendered the petition as defective liable to be dismissed. If any, authority is required in support of the above proposition the same is available in the judgment of Supreme Court in the case of Haji Abdul Aziz v. Government Balochistan 1999 SCMR 16."

7. The learned Division Bench in the instant matter, while passing its order dated 1.12.2003, however, could not convince itself with the aforesaid finding in the case of ***Rahat Hussain (supra)*** as according to the learned Division Bench in the case of *Ardeshir Cowasjee (supra)* a somewhat contrary view had already been taken whereas, in their view it is not that in each and every case Federation of Pakistan be joined as a Respondent and it is materially dependent on the facts of each case independently. It would be advantageous to refer to the observations of learned Division Bench as recorded in its order dated 1.12.2003, while making reference to the Hon'ble Chief Justice for

constitution of a full bench to resolve the contrary views of two different benches of this Court which reads as under:-

> "A Division Bench of this Court in the case of Ardeshir Cowsjee vs. Province of Sindh 2002 CLC 684 at page 688 has commented upon the above Article as follows:-
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> > "It can be seen that the persons to whom a direction can be issued or whose action or order can be declared unlawful and of no legal effect include only the persons "performing functions in connection with the affairs of Federation, a Province or a local authority." This obviously excludes persons not performing such functions. This category of the persons, to whom directions or orders can be issued in exercise of this Constitutional provision, has further been squeezed by the exclusions mentioned in the definition of "person" given in clause (5) of Article 199. A person not performing functions in connection with the affairs of Federation a Province or a local authority is not, thus, subject of this Constitutional provision and no direction to, or order against, him can be made in a Constriction petition."
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> In the present case the petitioners claim is that the respondents Collector of Customs and Assistant Collector of Customs are denying it the benefit of the notification issued by the Federal Government. In our considered opinion, the Collector of Customs and the Assistant Collector of Customs are persons performing functions in connection with the affairs of the Federation and they will be amenable to the directions of this Court under Article 199 of the Constitution. This is further exemplified from the definition of the term "person" as given in clause (5) of Article 199 where the ambit of the term person has been extended to include any authority of or under the control of Federal Government, undisputedly the Collector of Customs and the Assistant Collector of Customs are the authority of Customs of or under the control of the Federal Government and relief against them can be claimed in a petition under Article 199 of the Constitution independent of the Government more so when no grievance is made nor any relief is sought against the Government.
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> **As a sequel of above discussion, with all the respects at our command and due difference and with great humility, we beg to differ with the profound opinion given in the case of Rahat Hussain (supra) particularly to the rule laid down in its Para as quoted above as in our humble view, we find that it is not necessary nor a requirement of law that in every petition under Article 199 of the Constitution Government be also made a party.**
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> Following the dictum laid down in the case of Multiline Associates v. Ardeshir Cowsjee (PLD 1995 SC 423), we propose that a full bench for settling the question on which difference has arisen may be constituted. The office is directed to place the matter before the Hon'ble Chief Justice for this purpose."

8. From perusal of the aforesaid observations, it appears that the learned Division Bench in this matter after a threadbare discussion as well as examining the provisions of Article 199 of the Constitution and the case law on the subject came to the conclusion that the Collector of Customs is performing functions in connection with the affairs of the Federation and is amenable to the directions of this Court under Article 199 of the Constitution. It has been further observed that it is further exemplified from the definition of "person" as given in Article 199(5) of the Constitution, wherein, person has been extended to include any authority of or under the control of Federal Government, and according to the learned Division Bench the Collector of Customs is "an authority of and or under the control of the Federal Government" and relief can be claimed against the Collector of Customs through a petition under Article 199 of the Constitution independent of the Government / Federation, more-so when there is no specific grievance or relief against the Government. On a careful perusal of the above finding of the learned Division Bench, we are in agreement with such observations of the learned Division Bench and are further of the view that the law settled in the case of ***Rahat Hussain (supra)*** is not to be applied in each and every Constitutional Petition without examining the facts of a case. We are further of the view that in fact in the case of ***Rahat Hussain (supra)*** the learned Division Bench had placed reliance on the case of ***Haji Abdul Aziz V. Government of Balouchistan*** **(1999 SCMR 16)**, however, with utmost respect and humility at our command, we may observe that such reliance was also inappropriate inasmuch as the Hon'ble Supreme Court in that case was dealing with a matter which pertained to a Civil Suit, and not a Constitutional Petition. It is of utmost importance to keep in mind the difference in a Civil Suit and its competency in terms of Civil Procedure

Code, as against maintainability of a Constitutional Petition under Article 199 of the Constitution, while applying the ratio of the case in ***Haji Abdul Aziz (Supra)***. The peculiar difference in the facts of that case is itself a valid reason and ground to examine the issue and decide that whether the law settled by the Hon'ble Supreme Court would at all be applicable or not. There is another aspect of the matter as well which needs to be considered by this Court. The actual issue in the case of ***Haji Abdul Aziz (Supra)*** was not that Federation or Province was not impleaded; but was impleaded with a wrong nomenclature, though a relief was being sought against the Government. This in our view has also escape the attention of the learned Division Bench in the case of ***Rahat Hussain (supra)***. As reflected from perusal of the judgment in the case of ***Haji Abdul Aziz (Supra)***, the Suit was filed against the Government of Baluchistan through Deputy Commissioner, whereas, law requires that it ought to have been through concerned Secretary of the Ministry or Department. Therefore, in all fairness, in our considered view while relying upon this judgment in the case of ***Rahat Hussain (supra)***, the facts have not been appreciated properly. In the instant matter it is not the case of the respondents that Federation has been impleaded through a wrong nomenclature; in fact, it has not at all been impleaded, and petitioner's case is that its impleadment was not mandatory in the given facts as "Collector of Customs" is an authority of and or under the control of the Federation of Pakistan. On this count as well, in our considered view, the ratio of ***Haji Abdul Aziz (Supra)*** has been wrongly applied in the case of ***Rahat Hussain (supra)***; hence, is *per-incuriam*.

9. It will also be advantageous to refer to the provisions of Section 79 CPC and Article 174 of the Constitution of Islamic Republic of Pakistan which reads as under;

> **"⌈79. Suits by or against the Government.** ---⌈***⌋In a suit by or against the ⌈Government⌋ the authority to be named as plaintiff or defendant, as the case may be, shall be—
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> (a) in the case of a suit by or against the Federal Government, ⌈***⌋⌈Pakistan⌋; in the case of a suit by or against a Provincial Government, the Province; and ⌈*** ⌋"
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> **"174. Suits and proceedings.** The Federation may sue or be sued by the name of Pakistan and a Province may sue or be sued by the name of the Province."

10. In terms of Section 79 CPC, it is provided that in a Suit by or against the Government the authority to be named as Plaintiff or Defendant as the case may be, shall be in the case of a Suit by or against the Federal Government (Pakistan) and in the case of a Suit by or against a Provincial Government (Province). Similarly in Article 174 of the Constitution it has been provided that the Federation may sue or be sued by the name of Pakistan and a Province may sue or be sued by the name of Province. When both these provisions are read, it appears that they provide merely a nomenclature while suing the Federation or the Province. Notwithstanding this, it may further be observed that though the provisions of CPC are applicable as and when needed under the Constitutional Jurisdiction of this Court in terms of Article 199 of the Constitution; however, such provisions are not *stricto senso* applicable in each and every situation. And in our view there is a valid reason for this as well. In a Civil Suit after its admission, summons as prescribed are issued against all defendants to file their written statements. Now if some relief is being sought against Government, without its proper impleadment as a Defendant, there

would be no proper assistance or representation on its behalf, rather it would be a case of Ex-parte proceedings for all practical purposes, whereas, it is not so in a Constitutional Petition, as invariably, the Attorney General's office is put to notice through Deputy Attorney General or Standing Counsel. Similarly in cases against the Provincial Government, the Advocate General's office is put to notice. And this is also done in cases wherein the respective Government is not even a party. This is Courts discretion and to have proper assistance. And therefore, the provisions of CPC are not to be strictly applied in the manner as contended by the respondent's Counsel. These are applicable as enabling provisions and under no circumstances while exercising Constitutional Jurisdiction the Court is bound to apply such provisions so as to non-suit a party; or for that matter defeat the purpose of dispensing justice under the Constitutional Jurisdiction. The peculiar facts of each case are to be kept in mind and must always be given priority while dealing with any such situation. Be that as it may, in the matter of entertainment of the petitions and grant of relief in equitable and discretionary jurisdiction, it would not be necessary to follow in entirety the technicalities of the law but also by the substance of the controversy when the proceedings would appear not tainted with mala fides of the facts.[1] In this case prima facie the grievance of the Petitoner is not against the Federation of Pakistan, but it is the case of the Petitoner that Collector of Customs is misinterpreting the Notification already issued in favour of the Petitioner. Therefore, in the given facts joining the Federation as a Respondent is not a necessity and only at the most a procedural lapse which must not be taken as a ground to non-suit the Petitioner.

[1] Ardedshir Cowasjee v Karachi Building Control Authority (PLD 2004 SC 70)

11. A learned Division Bench of this Court in the case of ***Muhammad Younus Shaikh v Corex Enterprises*** (**2007 MLD 508**), had the occasion to examine somewhat similar facts, wherein, a learned Single Judge of this Court while hearing a Civil Suit on an application under Order VII Rule 11 CPC had rejected the plaint on the ground that only the Collector of Customs was arrayed as a Defendant instead of also joining Federation of Pakistan as a party to the Suit. In appeal the learned Division Bench repelled such argument and was pleased to hold as under:-

> 2A. In the context of such short controversy involved in the present appeal, we have heard learned counsel for the parties and perused the case record, which reveals that the two judgments referred and relied by the learned Single Judge, for enforcing the applicability of section 79, C.P.C. and Article 189 of the Constitution, to the facts and circumstances of the instant suit, were based on different premises, inasmuch as in both these cases the question of maintainability of suits was taken into consideration, where the subordinate functionaries of the Provincial/Federal Government were impleaded as parties, without joining Province/Federation as party to the proceedings, while in the present suit the Collector of Customs (Appraisement) was joined as defendant No.2 in the suit, being one of the officers of a statutory body. Thus joining of Federation of Pakistan was not necessary. Moreover, it some technical objection was coming in the way of the appellant as regards maintainability of the suit, following the principle laid down in the case of Wasim v. HAICO and 2 others (2002 CLD 1623) the proper course available for the Court was to afford due opportunity to the concerned party to overcome such technical defect, instead of ordering rejection of plaint in the suit for that reason. An interesting aspect gathered from the case of Wasim (surpa) is that in this ease also same learned counsel (Mr. Raja Muhammad Iqbal) has made reference to these cases in support of his contention with reference to the provisions of section 79, C.P.C. but such contention was not accepted by the Court.
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> 3. The submission of Mr. Sultan Ahmed Shaikh with reference to the provisions of Order, I Rule 9, C.P.C. is also apt and convincing, which specifically provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. This view also finds support from the case of Central Government of Pakistan and others v. Suleman Khan and others (PLD 1992 SC 590). Relevant observations read as under:

> "Order I, rule 9, C.P.C. gives also, very strong support for the foregoing approach regarding interpretation and application of Order I, Rule 10, C.P.C. This provision (Rule 9) is in a mandatory negative form; namely, that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties are concerned."

12. Insofar as reliance on the case of ***Narahari Mohanti & others (Supra)*** of the Orissa High Court by the Respondent's Counsel is concerned, it appears that the same is in fact against the arguments so advanced by the learned Counsel inasmuch as in that case the First Appellate Court while setting aside the order of the trial Court had remanded the Suit for giving an opportunity to the Plaintiff to implead the Government as a party and against that order a IInd Appeal was filed which was converted into a Revision, and ultimately the Revision was dismissed. Resultantly, the order of the Ist Appellate Court for remanding the matter and giving an opportunity to implead Government / Collector as a Defendant was upheld and therefore, this does not lend any support to the arguments so advanced by the Respondent's Counsel.

13. In view of hereinabove facts and circumstances of this case, we are of the view that the observations and the finding of the learned Division Bench in its order dated 1.12.2003 whereby, they were unable to concur and agree with the law settled in the case of ***Rahat Hussain (Supra)*** is correct and this full bench is also of the same view and therefore, the Reference in question is answered by holding that it is not mandatory / nor necessary nor a requirement of law to always implead Federation of Pakistan / Province as a Respondent in a Constitutional Petition, and it is always dependent on the facts and circumstances of the case as well as the relief sought through such

petition for which the Court seized of the matter is competent to pass an appropriate order viz. a viz. its maintainability, and further the law settled in the case of ***Rahat Hussain (Supra)*** is only to be applied in this manner and not otherwise.

14. The Reference stands decided as above by holding that instant petition is maintainable in its present form. Office is directed to place this matter for regular hearing immediately on priority basis as this Petition pertains to the year 1994.

Dated: __07.2018

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