

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT NO. 1310 / 2018

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No. 9574/2018.
For office objection regarding maintainability of Suit in view of
Judgment of Hon'ble Supreme Court dated 27.6.2018 passed in Civil
Appeal No.1171/2017 & Other connected matters.

07.08.2018.

Mr. Haider Ali Khan Advocate for Plaintiff.
Dr. Shah Nawaz Advocate for Defendant.
Mr. Umar Zad Gul Kakar DAG.

While confronted with the office objection regarding maintainability of this Suit pursuant to Judgment of the Hon'ble Supreme Court dated 27.06.2018 passed in Civil Appeal No. 1171/2013 requiring deposit of 50% of the disputed amount, learned Counsel for the Plaintiff submits that after issuance of impugned Notice an order in original has been passed against the Plaintiff, which has been appealed before the Commissioner Appeals and in terms of Section 48 of the Sales Tax Act, 1990, after making despot of 10% of the disputed amount, stay order has been issued; therefore, to the extent of interim relief the listed application has served its purpose and be dismissed as infructuous, whereas, the main Suit be allowed to be proceeded on merits as the Plaintiff has also impugned and challenged the jurisdiction of the Additional Commissioner to issue the impugned Notice.

Heard.

As to the listed application, the same stands dismissed as not pressed.

As to maintainability of Suit, it may be observed that since the Plaintiff has already availed alternate remedy as provided under the Sales Tax Act, 1990, by filing an appeal, after issuance of summons and notices in this Suit, this Suit in fact has become practically infructuous. Even otherwise it is settled law that if a party once opts to avail the alternate remedy provided under the statute, then even the jurisdiction of this Court under the Constitution cannot be ordinarily invoked; then perhaps, there appears to be no justifiable reason to entertain instant Suit under the (now restricted) Civil Jurisdiction of this Court. There is a plethora of case law of this Court as well as the Hon'ble Supreme Court of Pakistan, that if any person resorts to a statutory remedy against an order, then the same could not be abandoned or by passed without any valid and reasonable cause and such person cannot file a Constitutional Petition challenging the same action. I am afraid that plaintiff's Counsel has not been able to put forward any valid or reasonable cause to justify continuance of instant Suit except that jurisdiction of the Additional Commissioner has also been challenged. Again it is trite law that the question of jurisdiction, if any, should be first raised before the forum first under the hierarchy. In this context it would be advantageous to refer to the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Vs. Hamdard Dawakhana (Waqf) Karachi** reported in **PLD 1992 SC 847**, wherein the Hon'ble Supreme Court held that such practice, in cases when statute provides alternate and efficacious remedy up to the High Court, invoking Constitutional Jurisdiction of the Courts cannot be approved or encouraged. In the above judgment the Hon'ble Supreme Court had relied upon the following observation of the Court in C.A. NO. 79-K/1991 which was as follows:-

“We may now revert to the question, whether the appellant was justified to file above Constitution petition against the order of the Tribunal instead of invoking section 136 of the Ordinance for making a reference to the High Court. According to Mr. Rehan Naqvi, a reference under the above provision would not have been adequate and efficacious remedy as it would have taken years before it could have been heard. The same could be true for a Constitution Petition. The tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of the High Court has developed lately, which is to be discouraged. However, in certain cases invoking of Constitutional jurisdiction of the High Court instead of availing of remedy provided for under the relevant statute may be justified, for example when the impugned order/action is palpably without jurisdiction and/or mala fide. To force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper.

In the present case, the appellant had opted to avail of the hierarchy of forums provided for under the Ordinance upto the stage of filing of appeal before the Tribunal and, therefore, it would have been proper on the part of the appellant to have invoked section 136 of the Ordinance for making a reference to the High Court instead of filing a Constitutional petition. In our view, once a party opts to invoke the remedies provided for under the relevant statute, he cannot at his sweet will switch over to Constitutional jurisdiction of the High Court in the mid of the proceeding in the absence of any compelling and justifiable reason.”

Similarly, the same view has been followed by the Hon’ble Supreme Court in the case of ***The Commissioner of Income Tax Karachi and 2 others Vs. Messrs N.V. Philips Gloeilampfabriaken*** reported in **PLD 1993 SC 434**. This Court in the case of ***Messrs Pak-Saudi Fertilizers Ltd. vs. Federation of Pakistan*** and others reported in **2002 PTD 679** after exhaustively examining the judgments of various Courts came to the conclusion, that a person cannot be permitted to pursue a petition before this Court and so also avail the alternate remedies at the same time. The relevant portion of the judgment is reproduced as under:-

“In the present case the petitioner has filed the petition after finalization of the assessment order. Even the first appeal was filed by it during the pendency of its petition. Pressing into service the principle of law enunciated in Banarsi Dass (cited supra) the petition is dismissed as not maintainable. As regards the challenge to framing of the main assessment order it is clarified that nothing in this judgment shall preclude the petitioner from pursuing his departmental remedies. The appellate authorities are

directed to dispose of appeals strictly in accordance with law without any instructions or directions from any superior or other authority.”

The same view has been followed by a Division Bench of this Court in the case of ***Arshad Hussain Vs. Collector of Customs and 2 Others (2010 PTD 104)*** and ***M/s Bilal International V/s Federation of Pakistan & others (2014 PTD 465)***.

Recent view of the Hon'ble Supreme Court is also on the same line as observed in the case of ***Indus Trading and Contracting Company v Collector of Customs (Preventive) Karachi (2016 SCMR 842)*** which reads as under;

4. Before examining the merits of the case, we find it necessary to state that at the stage when regulatory duty was charged, the appellant ought to have challenged the same before the forum provided under the Customs Act. Instead of doing that, the appellant invoked the jurisdiction of the High Court under Article 199(1) of the Constitution of Pakistan. Ordinarily, the jurisdiction of the High Courts under Article 199 of the Constitution should not be invoked where alternative forum under a special law, duly empowered to decide the controversy is available and functioning. Where a special law provides legal remedy for the resolution of a dispute, the intention of the legislature in creating such remedy is that the disputes falling within the ambit of such forum be taken only before it for resolution. The very purpose of creating a special forum is that disputes should reach expeditious resolution headed by quasi-judicial or judicial officers who with their specific knowledge, expertise and experience are well equipped to decide controversies relating to a particular subject in a shortest possible time. Therefore, in spite of such remedy being made available under the law, resorting to the provisions of Article 199(1) of the Constitution, as a matter of course, would not only demonstrate mistrust on the functioning of the special forum but it is painful to know that High Courts have been over-burdened with a very large number of such cases. This in turn results in delays in the resolution of the dispute as a large number of cases get decided after several years. These cases ought to be taken to forum provided under the Special law instead of the High Courts. Such bypass of the proper forum is contrary to the intention of the provisions of Article 199(1) of the Constitution which confers jurisdiction on the High Court only and only when there is no adequate remedy is available under any law. Where adequate forum is fully functional, the High Courts must deprecate such tendency at the very initial stage and relegate the parties to seek remedy before the special forum created under the special law to which the controversy relates. We could have relegated the appellant to seek remedy before the appropriate forum, however, as the dispute in the present case is now more than twenty years old, we for this reason only as matter of indulgence, proceed to decide the controversy on its merits.

A Division Bench of this Court, in the case of **Messrs Maritime Agencies (Private) Ltd, v. Assistant Commissioner of S.R.B.** and others reported as **2015 PTD 160**, has been pleased to dismiss petition on the point of maintainability in the following terms:--

"6. The tendency to impugn the Show-Cause Notices issued by the Public Functionaries under taxing statutes, before this Court under Article 199 of the Constitution, and to casually bye-pass the remedy as may be provided under a Special Statute is to be discouraged as it tends to render the statutory forums as nugatory. Moreover, if the proceedings initiated under Special Taxing Statutes do not suffer from jurisdictional error or gross illegality the same are required to be responded and resolved before the authority and the forums, provided under the Statute for such purpose, whereas, any departure from such legal procedure will amount to frustrate the proceedings which may be initiated by the public functionaries under the law and will further preempt the decision on merits by the authorities and the forums which may be provided under the statute for such purpose. In the instant case a Show-Cause Notice has been issued by the respondent who admittedly has the jurisdiction over the case of the petitioner, wherein, certain queries have been made and the petitioner has been provided an opportunity to respond to such Show Cause. Petitioner is at liberty to file detailed reply and to raise all such legal objection, as raised through instant petition, which shall be decided by the respondent strictly in accordance with law, after providing complete opportunity of being heard to the petitioner with particular reference to the provisions of Section 3 of Sindh Sales Tax on Services Act, 2011, read with Rule 32 of the Sindh Sales Tax on Services Rules, 2011 as argued by the learned counsel for the petitioner before us. If the petitioner is aggrieved by any adverse decision by the respondent in this regard, a remedy as provided under the law in terms of Section 57 of Sindh Sales Tax on Services Act, 2011 can be availed by filling an appeal before the Commissioner (Appeals) Sindh Revenue Board. Similarly an appeal is also provided against the order of CIT (Appeals) in terms of Section 61 before the Appellate Tribunal, whereas, after the order of Appellate Tribunal, a Reference can also be filed before this Court in terms of Section 63 of the Sindh Sales Tax on Services Act, 2011 in respect of questions of law which may arise from the order of the Tribunal. Since in the instant case, no final adjudication on the proposed Show-Cause Notice has been made so far by the respondent and merely a Show-Cause Notice has been issued, therefore, we are of the view that instant petition is pre-mature, whereas no cause of action has accrued to the petitioner which may justify the filing of instant petition."

In view of such position, this Suit having become infructuous is accordingly dismissed as infructuous. The plaintiff is at liberty to pursue the alternate remedy already availed under the Sales Tax Act, 1990.

J U D G E

ARSHAD/