

IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 1178 of 2017

Plaintiff: **Muhammad Asim through Mr. Mushtaq Hussain Qazi Advocate.**

Defendant No. 2 to 4: **The Sindh Revenue Board through Mr. Ayaz Sarwar Jamali Advocate.**

Defendants No. 5: **The Commissioner Inland Revenue through Mr. Arshad Ali holding brief for Mr. Ameer Bakhsh Metlo Advocate.**

For hearing of CMA No. 6568/2017.

Date of hearing: **07.03.2019.**
Date of order: **07.03.2019.**

O R D E R

Muhammad Junaid Ghaffar, J. This Suit has been filed by the Plaintiff seeking the following relief(s):-

- a) declare that the impugned hearing notice dated 27.02.2017 is patently arbitrary, illegal, unconstitutional, unjust, without lawful jurisdiction, mala fide, ab initio and of no legal effect;
- b) declare that present proceedings initiated by the defendants against the plaintiff are contrary to the directions of this Hon'ble Court contained in order dated 02.12.2016 passed in Constitution Petition No. D-5624/2014 filed by the plaintiff against the defendants;
- c) declare that in terms of the above said order of this Hon'ble High Court the defendants have to discharge their initial burden to prove that the plaintiff is engaged in the providing and rendering of services as Fashion Designer to anyone else for manufacture and sale;
- d) declare that the plaintiff is engaged in the business manufacturing of textiles and after designing the same, eventually selling / launching cloths / lawns in the name and style of "Asim Jofa" in the market;
- e) declare that the plaintiff is duly registered under the Sale Tax Act, 1990 with the nature of business as "MANUFACTURER" with principal business activity of "MANUFACTURER OF OTHER TEXTILES N.E.C", hence the plaintiff is not liable to be doubly taxation under the Act, 2011 ostensibly holding him as service render / provider;
- f) declare that the plaintiff has never been and in not engaged in rendering or providing of services as Fashion Designer to any other person for his brand "Asim Jofa";

- g) declare that the plaintiff, being manufacturer of textiles duly registered under the Act, 1990 does not fall within the definition of fashion designer providing or rendering services of fashion designing enunciated in clause (42A) of section 2 of the Sindh Sales Tax on Services Act, 2011”
- h) declare that under section 8 of the Act, 2011 the tax can only be levied and collected on the value of taxable service as defined in section 3 and prescribed for tax in the Second Schedule to the Act ibid and not on the plaintiff who is manufacture;
- i) Declare that the Economic Activity of the plaintiff being that of manufacture of textile does not fall, in any way, within the ambit of section 4 of the Act, 2011;
- j) declare that the plaintiff, being manufacturer of textiles, is not liable to pay sales tax on services under section 9 of the Act, 20-11, which section dictates that the person providing or rendering service is liable to pay tax under the Act ibid;
- k) declare that the defendants cannot summon the plaintiff or his authorized representative to attend their office and answer all material questions without first divulging / giving any basis / reasons on the basis which the defendants are holding the plaintiff as renderer / provider of services;
- l) grant permanent injunction restraining all the defendants specifically the defendant No. 4 or any officer actin for or on behalf of the said defendants or the department from taking any coercive / adverse and prejudicial action including but not limited to issuance of any show cause notice against the plaintiff for any of his business concerns directly or indirectly on the basis their prejudgment and adamant / dogmatic standpoint under the Act, 2011 or in consequence of the action taken by the defendant No. 4 including the compulsory registration or from taking any other action which may adversely affect or interfere with the business of the plaintiff in any manner, whatsoever, and further be pleased to restrain the defendants from harassing or creating any hindrance, obstacles in the smooth running of the affairs of the plaintiff’s business till the disposal of the Suit.
- m) quash and set aside the impugned hearing notice dated 27.02.2017;
- n) award any other relief deemed just and appropriate in the circumstances of the case; and
- o) award costs and specials costs; and”

It appears that prior to filing of this Suit, the Plaintiff had earlier filed petition bearing CP.No.D-5624/2014 seeking almost a similar and or identical relief except the relief at Para (a) to (c). Perusal of the relief sought as above reflects that primarily Plaintiff has impugned hearing notice dated 27.02.2017 and also seeks directions against the Department to the effect that the proceedings initiated by them are contrary to the directions of the learned Division Bench of this Court as

contained in order dated 02.12.2016 in C.P. No. D-5624/2014. Para 5 & 6 whereof reads as under:-

“5. We have heard the learned Counsel for the parties, perused the relevant provisions of the Sindh Sales Tax on Services Act, 2011 with their assistance, and also examined the case law relied upon by the counsel for the parties in support of their contentions. From perusal of the record, it appears that at a preliminary stage of the proceedings initiated by the respondents (SRB), through a Show Cause Notice, whereby, the Petitioner has been confronted to explain certain facts relating to business activity of the Petitioner, the petitioner instead of submitting response to such Show Cause Notice, has directly approached this Court by filing Constitutional Petition under Article 199. Whereas, the respondent is found to be in possession of some information received from of income tax record of the petitioner as well as from the advertisement on the website, whereby, according to respondent (SRB) petitioner provides fashion designing services i.e. “Make to Order” to the third parties as well. While confronted with above position, learned counsel for the Petitioner could not properly submit response, however, submitted that as per his instructions, Petitioner does not provide fashion designing services to third parties, hence, does not fall within the ambit of Sindh Sales Tax on Services Act, 2011.

“6. In view of hereinabove facts and circumstances of the case, whereas, certain disputed facts are required to be ascertained, we are not inclined to decide instant Petition on merits, and would disposed of instant Petition with the directions to submit response of the impugned Show Cause Notice issued by the respondents, whereas, respondents are also directed to ensure that unless and until the submissions made by the learned Counsel for the Petitioner hereinabove regarding the business activity of the Petitioner is examined in terms of the relevant provisions of Sindh Sale Tax Act, 2011 the Petitioner may not unnecessary be required to get enrolled as Registered person and shall not be made liable to pay sales tax in terms of Section 8 of the Sindh Sales Tax on Services Act, 2011, as the initial burden to bring a person within the scope of the charging provisions of any taxing statute, rest upon departmental authorities. The case law as referred by the learned Counsel for the Petitioner is not applicable to the facts of the instant Petition as instant Petition has been filed on mere issuance of Show Cause Notice, which prima facie does not suffer from any jurisdictional defect, moreover, the Petitioner has been provided an opportunity of being heard and to explain the factual and legal position, which may emerge after examining the peculiar facts of instant case.”

Perusal of the above order of the learned of the learned Division Bench reflects that the learned Division Bench had declined to decide Petition on merits and disposed it off with directions to the Petitioner to respond to the impugned Show Cause Notice, whereas, Respondents (Defendants) were directed to ensure that unless and until the submission made by the learned Counsel for the Petitioner regarding the business activity is examined in terms of the Sindh Sales Tax on

Services Act, 2011, the Petitioner may not be unnecessarily required to get registered and to pay Sales Tax in terms of the said Act.

Thereafter, as soon as the hearing memo was issued, instant Suit has been filed. Learned Counsel for the Plaintiff was confronted as to maintainability of this Suit after passing of the order by the learned Division Bench to which his response is that issuance of hearing memo was not justified in view of the observations of the learned Division Bench. On perusal of the order of the learned Division Bench there appears to be no justification to impugn the hearing notice issued to the Plaintiff as already directions were given to the Department as noted hereinabove. If the case is that Respondents were not acting accordingly, the Plaintiff should have approached the learned Division Bench through a contempt application; however, this does not give rise to or a cause of action to file instant Suit. Notwithstanding this, even otherwise, a mere notice of hearing does not cause any prejudice to a party, which in fact appears to have been issued pursuant to directions of the learned Division Bench of this Court. Counsel for the Plaintiff was time and again confronted as to maintainability of this Suit and was even given a chance to withdraw it; however, he has declined to do so, and submits that since factual dispute is involved, as observed in the above order, instant Suit is maintainable. However, this contention is not correct; rather misconceived inasmuch as the learned Division Bench while declining indulgence under its Constitutional jurisdiction that disputed facts are involved, did not give any permission to agitate the same grievance by way of a Civil Suit; rather directed the Plaintiff to respond to the Show Cause Notice and approach the department. Mere involvement of disputed facts is not *ipso-facto* a ground to justify maintainability of the Suit.

In view of hereinabove circumstances, it appears that Plaintiff has filed instant Suit unwarrantedly and without any proper cause of action or being aggrieved, whereas, after failing to get any favorable orders in the petition, filing of this Suit could not be permitted as *Resjudicata* will also apply. This is an attempt to abuse the process of Court, whereas, restraining orders have also been obtained. Therefore, the Suit being not maintainable is accordingly dismissed with pending applications with cost of Rs. 25,000/- to be deposited in the account of Sindh High Court Bar Library.

J U D G E

ARSHAD/