

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui, J.
Agha Faisal, J.

CP D 1083 of 2020 : *Syed Jawad Arshad vs.
Federation of Pakistan & Others*

CP D 4410 of 2020 : *Muhammad Aamir vs.
Federation of Pakistan & Others*

CP D 2092 of 2021 : *Oriental Chemical Industries vs.
Federation of Pakistan & Others*

For the Petitioners : Mr. Aqeel Ahmed Khan, Advocate
(CP D 1083 of 2020 & 2092 of 2021)

Mr. Fazal M. Sherwani, Advocate
(CP D 4410 of 2020)

For the Respondents : Mr. Kafil Ahmed Abbasi
Deputy Attorney General

Mr. Shahid Ali Qureshi, Advocate

Mr. Kamran, Advocate

Date of hearing : 30.08.2021

Date of announcement : 03.09.2021

JUDGMENT

Agha Faisal, J. The crux of this determination is whether proceedings for quashing criminal proceedings / grant of bail, in taxation related *offences*, ought to be entertained by the High Court directly (and in the first instance) under Article 199 of the Constitution, notwithstanding the law mandating such matters to proceed before the court / bench of statutorily conferred jurisdiction.

2. The present petitions primarily seek to vitiate criminal proceedings pending trial before the competent court, wherein the *challan* has admittedly been filed. The petitioners have obtained the concession of *bail* as an interim measure, before the civil tax bench of this Court, despite the question of maintainability having been recorded at the first date of hearing¹.

¹ Order dated 17.09.2020 in CP D 4410 of 2020.

3. Briefly stated, CP D 1083 of 2020 was filed seeking *inter alia* a declaration that the impugned FIR² is illegal to the extent of the petitioner. On the first date of hearing³, while issuing notice, it was directed that “...petitioner will not be arrested pursuant to impugned FIR No.1 of 2020 dated 16.01.2020, till the next date of hearing”. This unsecured restraint upon the arrest of the petitioner subsists till this day.

CP D 4410 of 2020 was also filed under Article 199 of the Constitution, seeking quashing of another FIR, and bail was granted therein to the petitioner, subject to furnishing surety with the Nazir of this Court.

CP D 2092 of 2021 was filed on 24.03.2021, ostensibly by the petitioner in CP D 1083 of 2020, assailing a show cause notice dated 04.11.2019, in respect whereof the determinant order had already been rendered on 10.12.2019. The prosecution ancillary to the same matter had earlier been assailed vide CP D 1083 of 2020.

4. Petitioners’ learned counsel insisted that notwithstanding the registration of criminal proceedings, vide the respective FIRs, and submission of *challan* before the competent trial court, it was incumbent upon the civil tax bench of this Court to determine the viability of the criminal proceedings and regulate the custody of the accused.

Mr. Shahid Ali Qureshi, Advocate spearheaded the department’s case and articulated that this court was *forum non conveniens* for the present *lis*, as the issue of viability of the criminal proceedings and the regulation of custody of the accused was best determined / undertaken by the trial court wherein the proceedings were pending. Mr. Kafil Ahmed Abbassi, learned Deputy Attorney General, seconded the arguments of the department and supplemented that no case for invocation of writ jurisdiction was made out by the petitioners.

5. We have considered the respective arguments and appreciated the law to which our attention was solicited. The pivotal question before this Court is whether the ordinary course of contextual criminal proceedings could be allowed to be deflected by resort to writ jurisdiction.

² FIR 01 of 2020 dated 16.01.2020.

³ 18.02.2020.

6. In the present circumstances the respective FIRs had been lodged and the record demonstrates that a *challan* had also been submitted before the Court of the Special Judge (Customs & Taxation) Karachi (“Special Court”), prior to the institution of the relevant petition.

Examination of the applicable law⁴ demonstrates that the Special Court has been conferred with exclusive jurisdiction⁵ to entertain and proceed with regard to the relevant statutory offences and such jurisdiction includes the domain to determine the viability of proceedings and the regulation of custody of the accused. A special bench, being the Special Appellate Court (Customs & Taxation) (“Special Bench”), is also constituted at the High Court with exclusive jurisdiction to determine matters pertaining *inter alia* to appeals, references and revisions arising out of the Special Court.

The governing statute also envisages a bar upon any court, other than the Special Court and the Special Bench, to entertain any application or petition or pass any order or give any direction with respect *inter alia* to bail, in regard to the relevant statutory offences.⁶

7. The law also empowers the Special Court to dismiss a complaint, on its own accord, if found to be insufficient. In addition thereto, an accused may also prefer an application seeking acquittal if it can be demonstrated that there is no probability of the accused being convicted of the cited offence. The orders so rendered are further assailable in appeal / revision before the Special Bench of the High Court. In the presence of such adequate remedy the condition precedent per Article 199 of the Constitution, being the absence of remedy, is *prima facie* not satisfied⁷.

8. The august Supreme Court had illumined in *Ghulam Muhammad*⁸, back in 1967, that if an offence had been committed justice required that it should be enquired into and tried by the competent court. In the absence of a finding of guilt the accused had a right to be honorably acquitted by the

⁴ Sales Tax Act 1990.

⁵ Per section 37E of the Sales Tax Act 1990 - 37E. *Special Judge, etc. to have exclusive jurisdiction.* Notwithstanding anything contained in this Act or in any other law for the time being in force, (a) no court other than the Special Judge having jurisdiction, shall try an offence punishable under this Act; (b) no other court or officer, except in the manner and to the extent specifically provided for in this Act, shall exercise any power, or perform any function under this Act; (c) no court, other than the High Court, shall entertain, hear or decide any application, petition or appeal under chapters XXXI and XXXII of the Code of Criminal Procedure, 1898 (Act V of 1898), against or in respect of any order or direction made under this Act; ...; *pari materia* to section 185B of the Customs Act 1969 etc.

⁶ Per section 37E(d) of the Sales Tax Act 1990 - ... (d) no court, other than the Special Judge or the High Court, shall entertain any application or petition or pass any order or give any direction under chapters XXXVII, XXXIX, XLIV or XLV of the aforesaid Code.; *pari materia* to section 185B(d) of the Customs Act 1969 etc.

⁷ *Muhammad Abbasi vs. SHO Bhara Kahu & Others* reported as *PLD 2010 Supreme Court 969*.

⁸ Per *Hamoodur Rehman J. in Ghulam Muhammad vs. Muzammal Khan & Others* reported as *PLD 1967 Supreme Court 317*.

competent court and vice versa. Abjuring the recourse to regular proceedings by deflection to the High Court was duly deprecated. *Ghulam Muhammad* was relied upon in *Bajwa*⁹ and *Aleem*¹⁰ and the Supreme Court considered refusal of the High Court to deflect the normal course of a criminal case, through exercise of writ jurisdiction, as salutary.

9. It is pertinent to mention that the edict of the honorable Supreme Court in *Aleem*¹¹ is applicable on all fours to the present facts and circumstances as the invocation of the writ jurisdiction of the High Court was deprecated in a matter where the trial was pending before the learned Special Judge (Customs & Taxation).

10. *Muhammad Afzal Zullah CJ.*, while, approving the authority cited supra, observed in *Habib Ahmed*¹² that if prima facie an offence had been committed, the ordinary course of trial, before the competent court, was not to be allowed to be deflected through an approach to the High Court.

The august Supreme Court, while allowing an appeal against an order of the High Court, held in *Sardar Khalid*¹³ that by allowing recourse to writ the High Court erred in law by short circuiting the normal procedure of law, while exercising equitable jurisdiction which is not in consonance with the law.

11. In view of the preponderance of binding authority, cited supra, it is our considered view that the ordinary course of criminal proceedings could not be allowed to be deflected by resort to writ jurisdiction. The statutory fora, being the Special Court and / or the Special Bench, are competent to determine the viability of the relevant criminal proceedings and regulate the custody of the accused. No case has been set forth before us to merit the invocation of the discretionary¹⁴ writ jurisdiction of this Court in such regard; hence, CP D 1083 of 2020 and CP D 4410 of 2020 are hereby dismissed.

12. In so far as CP D 2092 of 2021 is concerned, it was filed on 24.03.2021, assailing a show cause notice dated 04.11.2019, in respect whereof the determinant order, per section 11(3) of the Sales Tax Act 1990, had already been rendered on 10.12.2019. No rationale has been

⁹ Per *Aslam Riaz Hussain J.* in *Abdul Rehman Bajwa vs. Sultan & Others* reported as *PLD 1981 SC 522*.

¹⁰ Per *Muhammad Afzal Zullah J.* in *Abdul Aleem vs. Special Judge (Customs) Lahore & Others & Others* reported as *1982 SCMR 522*.

¹¹ A leave refusal order; however cited with approval by the Supreme Court in *Habib Ahmed*.

¹² A *Habib Ahmed vs. MKG Scott Christian & Others* reported as *PLD 1992 Supreme Court 353*.

¹³ Per *Chaudhry Ijaz Ahmed J.* in *Haji Sardar Khalid Saleem vs. Muhammad Ashraf & Others* reported as *2006 SCMR 1192*.

¹⁴ Per *Ijaz Ul Ahsan J.* in *Syed Iqbal Hussain Shah Gillani vs. PBC & Others* reported as *2021 SCMR 425*; *Muhammad Fiaz Khan vs. Ajmer Khan & Another* reported as *2010 SCMR 105*.

articulated to justify the reason for not having assailed the appealable order in the statutory hierarchy within the limitation period, or thereafter, and having preferred the present petition instead more than fifteen months later. The said petition is even otherwise *prima facie* barred by laches¹⁵. It is apparent from the dates mentioned supra that the adjudication predated the prosecution. The FIR dated 16.01.2020 was assailed on 15.02.2020 vide CP D 1083 of 2020; when the show cause notice had already culminated in the order per section 11(3) of the Sales Tax Act 1990. Petitioner's counsel has remained unable to articulate any justification as to why the statutory right to appeal was abdicated by the petitioner and has further failed to provide any cogent reason for this Court to assume jurisdiction in a matter for which an entire dispute resolution hierarchy has been provided by law¹⁶. As a consequence hereof, CP D 2092 of 2021 is hereby dismissed.

13. In summation, the three subject petitions, along with pending applications, are dismissed.

JUDGE

JUDGE

¹⁵ *Trustees of Port of Karachi vs. Organization of KPT Workers & Others* reported as 2013 SCMR 238 – if the claim was *prima facie* barred by limitation then relief ought to be refused on the ground of laches.

¹⁶ *State Bank of Pakistan vs. Imtiaz Ali Khan & Others* reported as 2012 PLC (CS) 218 Supreme Court – if a person failed to exercise a right within the time specified by law, the same could not be permitted to be enforced through writ *inter alia* on account of laches.