

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

**Suit NO. 2535 of 2014**

Plaintiff : Malik Abdul Qayyum,  
through: Khawaja Shams-ul-Islam,  
Advocate.

Defendant No.1 : Directorate General of Intelligence & others  
through Mr. Muhammad Sarfaraz Ali  
Metlo, Advocate.

Date of hearing: 13.03.2015.

Date of announcement: 02.04.2015.

**ORDER**

**SALAHUDDIN PANHWAR, J.** Through instant application (CMA No. 17143 of 2014); the plaintiff prayed that:

“...to direct the defendants No.1 and 2 to immediately and forthwith release the 28 transit concrete mixture trucks imported by the plaintiff, without charging any extra amounts or surcharge, as the plaintiff has already paid all the levi-able duties and taxes as assessed by the defendant No.2...”

2. Since the above CMA, was filed with main suit therefore, a concise reference to the pleading shall be helpful to understand the need of instant CMA. The plaintiff in his suit claimed to be a government contractor, carrying business all over country, in particular, Baluchistan and Sindh. He used to import different type of construction machinery. He finalized a deal for purchase of 28 used and old Concrete Transit Mixture Trucks from a

Seller in Dubai, UAE, falling under HS Code 8605.4000. Exporter arranged the pre-shipment inspection. After arrival of said consignment at Karachi port on 23.10.2014 plaintiff through his clearing agent filed 28, Goods Declaration Forms (known as Bill of Entry) which, however, were not accepted by Customs official and assessed the same by increasing value by more than 100% for each truck which the plaintiff not objected and paid all duties and taxes on 30.10.2014; that all of sudden, soon after the release of consignments by the custom dry-port Hyderabad the officials of defendant No.1 without any seizure memo, notice or show cause, detained consignments of plaintiff in name of enquiry and investigation, though, knowingly that pre-shipment inspection certificates in respect of trucks in question were issued by Veritas Dubai, UAE but verification thereof was sought from Veritas Pakistan office of Bureau which, accordingly, was denied. On 19.11.2014, defendant No.1 wrote to Chief Collector Enforcement (South), Custom House, Karachi to carry on a joint examination of consignment but same was not done. The plaintiff claimed detention of consignment by defendant No.1 to be illegal in gross violation of Sections of Customs Act. FIR, bearing C.No.149(1)DCID-Port/FIU-Hyd-CM/14 dated 21.11.2014, lodged by defendant No.1, was claimed to be false and frivolous , however, plaintiff obtained bail before arrest and also filed quashment petition.

3. It is further pleaded that Govt. of Pakistan, Ministry of Commerce issued a letter to all collectorates of customs on 10.11.2014 whereby directing to immediately release Transit

Mixer Trucks held up and detained for any reason subject to surcharge of 15% of C&F value and submission of undertaking that vehicles released shall be used for declared purpose. Plaintiff immediately applied to defendant No.1 vide his letter dated 15.11.2014 thereby opting to aforesaid payment of surcharge of 15%. However, Ministry of Commerce on 26.11.2014 again notified to concerned Customs Collectrates that except the consignment of M/s Baig Enterprises & Engg. All other currently held up consignments of transit mixture trucks be released.

4. In above back ground, the plaintiff claiming malafide on part of defendants with further claim that there is no remedy available to plaintiff against illegal detention of his consignments he sought following relief (s):-

- a) Declare that the 28 transit concrete mixture trucks imported by the plaintiff after proper assessment and examination by the competent custom officials, as well as payment of leviabale duties and taxes by the plaintiff as determined by the customs officials, became out of charge, hence the detention of the same by defendants No.1 and 2 on 31.10.2014 I patently illegal, without lawful authority, null and void, of no legal effect, whatsoever, besides the same is corum non-judice passed / created without any jurisdiction, in gross violation of sections 32, 32A and 156 of the Customs Act, 1969 as well as in gross violation of fundamental rights guaranteed to the plaintiff under the Constitution of Islamic Republic of Pakistan;
- b) Declare that so-called verification of PSI certificates sought by the defendant No.1 from Bureau Veritas Karachi, instead of the issuing office of Bureau Veritas Dubai, UAE is based on dishonesty, malafides and corrupt motives, hence this Hon'ble Court may kindly order initiation of immediate enquiry and taking

- disciplinary / penal action against the delinquent officials of defendants No.1 and 2;
- c) Declare that since the consignments of the plaintiff had already been assessed and cleared by the defendant No.2 after payment of leviable taxes and duties, and became out of charge, the Defendant No.1 had no lawful authority, right or powers to interfere into the matter in any manner in terms of Sections 32, 32A and 156 of the Customs Act, 1969.
  - d) Direct the defendant No.1 to immediately release all the 28 transit mixture trucks imported by the plaintiff without charging any extra amounts or surcharge, as the plaintiff has already paid all the leviable duties and taxes as assessed by the Defendant No.2, thereby rendering the said consignments as out of charge;
  - e) Grant permanent injunction restrain the Defendants, specially the Defendants No.1 and 2, their employees, subordinates, agents, representatives, attorneys, successors or any one claiming on their behalf from taking any coercive action including lodging any further criminal cases / FIRs, as well as not to demand any amount / surcharge from the plaintiff in respect of the aforesaid consignments of 28 transit concrete mixture trucks or initiating any adjudication proceedings;
  - f) Consequential relief (s), which this Honourable Court deems fit and proper under the circumstances of the case may kindly be passed;
  - g) Grant any other relief (s), which this Honourable court deems fit and proper under the circumstances of the case;
  - h) Cost of the suit;

5. Against the above application (CMA 17143), the objections in shape of counter affidavit were filed on behalf of defendant No.1 wherein assertions and claims of the plaintiff were denied. It was claimed that suit of plaintiff is barred by subsection (2) of Section 217(1) of the Customs Act, 1969; pre-shipment inspection certificates, produced by plaintiff, were claimed to be fake hence plaintiff was found involved in import of 28 Nos. of

old and used trucks by misdeclaring its description which was in violation of number of provisions of Customs Act, 1969 so also Sales Tax Act, 1990 and Income tax Ordinance, 2001. It was claimed that officers of Directorate are competent and legally authorized to perform the acts. The maintainability of the suit was also strongly insisted. Rejoinder was filed against such counter affidavit whereby contents of counter affidavit were denied.

6. The learned counsel for the plaintiff has argued that consignments were with-held illegally and without any legal and lawful justification; action of withholding of consignments is in violation of Section 25,18 and 79 of Customs Act; defendants should have approached to Dubai office but they approached to defendant No.3; plaintiff on making all charges was not liable to be deprived of custody of consignments. As regard, jurisdiction, it was argued that since no show cause notice was issued hence this court has got jurisdiction. He placed reliance on the case laws reported as SHAHZAD AHMED CORPORATION v. FEDERATION OF PAKISTAN [2005 PTD 23], K.G. TRADERS v. DEPUTY COLLECTOR OF CUSTOMSPLD [1997 Karachi-541], judgment (unreported) passed in Civil Suit No.843/2014 and that of CP No.4838 of 2014, SBLR 2014 Sindh 543, NATIONAL BANK OF PAKISTAN v. SAF TEXTILE MILLS LTD. [PLD 2014 SC 283], BAIG ENTERPRISES AND ENGINEERING v. FEDERATION OF PAKISTAN through Secretary [2015 PTD 181].

7. On the other hand, the learned counsel for the defendant No.1, strongly objected to the maintainability of the instant application and that of suit. He referred that 60 days' time is available to issue show cause notice but before expiry of that period the proceedings were stayed on move of the plaintiff; jurisdiction of this Court is barred by Section 217 of the Customs Act hence not only application but suit merits dismissal. Concluding his arguments, he insisted that relief sought is in nature of mandatory injunction which cannot be granted at this stage. He placed reliance on the case laws reported as Messrs ROHI GHEE INDUSTRIES (PVT.) LTD and others v. COLLECTOR OF CUSTOMS and others [2007 PTD 878], Messrs SHAFIQ TEXTILE MILLS LTD., KARACHI v. FEDERATION OF PAKISTAN through Secretary, Ministry of Finance, Islamabad and 4 others [2007 PTD 1480], AL AHRAM BUILDERS (PVT.) LTD. v. INCOME-TAX APPELLATE TRIBUNAL [1993 SCMR 29], COLLECTOR OF CUSTOMS, LAHORE and others v. UNIVERSAL GATEWAY TRADING CORPORATION [2005 SCMR 37] and AKBAR HUSSAIN v. AISHABAI [PLD 1991 SC 985].

8. I have heard the respective sides and have gone through the available material.

9. The instant application of the plaintiff appears to be falling within meaning of the Rule-1 of Order 39 of the Code which is titled as '**Temporary injunctions & interlocutory orders**'. The jurisdiction vested by this does give jurisdiction to the Court to make an order which may fall within meaning of term

**‘mandatory injunction’**. To make myself clear, let the provision be referred for convenience which is:

‘1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in **danger of being wasted, damaged or alienated** by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or **make such other order** for the purpose of staying and **preventing the wasting, damaging,** alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.’

Thus, the reading of the above provision allows me to safely hold that under this provision a Court can competently pass an appropriate order preventing wasting / damaging of property only if it is so established *prima facie* through affidavit or otherwise. Thus, competence of nature of relief through instant application is maintainable.

10. However, since question of the jurisdiction of this Court is strongly pressed, therefore, it would be in all fairness to decide this issue first because it is the jurisdiction which dresses an interim/interlocutory order, the legal status otherwise same shall be nothing but *coram non-judice*. Therefore, it is always demand of administration of justice to attend the question of jurisdiction *first*.

The jurisdiction of the **‘Civil Court’** is confined to the **‘civil nature’** by the provision of Section 9 of the Code (C.P.C) which says that:

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a **civil nature** excepting suits of which their cognizance is either **expressly** or **impliedly barred**.

Thus, I can safely conclude that to make a lis maintainable before the Civil court one has to establish :

- i) the matter relates to ***'civil nature'***
- j) the jurisdiction is not directly or impliedly barred;

Needful to add here that the term ***'civil nature'*** was explained by the explanation provided below the Section 9 of the Code in following manner:-

*Explanation.- A suit is which the **right to property or to an office** is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to **religious rites or ceremonies**.*

Thus to bring an ordinary civil suit within meaning of term ***'civil nature'*** the lis should be confined to a ***'right to a property or to an office'*** and the reliefs sought therein should be recognized by the Specific Relief Act as the purpose whereof (Specific Relief Act) was to define and amend the law relating to ***'certain kinds of specific relief obtainable in civil suits'***. Thus, the Civil Court can competently record a decree whereby declaring the ***'legal character'*** of one or his right / interest in ***'property'*** but the Civil Court is not competent to decide vires of law because it is the absolute and exclusive domain of the ***'constitutional courts'*** .



11. At this juncture, it would be proper and relevant to refer the para-15 of the plaint which reads as:-

‘That, since **no remedy is available** to the Plaintiff against the illegal detention of the consignments by the Defendant No.1, therefore, this Hon’ble Court has jurisdiction to proceed with the matter, besides, since the matter requires **question of law which can only be interpreted by this Hon’ble Court,** as well as it is not a matter pertaining to any show cause notice or order-in-original, rather the matter pertains to the illegal detention of the vehicles by Defendant No.1 without any lawful authority, therefore, this Hon’ble Court is only empowered to take cognizance of the matter’  
(underlining has been supplied for emphasis).

12. Let me make it quite clear that non-availability of remedy or involvement of question of law can competently be the grounds to invoke constitutional jurisdiction but these are not the required ingredients to term a bundle of facts into **‘Civil Nature’** which has its own peculiar meaning and definition. The Civil Court is competent to record a decree declaring the legal character, right, interest, possession, enforcement of a contract or adjudication of document but such jurisdiction can only be exercised only in those matters which *firstly* qualify the term **‘civil nature’** and are not directly or implied barred. Let me add that the bar, even if provided under a statute would not stand in the way of the Civil Court to take cognizance onto the matter of **‘civil nature’** if there is *prima facie* malafide or exercise of jurisdiction by an authority in a manner not recognized by law. I am quite conscious of the legally established principle of law that:

***‘even where the jurisdiction of a civil court is barred and conferred upon Special Tribunal, Civil Courts being courts of ultimate jurisdiction will have the jurisdiction to examine the acts of***

***such forums to see whether their acts are in accordance with law or are even malafide'***

Reference, if any, can well be made to 1974 SCMR 356 and PLD 1997 SC 3. However, when a ***lis*** is brought to challenge the order or action of authority alone then this would not qualify the meaning of '***civil nature***' rather it would be a case of writ falling within category of '**writ of certiorari**'. The Civil Court may examine the application of any law while trying a matter of '***civil nature***' but such examination shall always confined to application or otherwise of such law in such a particular situation but vires of law cannot be adjudicated by the Civil Court. In short, to justify cognizance by the Civil Court the matter should always be of '***civil nature***' and reliefs, sought therein should be recognized by '**Specific Relief Act**'.

13. However, this is not the case in constitutional jurisdiction because while forming the Article 199(1)(b)(c) of the Constitution, the legislature has not confined the powers and jurisdiction of this Court but clothed the High Court with an authority to issue appropriate directions to any **person** or **authority** if there is a denial to any of the **Fundamental Rights**. The deliberate use of the phrase '**any person**' in addition to words '**authority, including any Government**', itself shows that exercise in such like matter can well be exercised regardless the character and status of one which may be '**private**' or of '**an authority, including government**'. The Constitutional Court can competently examine the application of law so also vires thereof. I may safely say that it is the domain of the

Constitutional Court to protect Fundamental Rights, guaranteed in the Constitution by examining the acts and omission of the authority e.t.c and declared the same to be unconstitutional or otherwise, as is found at the end of the day. It is the absolute jurisdiction of the Constitutional Court to determine pure question of laws or application thereof in a particular situation e.t.c. The malafide or absence of alternate remedy can well be a ground to invoke the constitutional jurisdiction, which, *undoubtedly* can't be case for invoking jurisdiction of '**Civil Court**'. I would like to refer the case of Al Ahram Builders (\*Pvt.) Ltd. V Income Tax Appellate Tribunal (1993 SCMR 29) wherein it was held that:

'The tendency to by-pass the remedy provided under the relevant statute 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 malafide.'

Besides 'an action or order of an authority of Customs, even if, suffering from some illegality, would not justify by-passing the available remedy, provided under the Customs Act, 1969. I am supported with such view with the case reported as Messrs BINACO TRADERS through Proprietor v. FEDERATION OF PAKISTAN and 3 others [2006 PTD 1491], wherein while *with reference of number of cases of Apex Court*, the suit filed directly before Civil Court by-passing available remedy, was dismissed.

14. To claim jurisdiction of this court, the plaintiff has insisted on the unreported judgment of this Court, passed in Civil Suit No.843 of 2014. With due respect, I say that the issue, involved / framed in that judgment was :

***'whether intravenous infusion (IV infusion) manufactured with low density polyethylene of 'pharmaceutical product or otherwise?'***

hence it has no relevancy with instant matter. As a matter of fact, the said judgment rather strengthens the view that suit challenging the action of custom authority or vires of law are not maintainable, as has been in the instant case. The position being so shall stand clear from the concluding para-11 of the said judgment which is:

‘.....Reliance was placed on Collector of Customs Lahore and others v. Universal Gateway Trading Corporation and another 2005 SCMR 37. **The case arose under the Customs Act. At issue was whether certain goods had been lawfully imported by the respondents or smuggled.** No question arose regarding the interpretation of any statutory provision or subordinate legislation such as an exemption notification. With respect, this decision is not of any direct relevance. Reliance was placed on Amin Textile Mills (Pvt) Ltd. v. Commissioner of Income Tax and others 2000 SCMR 201. This case arose under the Income Tax Ordinance, 1979. **The question was whether the impugned notices, issued under s. 65 of the said Ordinance, were within, and in proper exercise of, the jurisdiction of the income tax officer.** Again, with respect, this question is substantively different from the one raised in the present Suits.

(However, in the instant matter the violation of provisions of Sections 32, 32A and 156 of Customs Acts, 1969 as well gross violation of

fundamental rights, guaranteed under Constitution of Pakistan, are sought to be declared (*as par prayer clause (a) & (c)*) which cannot be undertaken without interpretation of said provisions and Chapter-II of Constitution, therefore, the referred cases i.e 2005 SCMR 37 and 2000 SCMR 201 do apply)

The para continues:-

‘...Reliance was placed on *Binaco Traders v. Federation of Pakistan and others* 2006 PTD 1491 (SHC; SB). This was also a decision in proceedings by way of a suit, relating to the Customs Act. The plaintiff sought to challenge a decision by the Customs authorities to take over his imported goods under **s. 25-A of the Customs Act (as it then was) on account of alleged undervaluation thereof**. As is obvious, the issue raised in the suit was completely different from the one at hand.

(In the instant matter the plaintiff not only alleged to imported articles undervalued but also under bogus PSI (*as alleged by authority*) hence the said case law 2006 PTD 1491 (SHC; SB) is fully applicable to peculiar situation of instant matter)

The para continues:-

‘...Reliance was placed on *Malik Muhammad Saeed v. Federation of Pakistan and others* 2006 PTD 2167. Again, these proceedings were by way of a suit relating to the Customs Act. At issue was the **importation of a car allegedly in violation of the relevant rules and procedures, and the resultant imposition of fine and penalty**. With respect, this is not the issue at hand.’

(In the instant matter the issue is that of importing articles in violation of rules and even under bogus document PSI (*as alleged by authority*) hence the said case law 2006 PTD 2167 is fully applicable to peculiar situation of instant matter)

15. The other judgment relied in support of this contention of plaintiff is one passed in CP No.4838 of 2014 'Re-M/s M. Yasin & Co. v. Federation of Pakistan & Ors'. where under constitutional jurisdiction the writ was issued which was filed against '**unlawful detention of 4 used Hino Concrete Transit Mixture Trucks imported by the petitioner**'. I have already admitted the legal position in clear words that an unlawful and malafide action of an authority can competently be brought for enforcement of guaranteed fundamental rights in constitutional jurisdiction. However, even this judgment *in no way* helps the plaintiff to justify his claim of jurisdiction of this Court in the instant matter.

16. Further, the relief (s), sought through prayer clause (a) to (d), *prima facie* appear to be not falling within the scope of '**specific relief Act**' obtainable in civil suits as declaratory decree; sought is dependent upon direct interpretation of certain provision (s) of the Customs Act and that of Chapter-II of Constitution, which a civil court is not competent to undertake. To make my view quite clear and obvious, I would like to refer the relevant portion of unreported judgment of Honourable Supreme Court in case of M/s Ghani Tayyab (Pvt.) Ltd. & Irfan Patel & another v. Federation of Pakistan & others, relied by the counsel for the defendant No.1, which reads as:-

*'The main contention of the learned counsel for the petitioners was that where under Section 25B of the Customs Act, 1969 a value of a class or description of goods was notified for the purpose of duty, it, could not have been charged in any other manner notwithstanding the value of the goods declared was higher than the one notified under the afore said provision. The learned counsel next contended that*

*where Section 25B of the Act has been given overriding effect on the provision contained in Section 25 of the Act, the goods thus imported could not have been charged at value higher than the one so notified'*

.....

*The contention raised by the learned counsel for the petitioners may not be without force but this question was to be raised at the relevant time before the Customs Authority. **How could that be raised before a Civil Court is not understandable. Jurisdiction of Civil Court is clearly barred under Section 217 of the Custom Act. The suit thus instituted, in our view, was not competent.** Though this point has not been raised in the fora below yet it being a question of jurisdiction cannot be lost sight of.'*

17. Thus, now I can safely conclude that instant suit is incompetent and the jurisdiction of this Court is barred by Section 217 of the Customs Act, hence plaint can be rejected under Order VII Rule 11 CPC. Reference can be made to the case of Raja ALI SHAN v. Messrs ESSEM HOTEL LIMITED [2007 SCMR 741].

18. In result of above conclusion, I am left with no option but to reject the plaint without any further discussion on interlocutory applications, including the instant CMA which in consequent to rejection of plaint, stood dismissed automatically.

**J U D G E**