

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

Suit No. 1822 of 2010

Zeeshan Javaid Arain & another

Versus

M/s. Lucky Cement Ltd. & another

Date	Order with signature of Judge
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For hearing of CMA No.10245/11

Dated of hearing: 11.11.2014

Mr. M. Jawaid Qazi Advocate for the plaintiff.
Mr. Usman Shaikh Advocate for the defendant
Qazi Majid Ali AAG

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Learned Counsel through this application claims rejection of the plaint on the ground that the plaintiff being unregistered partnership firm cannot maintain this suit and secondly in terms of the Agreement available as annexure D-1 at page 59 the plaintiff has no right and authority to file this suit for recovery on behalf of defendants.

Learned Counsel for the defendant submitted that in pursuance of the provisions of Rules 36 and 36A of the Excise Duty on Minerals (Labour Welfare) Rules, 1969 it is the duty of the concerned officer to cause and effect recovery of any amount if not paid and that in terms of Rule 36A(10) the plaintiff is required to file a representation before a forum having jurisdiction. Learned Counsel has relied upon Section 3 of the Excise Duty on Minerals (Labour Welfare) Act, 1967. Learned Counsel further relied upon the rules framed thereunder. He submitted that in terms of such Rules power vests with the Commissioner despite issuance of lease/license by the Government. Learned Counsel submitted that the lessees so appointed are the agents of the Commissioner. He also submitted that lessee shall exercise only those powers and responsibilities which are delegated under the agreement. Learned Counsel has relied upon Rule 43 which provides the duty for the recovery

which has escaped assessment. Learned Counsel submitted that in pursuance of such rules it is only the Commissioner who is vested with the authority. Learned Counsel has further relied upon Rule 44 and submitted that such arrears are recoverable as land revenue and shall be credited to government in the manner specified in Rule 39. Learned Counsel submitted that plaintiff has no right under the law to initiate proceedings for the recovery of the amount which is claimed to have not been paid.

On the other hand learned Counsel for the plaintiff at the very outset relied upon the agreement in terms whereof the plaintiffs were declared to be the highest bidder and the lease in respect of Karachi area was awarded. Such agreement was executed on 19.1.2007 by the Governor of Sindh on behalf of Government. Learned Counsel further submitted that in pursuance of such agreement the lessee/plaintiff is entitled to collect excise duty on specified minerals dispatched by road and from those areas of royalty leases whereof were granted/permitted by the Directorate of Mineral Development, Government of Sindh. Learned Counsel submitted that since entire amount recoverable in this regard has already been paid to the government therefore, such provision as relied upon by the learned Counsel for the defendant are not applicable as the amount sought to be recovered only belongs to the plaintiff.

Learned Counsel has further relied upon Messrs Muhammad Junaid v. Karachi Electricity Supply Corporation Ltd. (2010 YLR 952) which provides permission for filing a suit by unregistered firm against the party for enforcement of his right arising out of the contract. However he submitted that such prohibition cannot be applied to a case which is for the enforcement of legal or statutory obligation. Learned Counsel has further relied upon the cases of Messrs Crescent Glass Works v.

Messrs Hashwani Sales & Services Ltd. (2003 YLR 35) and Akbar Khan & others v. Allied Bank of Pakistan (2011 YLR 496).

I have heard the learned Counsels and perused the record. The reliance that has been placed by the learned Counsel for the defendant do provide a recovery mechanism however when such prescribed rules are seen in the light of the agreement entered into between the government and the plaintiff, it appears that the entire amount that is liable to be recovered and to be deposited in the government exchequer has already been deposited. The amount sought to be recovered through these proceedings is in fact the money which prima facie belongs to the plaintiff. The agreement available and filed along with the plaint provides that since the plaintiff has been considered as a highest bidder in relation to the recovery of tax which is the subject matter of the agreement, the amount stood paid. Such powers for its recovery in fact have been delegated to the plaintiff and the concerned authorities have no nexus or interest in recovery. Rule 36 of Excise Duty on Minerals (Labour Welfare) (Sindh) Rules, 1969 provides mechanism for the recovery of duty in pursuance of section 3 of the Act. Rule 36 *ibid* provides that the Commissioner may with prior approval of the government lease out by public auction for a period not exceeding one year collection of duty on such terms and conditions as specified by the government. It appears that in pursuance of Rule 36A such rights were delegated to the plaintiff when an agreement was executed in pursuance of the above Rules.

Perusal of Rule 36A(10) provides that the lessee and every person employed by the lessee as his agent for collecting the duty shall be deemed to be persons appointed for collecting the duty under these Rules and that the lessee shall exercise all powers and be subject to all responsibilities attached to persons appointed to collect the duty under these Rules. The details of the agreement provides that for a period of one year such powers as referred above has been delegated and such

recourse as relied upon by the learned Counsel for the defendant that it should be the prerogative of the Commissioner to adopt such method for recovery if dined by the defendant is not available to them.

In my view, in presence of the agreement whereby the authority has been delegated by the plaintiff for its recovery vests with the plaintiff and the plaintiff cannot be subjected to recourse as relied upon by the learned Counsel for the defendant.

As far as the other issue regarding maintainability of the suit is concerned that suit has been filed by an unregistered partnership firm, it appears that the alleged partners i.e. plaintiff No.1 & 2 have themselves filed the suit and as such this argument is not available to the defendants. Even otherwise the suit appears to have been filed for enforcement of rights arising out of the agreement/contract and hence scope of section 69 of the Partnership Act cannot be extended and applied to the present proceedings.

These are the reasons for the short order dated 11.11.2014 whereby the application U/O VII Rule 11 CPC was dismissed.

Judge