

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.163 of 2018

(*Federation of Pakistan & Others v. Mehran Associates*)

Present:

Muhammad Shafi Siddiqui &
Sana Akram Minhas JJ

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| Appellant No.1: | Federation of Pakistan Nemo |
| Appellant No.2 to 5: | Collector of Customs <i>et al</i> Through Ms. Masooda Siraj, Advocate |
| Respondent: | Mehran Associates Through Ms. Fahmida Khanum, Advocate |
| Date of Hearing: | 14-5-2024 |
| Date of Decision: | 21-6-2024 |

J U D G M E N T

1. **Sana Akram Minhas, J:** This High Court Appeal challenges a judgment and decree dated 7.3.2018 and 20.3.2018 respectively ("**Impugned Judgment**") by a learned Single Judge in Suit No.534/2008 (*Mehran Associates v. Federation of Pakistan & Others*) ("**Suit 534**"). This Suit for "**Damages & Compensation**" was initiated on 5.4.2008 by Respondent (Plaintiff in Suit 534) against Appellants (Defendants in Suit 534), all of whom are officials of Customs Department except for Appellant No.1.

Essential Facts

2. In brief, Respondent imported a consignment of "*Blue Cow Sweetened Condensed Filled Milk*" from Singapore, produced by the Singaporean company F&N Foods Pte. Ltd. The shipment included 960 cartons, but a dispute between Appellants No.2 to 5 ("**Customs**") and Respondent prevented the consignment from being cleared resulting in its expiration and wastage.

3. Issues were framed/adopted on 13.12.2010, the Evidence Commissioner was appointed on 27.5.2013, and evidence was thereafter recorded in Suit 534. The record displays that although Appellants contested the said Suit, but they opted not to present any evidence despite being given opportunities. This fact is confirmed from order dated 26.2.2014 passed in Suit 534 and by the Evidence Commissioner's "*Final Report*" dated 23.4.2014 (taken on record on 29.9.2014) without any objections from either side.

Impugned Judgment

4. The Single Judge decreed Suit 534 in favour of Respondent, granting Rs.874,653/- with a 10% markup from the date of the Suit until realization. The Respondent was only granted the proven value of the goods and special damages were not awarded due to lack of evidence. The Customs were held liable for this amount, which was to be recovered from their salaries. Additionally, Respondent was entitled to the costs of Suit 534.
5. The Suit 534 was found to be maintainable as the decision dated 4.2.2006 of the Customs, Excise & Sales Tax Appellate Tribunal at Karachi ("**Tribunal**") (presented in evidence as Exhibit P/17), which invalidated the Order-in-Original dated 13.4.2004 ("**Order-in-Original**") (Exhibit P/15) against Respondent, attained finality. The key findings in the Impugned Judgment were:
 - i) The Respondent's consignment was valid for consumption and improperly withheld by Customs.
 - ii) Show cause notice dated 30.3.2004 ("**SCN**") (Exhibit P/11) issued by Customs was belated and discriminatory compared to other similar cases.
 - iii) Customs acted discriminatorily and with unreasonable delay leading to the spoilage of goods.

Respective Arguments

6. The learned Counsel representing Customs put forth the sole argument pertaining to section 217 of the *Customs Act, 1969* ("**1969 Act**"). She maintained that Respondent's consignment was not wrongfully withheld and that the actions of the Customs officials were justified based on prevailing regulations and procedures. She underscored that the officials acted bona

fide and within their lawful duties. Therefore, as officials of the Customs Department, they were entitled to statutory immunity under section 217(1) of 1969 Act, rendering Suit 534 barred and liable to be dismissed. She averred that as per section 9 of the *Code of Civil Procedure, 1908 ("CPC")*, civil courts are barred from entertaining suits where their cognizance is either expressly or impliedly barred. This express bar is provided in section 217(2) of 1969 Act which prohibits civil courts from intervening in matters specifically handled under the 1969 Act.

7. On the other hand, learned Counsel for Respondent supported the Impugned Judgment. She contended that the goods were compliant with the prevailing *Import Policy Order of 2003-2004* and were not subject to any restrictions outlined in it. She particularly emphasized clause 6(14) of the said Order, notified by SRO 489(I)/2000 dated 17.7.2000, which required that all edible products on import into Pakistan must have at least 6 months or 50% of their shelf life remaining, whichever is lesser, calculated from the date of filing the Import General Manifest. Despite this compliance, Appellant No.3, who served as Additional Collector of Customs at the time, declined to authorize the release of the goods, resulting in their expiration and consequential damages to Respondent.

Point For Determination

8. We have considered the submissions made by each Counsel and have reviewed the record before us.
9. The central point for determination is whether the Customs officials acted within the scope of their lawful duties, entitling them to statutory immunity under section 217 of 1969 Act, thus justifying withholding of the Respondent's consignment and warranting the dismissal of Suit 534.

Timeline Of Customs' Response To Respondent's Consignment

10. The following chronological record of events highlights the Customs' response in handling Respondent's consignment:

| SR. NO. | DATE | EVENT |
|---------|-----------|---|
| 1. | 15-4-2003 | Condensed Milk production / manufacturing date |
| 2. | 15-4-2004 | Condensed Milk expiry date |
| 3. | 25-6-2003 | Condensed Milk imported (being date of Import General Manifest) |
| 4. | 7-7-2003 | Into-bond Bill of Entry filed |
| 5. | 10-7-2003 | Goods physically examined |

| SR. NO. | DATE | EVENT |
|---------|-------------------------------|---|
| 6. | 12-7-2003 | Assessment completed under section 80 of Customs Act, 1969 on into-bond Bill of Entry |
| 7. | 6-10-2003 | Ex-bond Bill of Entry filed for assessment of taxes NB: On this day, expiry date of milk was 6 months & 10 days away |
| 8. | 30-3-2004 | Show cause notice issued NB: SCN was issued 5 months & 25 days after filing of ex-bond Bill of Entry, at a time when only 15 days remained for consumption |
| 9. | Between 25-6-2003 to 2-4-2004 | Three (3) identical consignments of other importers released without objection |
| 10. | 3-4-2004 | Respondent's reply to show cause notice |
| 11. | 13-4-2004 | Order-in-Original passed for outright confiscation of goods |
| 12. | 15-4-2004 | Condensed Milk expires |
| 13. | 17-6-2004 | Respondent files Appeal before Customs Tribunal |
| 14. | 4-2-2006 | Customs Tribunal holds refusal of Customs to release goods based on ex-bond Bill of Entry as illegal |

11. As per the Bill of Entry (Exhibit P/10), the goods were imported on 25.6.2003. Thereafter, the goods were bonded on 7.7.2003. The dates of production and expiry, as shown on the original tin/can (Exhibit P/25 & P/26), were 15.4.2003 and 15.4.2004, respectively, a fact also confirmed in the Customs' Written Statement dated 12.8.2008 (in paragraph B-2). Upon import on 25.6.2003, 10 months remained until the expiry of the subject product/goods. The SCN was issued to Respondent for the first time on 30.3.2004, i.e. 5 months and 24 days after the filing of the ex-bond Bill of Entry for clearance and with only 15 days remaining before the goods' expiry date of 15.4.2004. The Respondent promptly responded 3 days later, denying the Customs' allegations. Notably, the Bill of Entry for ex-bonding the goods and their clearance for home consumption was filed on 14.7.2003, yet the goods remained uncleared. It was evident that the goods were suitable for home consumption and still had 6 months and 10 days remaining until its expiry when they were warehoused in bond under Customs custody and control awaiting clearance upon payment of taxes.
12. The Order-in-Original (based on SCN dated 30.3.2004) was set aside by the Tribunal through its order dated 4.2.2006. The Tribunal determined that "*clearance of goods was refused on flimsy grounds*" and that actions of the Customs Officials were illegal. This determination is significant, especially since no appeal was filed against the order, allowing it to attain finality. It is uncontested and evident from the record that Respondent on 15.6.2006 also invoked the jurisdiction of the Federal Tax Ombudsman ("**FTO**") in Karachi under the *Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000*, which led to a favourable recommendation dated 2.9.2006 for Respondent. However, following the Customs' representation under section 32 of the said Ordinance, the President of Pakistan by order dated

27.11.2007 (Exhibit P/21) reversed the FTO's decision but left Respondent free to pursue its claim in a court of law. Consequently, Respondent on 5.4.2008 (i.e. within 5 months of the President's order) instituted Suit 534.

13. The Respondent also alleged discrimination, claiming that three identical consignments of other importers were cleared by Customs without objection between 25.6.2003 (the date of Respondent's Import General Manifest i.e. the date the milk was imported) and 30.3.2004 (the date of SCN). To bolster this claim, Respondent presented evidence, including the Bills of Entry of those importers who brought in the same consignments from different manufacturers with identical Harmonized System (HS) Code / Pakistan Customs Tariff (PCT) headings, corresponding to the same period, as confirmed by the records themselves. Specifically, the first entry is dated 28.6.2003 (Exhibit P/22), the second on 24.7.2003 (Exhibit P/23), and the third on 31.7.2003 (Exhibit P/24). This evidence indicates that the Customs cleared similar products/goods for other importers during this time frame.

Ousting Jurisdiction Of Civil Courts

14. The subject of ousting jurisdiction of the civil court under section 9¹ CPC has long been the focus of extensive attention and legal discourse.
15. In **Abbasia Cooperative Bank v. Muhammad Ghaus** (PLD 1997 SC 3), the Supreme Court declared that when the jurisdiction of the civil court to scrutinize the validity of an action or order by an executive authority or special tribunal is contested based on jurisdiction ouster, certain conditions must be met. These are:
- i) The authority or tribunal must have been validly constituted under the relevant law.
 - ii) The order or action must align with the law granting exclusive jurisdiction to the authority or tribunal, ensuring adherence to the statutes conferring jurisdiction and avoiding any excess or lack of jurisdiction.
 - iii) The order or action by the authority or tribunal must not be malicious in nature (as a mala fide act by its very nature is an act without jurisdiction and is void, being an order passed not for the purpose

¹ Section 9: Court to try all civil suits unless barred: 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.

Explanation: A suit in 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.

intended by the enactment granting the power, but for some other collateral or ulterior purpose²).

- iv) The principles of natural justice must not have been violated during the issuance of the order or undertaking of the action.

16. In **Federation of Pakistan v. Saman Diplomatic Bonded Warehouse** (2004 PTD 1189)³, a Division Bench of this Court summarized the principles concerning the jurisdiction of the civil court under section 9 CPC:

(At Page 1207): The following ratio are deducible from the cases cited at the bar:

- (i) *The Civil Courts under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication.*
- (ii) *The provisions contained in a statute ousting the jurisdiction of Court of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to.*
- (iii) *The bar of jurisdiction could never be sustained if it could be shown that the impugned order / action was passed / taken not in bona fide exercise of powers conferred by the Act or the Rule.*
- (iv) *A mala fide order or one without jurisdiction is a fraud on the law and can never be assumed to have been passed under a particular statute.*
- (v) *Where the jurisdiction of Civil Court is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown that the Authority or the Tribunal was validly constituted under the Act and; that the order passed or the action taken by the authority or Tribunal was not mala fide; and that the passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or Tribunal; and that in passing the order of taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the Tribunal would not be immune from being challenged before a Civil Court.*
- (vi) *Where the Authority or Tribunal acts in violation of provisions of statute which conferred the jurisdiction on it or the order is exercised in lack of jurisdiction or mala fide or passed in violation of principles of natural justice,*

² PLD 1965 SC 671 (*Abdul Rauf v. Abdul Hameed Khan*); PLD 1965 SC 698 (*Muhammad Jameel Asghar v. Lahore Improvement Trust*)

³ The Division Bench, in appeal, set aside on merits Single Judge's judgment (reported in 2003 PTD 409 – *Saman Diplomatic Bonded Warehouse v. Federation of Pakistan*)

such order could be challenged before the Civil Court in spite of provisions of statute, barring the jurisdiction of Civil Court.

17. In Searle IV Solution v. Federation of Pakistan (2018 SCMR 1444), the central tenet set forth by the Supreme Court is that, although an ouster clause in a special statute barring the jurisdiction of a "civil court" does not apply to the High Court of Sindh at Karachi in civil suits, there is still an "implied" bar to jurisdiction under section 9 CPC. This implied bar arises from the special law, which provides for exclusive jurisdiction by a specialized forum. A plaintiff can only bypass this implied bar by demonstrating that its case falls within one of the established exceptions to the ouster of jurisdiction (as discussed in paragraph 15 above).
18. In essence, for the civil court's jurisdiction to be ousted, the aforesaid criteria must be satisfied, ensuring procedural fairness and legal validity in the actions or orders under scrutiny. If one or more of these conditions are violated, an exception is carved out for the civil court to assume jurisdiction.

Statutory Immunity & Ouster Clause Under Section 217⁴ of 1969 Act

19. Section 217 of 1969 Act has two distinct components. Section 217(1) provides personal indemnity to customs officials, protecting them from being sued for actions taken in good faith. Section 217(2) bars the jurisdiction of courts from entertaining suits that question orders passed under the 1969 Act or its Rules.
20. As is self-evident, the protection provided under section 217(1) of 1969 Act is contingent upon certain conditions and is not absolute. Put simply, the protection is not guaranteed in all circumstances but is dependent on specific conditions being met. This statutory immunity applies to official acts conducted by the Federal Government or any public servant in good faith and strictly within the confines of the law. In essence, it shields these officials from personal liability for actions undertaken in the course of their duties, provided those actions are carried out honestly, without malice, and within their legal authority. The purpose of the immunity is to enable officials to fulfil

⁴ Section 217. Protection of action taken under the Act: (1) No suit, prosecution or other legal proceeding shall lie against the Federal Government or any public servant for anything which is done or intended to be done in good faith in pursuance of this Act or the rules and notwithstanding anything in any other law for the time being in force no investigation or enquiry shall be undertaken or initiated by any governmental agency against any officer or official for anything done in his official capacity under this Act, rules, instructions or directions made or issued thereunder without the prior approval of the Board.

(2) No suit shall be brought in any civil court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act.

their duties without the constant threat of litigation, facilitating more decisive and effective execution of their responsibilities. However, in order to maintain a balance and ensure accountability and adherence to legal and ethical standards, this immunity only extends to official acts performed with honest intent within the boundaries of the law.

21. Turning to the bar outlined in section 217(2) of 1969 Act, it has been consistently affirmed that a mala fide order or one issued without jurisdiction is a fraud on the law and can never be considered as having been passed under the particular statute. In **K.G. Traders v. Deputy Collector of Customs** (PLD 1997 Kar 541)⁵, Sabihuddin Ahmed J ruled:

9.

With profound respect I must say that the contention is patently misconceived. It is well established that provisions barring jurisdiction of Civil Courts in terms similar to the above quoted provisions of the Customs Act are only attracted when the impugned action is found to be within four corners of that statute under which it is taken and does not suffer from taint, malafide or absence of jurisdiction. One may refer to two judgments of the Honourable Supreme Court in the case of Abdul Rauf v. Abdul Hameed Khan (PLD 1965 SC 671) and Muhammad Jameel Asghar v. Lahore Improvement Trust (PLD 1965 SC 698).

13. Syed Tariq Ali attempted to argue that while the impugned action might be questionable in the Constitutional jurisdiction. This contention I am afraid is also untenable. It is indeed true that in the original civil jurisdiction the powers exercised by this Court are not wider than those exercised by ordinary Civil Courts under the CPC. Nevertheless all the above precedents relate to the jurisdiction of Civil Courts and are founded upon the principle that a Court of general jurisdiction has plenary power to resolve all disputes of a civil nature unless barred by any law and provisions of special law purporting to take away their jurisdiction ought to be strictly construed.

Thus, a plea of jurisdictional bar could only be sustained if it is shown that the order impugned was made in the bona fide exercise of powers conferred by the 1969 Act or its Rules and not otherwise. Overall, the principle is that jurisdiction ouster must be clearly and strictly within the statutory framework, and any deviation from this would invalidate the ouster claim (such as where the authority has not acted in conformity with the statute's mandate). Accordingly, the exclusion of civil court's jurisdiction ought not be lightly assumed or readily inferred but should be jealously safeguarded.

⁵ Single Judge's order was upheld by a Division Bench in HCA No.213/1997 (*Deputy Collector of Customs (Appraisement) & Others v. K.G. Traders & Others*) vide judgment dated 1.6.1999

22. Applying the aforementioned principles in the context of the present case, Customs chose to delay the clearance process despite full awareness of the products/goods shelf life and expiry date, causing the goods to expire. This delay appears intentional, especially considering that other importers of the same product were allowed to clear them promptly. Additionally, Appellant No.3, in his Order-in-Original (later overturned by the Tribunal), acknowledged that Respondent's case did not involve any misdeclaration or false statements, thus confirming Respondent's credibility. Furthermore, the Tribunal's invalidation of the Order-in-Original against Respondent, indicated that the Customs' actions were illegal. Moreover, similar consignments from other importers were cleared without issues, suggesting discriminatory treatment against Respondent. Hence, Customs' invocation of statutory immunity under section 217(1) of Act 1969 was rendered inapplicable due to their actions lacking good faith. As a result, they could not claim the consequent ouster of jurisdiction of civil court under section 217(2).

Conclusion

23. Taking into account the above circumstances, we hereby uphold the learned Single Judge's Impugned Judgment dated 7.3.2018 and Decree dated 20.3.2018 passed in Suit 534/2008, as sound and impervious to challenge. The instant High Court Appeal is **dismissed** with pending application(s), with no ruling on costs.

JUDGE

JUDGE

Karachi
Dated: 21st June, 2024