

IN HIGH COURT OF SINDH, AT KARACHI

Suit No.519 of 2008

ORDER

Date of hearing 28.01.2014.

Plaintiff through Mr. Jehanzeb Awan, advocate.

Defendants No.1 & 2 through Mr. Usman Hadi, advocate.

Defendant No.3 through Rehan Aziz Malik, advocate.

NAZAR AKBAR-J: The application under Order VII Rule 11 CPC was dismissed by a short order, for the reasons to be recorded later on.

2. In brief, the case of the Plaintiff is that the Plaintiff is engaged in the business of manufacturing and export of textile products and the Defendant No.1 is the Freight Forwarding Agency at Karachi and associated with the Defendant No.2, who operates from Dubai whereas the Defendant No.3 regularly providing services to the Defendant No.1 and in view of their nature of business, the Plaintiff has availed services of the Defendants for export of their consignment details whereof are given in the plaint and for the purposes of this Application the said details are not required to be reproduced here. The controversy between the Parties started when certain consignments of various values could not reach to its destination and the correspondence between the Plaintiff and the Defendants as per the Plaintiff were misleading, which ultimately caused losses to the Plaintiff. The Plaintiff filed a Complaint against the

Defendants before the Collectorate of Customs and the said Complaint was finally disposed of by an Order-in-Appeal No.01/2007 dated 22.05.2007 whereby the order of the Additional Collectorate of Customs (Preventive) was affirmed. The suit for Damages has been filed on 28.03.2008 within one year of disposal of complaint of the Plaintiff in terms of Section 193 of the Customs Act, 1969.

3. The Defendants No.1 and 2 have preferred this Application on the grounds that the Plaintiff has no cause of action and the Suit is barred by Section 217 (2) of the Customs Act, 1969. The third contention of the Defendants is that the Plaintiff is estopped from filing fresh litigation against the Defendant as cause of action is same and the compromise/settlement between the Parties before the Customs Authorities clearly mentioned that no further claim/damages/demand to any kind shall be raised by either side against each other. He has heavily relied on the following observation from order-in-original:

“Accordingly, the dispute under reference stands resolved completely and no further claim or demand of any kind (as agreed upon by both parties) shall be raised by either side in respect of the consignment adjudicated upon vide the instant order. Besides, M/s. Freight Systems Co. Ltd., (LLC) are also warned to be careful in future”.

Therefore, according to the learned counsel for the Defendants, the Plaintiff was estopped from raising any claim or demand since they have entered into an agreement not to raise any such demand. The learned counsel for the Defendants No.1 and 2 in support of his contention that the Suit is hit by the Provisions of Section 217 (2) of the Customs Act, 1969, has relied upon the following case law:-

- I. Messrs. Rohi Ghee Industries (Pvt.) Limited vs. Collector of Customs (2007 PTD 878).
- II. Mrs. Hashmi Nazar vs. Sakhidad (PLD 1973 Karachi (Note) 139).
- III. Messrs. Dewan Scrap (Pvt.) Limited vs. Customs, Central Excise and Sales Tax Appellate Tribunal (2003 PTD 2127).

4. Learned counsel for the Plaintiff in rebuttal has contended that the cause of action for Damages has matured after the disposal of the dispute before Customs Authorities. He averred that before and during the process of litigation before Custom Authorities, the Plaintiffs have lost their business with the Customers whose consignment was delayed on account of incorrect information of Defendant No.1 and the same can only be decided after trial that whether the conduct of the Defendants in dealing with the Plaintiff has caused losses in a particular transaction resulted in monetary losses to the Plaintiff including loss of Customer etc? Therefore, at this stage, the Suit cannot be dismissed. He, in order to rebut the contention of Defendants that the Suit is hit by Provisions of Section 217 (2) of the Customs Act, 1925, has drawn my attention to the Prayer Clause of the Plaint. The Plaintiff has made the following prayers:-

- "A. *Damages for cancellation of balance quantity for the sum of £113,1765/- (Euros One Hundred Thirteen Thousand One Hundred Seventy Six only) alongwith markup thereon at a rate of 16% till the date of actual payment.*
- B. *Compensation for loss of future business, mental torture and stress for the sum of £310,000/- (Euros Three Hundred Ten Thousand only) alongwith markup thereon at a rate of 16% till the date of actual payment.*
- C. *To grant costs of the suit to the Plaintiff.*

D. *To grant any other relief/reliefs which this Honourable Court deems fit and proper in the circumstances of the case.”*

The Section 217 (2) is reproduced below. Section 217 (2) of the Customs Act, 1969 reads as follows:-

“217 Protection of action taken under the Act—

¹[(1)]

⁵[(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.”*

5. Perusal of Subsection (2) of Section 217 of the Customs Act, 1969 indicates that the Suit is barred only on the “question raised” before and decided by the Custom Authorities. The bar contained in Section 217 of the Customs Act, 1969, does not include rights of the Party to claim damages on account of losses sustained by the Plaintiff during the course of business and litigation as well as future loss on account of losing the clients etc. Therefore, according to Plaintiff’s counsel the citations relied upon by the learned counsel on this point are referring to the bar of re-agitating the controversy on the subject matter, which has been adjudicated upon by the Custom Authorities under the Customs Act, 1969. Learned counsel for the Defendants have failed to point out that the Custom Authorities have passed any order accepting or declining the Damages of the nature claimed by the Plaintiff in the present Suit. It is also an admitted position that the Damages were not even claimed before the Custom Authorities by the Plaintiff.

6. I have also examined the case law relied upon by the counsel for the Defendant to hit jurisdiction of this Court under Section 217(2) of the Customs Act, 1969. In my humble view the bar of not filing a suit is only

in respect of a challenge to the orders passed by Customs Authorities whereby any assessment has been made, tax has been levied or penalty has been imposed under the Customs Act, 1969. The present suit is for damages allegedly sustained by the Plaintiff on account of mental torture, stress suffered by them because of the cancellation of consignment of such quantities sent by the Plaintiff to their customers. Throughout the plaint, I did not find even one word in which the orders passed by the Customs Authorities under the Customs Act, 1969 has been referred to with any adverse remarks. Through this suit the Plaintiff has not prayed for setting aside of any order or modification in any order passed by the Customs Authorities, nor any assessment or tax levied or any penalty imposed by them is challenged by the Plaintiff. In all the three citations the maintainability of the suit has been declared out of the provisions of Civil Court only with reference to the points raised and adjudicated upon by the relevant authorities under the said special laws and after failing in that the Plaintiff have knocked the doors of Civil Court to seek redressal of the same on similar grievances, which were denied by the Authorities under Customs Act, 1969. Therefore, none of these citations is relevant to attract the provisions of Order VII Rule 11 CPC for rejection of plaint. The contention that no cause of action has accrued to the Plaintiff is based on the ground that the suit is hit by Section 217(2) of the Customs Act 1969 is equally misconceived. The plaint clearly shows a cause of action and is not hit by Section 217 (2) of Customs Act, 1969 either, therefore, both these contentions have no force.

7. The Plaintiff's next contention that the Defendant is estopped from filing the present suit is equally misconceived. Since the Plaintiff has not

raised any “further claimed” on any of the consignments, which were subject matter of the dispute before the Customs Authorities. The Prayer Clause reproduced above, clearly negates the contention of the learned counsel for the Defendants. The argument advanced on the basis of finding of Customs Authorities reproduced above is restricted if at all, to “in respect of the consignment adjudicated upon vide the instant order”. The contention that the Plaintiff is estopped from filing legal proceeding is also contrary to the provision of Section 28 of the Contract Act, which is reproduced as under:-

“28. *Agreement in restraint of legal proceedings void.* Every agreement, by which any party thereto is restricted absolutely from enforcing his right under or in respect of any contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his right, is void to that extent.”

Learned counsel for the Defendants to prove this point of estoppel and that the claim of the Plaintiff in the present Suit arising out of same cause of action has also referred to the following case law:-

- I. Syed Imtiaz H. Rizvi vs. Abdul Wahab (2007 CLC 483).
- II. Ghous Bux vs. Muhammad Suleman (2001 MLD 1159).
- III. Mst. Hajiani Khatija Bai vs. Haji Dawood (2003 MLD 828).
- IV. Muhammad Tufail vs. Atta Shabir (PLD 1977 SC. 220).
- V. Punoo Khan vs. Mst. Iqbal Begum (2012 MLD 1678).
- VI. Muhammad Yasin Khan vs. Azad Government of Jammu and Kashmir (1991 MLD 2295).
- VII. Mst. Sharifan Begum vs. Muhammad Shahbaz (2000 CLC 63).

8. I have examined all these citations. I am afraid that none of these citations is relevant to the facts of the case. None of these citations is on the point that even suit for Damages can be hit by the Provisions of Order VII Rule 11 CPC on the question of jurisdiction since the Parties had taken their dispute other than damages, before the Customs

Authorities or Settlement Authorities. Therefore, the case law cited by the learned counsel at the bar is not relevant for dismissal of the Suit for Damages.

9. Lastly, learned counsel for the Defendants claimed that they have no privity of Contract and, therefore, the Suit is liable to be dismissed. This contention is contrary to the record. Admittedly the Defendants have contested complaint of Plaintiff and they had entered into an Agreement/Settlement with the Plaintiff before the Customs Authorities as mentioned in the Order-in-Original. The Order-in-Original clearly shows that the Defendants have not only conceded to the relationship with the Plaintiff, but they have also not taken plea of non-existence of contractual obligation with the Plaintiff before the Customs Authorities

10. These are the reasons for the dismissal of application under Order VII Rule 11 CPC which was dismissed by a short order passed on 28.01.2014.

JUDGE

Approved for reporting.

JUDGE

MUBASHIR