

Stereo. H C J D A 38.
JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

ICA No.1219 of 2016

M/s. Tandlianwala Sugar Mills Ltd.

Versus.

Province of Punjab, etc.

J U D G M E N T

Date of hearing: 10.10.2017

Appellant by Mr. Ali Sibtain Fazli, Advocate.

Appellants in connected matters: M/s. Shazib Masud, Umer Tariq Gill, Hasham Ahmad Khan and Abad ur Rehman, Advocates

Respondents by: Mrs. Asma Hamid, Addl: Advocate General Punjab.

Mr. Imran Aziz Khan, Deputy Attorney General for Pakistan.

Ch. Imtiaz Elahi, Assistant Attorney General for Pakistan.

Mian Abid Zia, Law Officer, Excise and Taxation Department.

Mudassir Khalid Abbasi, J.: Through this single judgment we intend to decide the instant appeal alongwith ICAs No.1220/16, 1224/16, 1225/16, 1221/16, 1223/16, 1227/16, 1222/16, 1226/16 and 1228/16 as common questions of law and facts are involved in all these appeals.

2. These Intra Court Appeals under Section 3(2) of Land Reforms Ordinance, 1972 have been filed against judgment dated 15.07.2016 passed by learned Single Bench of this Court in W.P. Nos.18345/2012, 18347/2012, W.P. No.18348/2012, 18349/2012, 18350/2012, 18351/2012, 18378, 3913/2014 and 25447/2015.

3. Precisely, the facts are that appellants, being engaged in manufacturing and sale of sugar, are licensed to operate as distilleries under section 21 of the Punjab Excise Act, 1914 ("Act, 1914"), for extracting Ethanol (commonly known as spirit) from Molasses (a byproduct of sugar manufacturing). A notification S.O. TAX(E&T)3-4/2012 dated 03.07.2012 was issued, under section 31 of the Act, 1914, whereby a duty of Rs.2/- per liter was imposed on manufacture of spirit in any distillery or brewery established or licensed under section 21, with effect from 1st July 2012. Demand/show cause notices were issued to the appellant by the Excise and Taxation Officer for deposit of the afore-noted excise duty, these notices also state that in case of failure, recovery shall be made alongwith penalty under the law.

4. Appellants filed constitutional petitions to challenge the notification dated 03.07.2012 contending that same is violative of Article 151 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"). Vires of Section 131 along with the notification were also challenged by seeking amendments in the plaint. These writ petitions were dismissed in the following words:-

"Keeping in view the above discussion, this Court finds no arbitrariness, unreasonableness, irrationality and unconstitutionality in Section 31 read with Sections 3(6) and 3(14) of the Act, 1914, and feels no hesitation to hold that it

is a valid piece of legislation. This Court is also of the opinion that Notification dated 03.07.2012 levying duty on the product i.e. spirit being manufactured by petitioners and others, was validly issued on the strength of Section 31 ibid.

51. *In view of above discussion, instant petition along with connected petitions, being devoid of merit, are hereby dismissed with no order as to costs."*

5. At the outset, learned Addl. Advocate General representing the respondents has raised an objection regarding the maintainability of these appeals in terms of proviso of Sub Section 2 of Section 3 of Law Reforms Ordinance, 1972, it has been argued that Section 14 of Punjab Excise Act, 1914 provides an appeal from an original and appellate order of an Excise Officer, whereas, Section-15 empowers the Board of Revenue to exercise revisional powers against any order passed by the any subordinate Excise Officer. Likewise a Commissioner or Collector may call for the record of any case pending before, or disposed of by any Excise officer subordinate to him. Whereas in terms of the afore-referred provision of Law Reforms Ordinance, no appeal shall lie, if the application brought to High Court under Article 199 arises out of "Any Proceedings" in which the law applicable provided at least one appeal or one revision or one review to any Court Tribunal or authority against the "Original Order". Therefore, these appeals are hit by the afore-referred provision of Law Reforms Ordinance. Reliance is placed on "Deputy Commissioner/ Administrator, District Council Attock and another v. Lawrencepur Woolen Textile Mills Ltd" (1999 SCMR 1357), "Iqan Ahmed Khurram v. Government of Pakistan and others" (PLD 1980 SC 153), "Mst. Karim Bibi and others v. Hussain bakhsh and another" (PLD 1984 Supreme Court 344), "Muhammad Abdullah v. Deputy Settlement

Commissioner, Centre-I, Lahore” (PLD 1985 Supreme Court 107). Finally argued that these appeals are liable to be dismissed, being not maintainable.

6. On the other hand, learned counsel for the appellant has argued that Intra Court Appeals are maintainable on the grounds that demand/show cause notices whereby, appellants have been asked by the respondents to deposit the requisite duty at the rate of Rs.2/- per liter on manufacturing of spirit in distilleries, in pursuance to a notification dated 30.07.2012, in terms of Section 31 of Punjab Excise Act, 1914, do not fall within the purview of “original order” arising out of proceedings as contemplated in the ordinance. Besides demand notices, mainly legislative competence of the respondents coupled with the vires of Section 31 of the Act *ibid* read with Section 3(6), 3(14) and the vires of the afore-noted notification with reference to Article-151 of the Constitution have been challenged, therefore, it is out of the purview of any departmental authorities to determine the constitutionality of these laws/notification. Further contends that since the High Court has dismissed the petitions, therefore, this Court is fully equipped with the powers to determine the constitutionality of the Act in view of Article 151 and other enabling provisions of the Constitution. Reliance is placed on “Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly, NWFP and another” (PLD 1995 SC 66), “Pakistan International Airlines Corporation through Chairman and others v. Samina Masood and others” (PLD 2005 SC 831), “Town Committee, Kot Abdul Malik District Sheikhpura through Administrator v. Province of Punjab through the Secretary, Local Government and Rural Development Department

Punjab Lahore and another” (2001 YLR 1032), *“Pakistan Telecommunication Company Ltd. v. Federation of Pakistan”* (2016 PTD 1484) and *“Pakistan Oilfields Limited, Rawalpindi v. Province of Punjab, through Secretary Finance Department, Lahore and others”* (2010 SCMR 328). Finally, prayed for setting aside the impugned judgment.

7. Arguments heard. Record perused

8. Primarily, there are two critically important features of this case, pertaining to maintainability of these appeals. *Firstly*, that as to whether the demand/show cause notices issued by the respondents fall within the purview of **proceedings in which** law provides for an appeal, revision or review against the **original order** as envisaged in proviso to Section 3(2) of Law Reforms Ordinance and *secondly*, that in case where the demand of requisite duty has been challenged along with the vires of statute and competence of Province to enact the law was challenged and declared as **intra-vires** by the Learned Single Bench of this Court under its constitutional jurisdiction, as to whether Intra Court Appeal in terms of Land Reforms Ordinance, 1972 is maintainable.

9. In order to address the afore-referred proposition of law, for facility of reference, it would be appropriate to reproduce Section 3 of Law Reforms Ordinance, 1972:--

“3. Appeal to High Courts in certain cases:

1. An appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a single Judge of that Court in the exercise of its original civil jurisdiction.

2. An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a Single

Judge of that Court under [clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan] not being an Order made under sub-paragraph (i) of paragraph (b) of that clause:

Provided that the appeal referred to in this sub-section shall not be available or competent if the application brought before the High Court under Article 199 arises out of any proceedings in which the law applicable provided for at least one appeal or one revision or one review to any Court, Tribunal or authority against the original order.

3. No appeal shall lie under sub-section (1) or sub-section (2) from an interlocutory order or an order which does not dispose of the entire case before the Court.”

Sections 14 and 15 of the Punjab Excise Act 1914 read as under:-

“14. Appeal.— An appeal shall lie from an original or appellate order of an excise officer in such cases or classes of cases and to such authority as the Provincial Government shall by notification declare.

Provided that no order under this section shall be passed unless the appellant is afforded an opportunity of being heard].

15. Revision.— (a) The Board of Revenue may at any time revise any order passed by any excise officer subordinate to it.

(b) A Commissioner or Collector may call for the record of any case pending before, or disposed of by, any excise officer subordinate to him, and if he is of opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Board of Revenue:

Provided that the Board of Revenue shall not under this section pass an order revising or modifying any proceeding or order of a subordinate excise officer and affecting any person without giving such person an opportunity of being heard.”

10. With regard to the first proposition as referred above, in respect of words "original order" and "proceedings" contemplated in law Reforms Ordinance, with reference to

the maintainability of Intra Court Appeal, it has been settled in case of “Mst. Karim Bibi and others v. Hussain bakhsh and another” (PLD 1984 Supreme Court 344) that word ‘proceeding’ would include every step taken towards further progress by which the machinery of law is put to motion and original order may be the order passed by the lowest officer or authority in the hierarchy. Therefore, the test is that as to whether the original order passed in proceedings is subject to an appeal under the relevant law, irrespective of fact whether the remedy of appeal so provided was availed or not. It has been further held that original order is an order with which the proceedings under regular statute had commenced. Relevant paragraphs of the afore-cited judgment are reproduced as under:-

“The test laid down by the Legislature in the proviso is that if the law applicable to the proceedings from which the Constitutional Petition arises provides for at least one appeal against the original order, then no appeal would be competent from the order of a Single Judge in the constitutional jurisdiction to a Bench of two or more Judges of the High Court. The crucial words are the "Original Order". It is clear from the wording of the proviso that the requirement of the availability of an appeal in the law applicable is not in relation to the impugned order in the constitutional petition, which may be the order passed by the lowest officer or authority in the hierarchy or an order passed by higher authorities in appeal, revision or review, if any, provided in the relevant statute. Therefore, the relevant order may not necessarily be the one which is under challenge but the test is whether the original order passed in the proceedings is subject to an appeal under the relevant law, irrespective of the fact whether the remedy of appeal so provided was availed of or not. Apparently the meaning of the expression "original order" is the order with which the proceedings under the relevant statute commenced. The word "proceedings" has been used in different enactments and has been subject to judicial interpretation in a number of cases wherein it has received either restricted or wide meaning according to the text and subject-matter of the particular statute.

The term 'proceedings' is a very comprehensive term, and, generally speaking, means a prescribed course of action for enforcing a legal right, and hence it necessarily embraces the requisite steps by which judicial action is invoked. A 'proceeding' would include every step taken towards the further progress of a cause in Court or before a Tribunal, where it may be pending. It is the step towards the objective to be achieved, say for instance the judgment in a pending suit. The proceeding commences with the first step by which the machinery of the law is put into motion in order to take cognizance of the case. It is indeed comprehensive expression and includes all possible steps in the action under the law, from its commencement to the execution of the judgment.

(emphasis supplied)

In another pronouncement by the Hon'ble apex Court cited as "Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore" (PLD 1985 Supreme Court 107), afore-referred view was affirmed in the following words:-

"5. The above contention, however, can no longer be accepted, because a similar question has been elaborately examined by this Court recently in a settlement case, namely Mst. Karim Bibi v. Hussain Bakhsh and others (P L D 1984 S C 344), and it was held that the meaning of the expression 'original order' is the order with which the proceedings under the relevant statute commenced."

11. In view of afore-noted judgments, we can draw a definite conclusion that there are two fundamental qualifications to bring a case within the mischief of proviso to Sub Section 2 of Section 3 of Land Reforms Ordinance regarding non-maintainability of an Intra Court Appeal. Firstly, that the action impugned in writ petition should be a step in proceedings leading to an original and secondly, at least one appeal, revision or review should be available against the original order, irrespective of the fact whether such remedy was availed or not. In the light of afore-referred pronouncement made by the Hon'ble Apex

Court, present case qualifies both these tests as the demand/show cause notices, impugned in the writ petitions, are original orders in case of demand and in case of show cause notice is a step in proceedings. Undeniably, appeal under Sections 14 or revision under section 15 of the Punjab Excise Act 1914 is available.

12. So far as the second aspect of this case is concerned, much emphasis has been laid by learned counsel for the appellants that where the vires of law and legislative competence of the Province is brought under challenge, provision of appeal before the authorities becomes redundant because such controversies cannot be resolved by the departmental authorities. This argument might have some weight in case any provision of Punjab Excise Act, 1914 had been declared as ultra vires by the Learned Single Judge of this Court while exercising its constitutional jurisdiction. If such argument is accepted it would become a tool to avoid jurisdictional objection on maintainability of writ petition and intra court appeal as a consequence. In instant case, the provisions of Punjab Excise Act, 1914 and the notification have been declared intra vires, meaning thereby that law is intact, therefore, remedy of appeal against the demand of impugned duty is available under the law. Hence, appellants are left with only option to invoke the provisions of Article 185(3) of the Constitution against the impugned judgment. It is settled principle of law that appeal is creation of statute, which cannot be taken away or made available except in accordance with law providing it.

13. The case law referred by the appellants is examined and found distinguishable. “Pir Sabir Shah v. Shad

Muhammad Khan, Member Provincial Assembly, NWFP and another” (PLD 1995 SC 66) deals with the powers, mode, criteria and mechanism regarding the powers of judicial review of this Court in altogether a different perspective. The *ratio decendi* of this case is that question of vires cannot be determined otherwise than the exercise of judicial review under Article 199 of the Constitution. The theory of *ultra-vires* is that the act in question, be it as legislative or an administrative is beyond the legal competence of the authority. Election Commission is not competent to deal with the vires of law and it will be finally determined/decided by the superior courts and the forum is either High Court or Supreme Court. Maintainability of Intra Court Appeal was not the subject matter of the case nor was it discussed at all.

In case of “Pakistan International Airlines Corporation through Chairman and others v. Samina Masood and others” (PLD 2005 Supreme Court 831) vires of a regulation was directly challenged, enforcing fundamental rights conferred by Article 25 of the Constitution, against which neither any proceedings were involved nor any original order was required to be passed. The principles laid down in “Mst. Karim Bibi and others v. Hussain bakhsh and another” (PLD 1984 Supreme Court 344) were endorsed. Relevant portion from the judgment in Samina Masood Case is reproduced:

“8. Both the learned counsel for PIA wanted to derive benefit from proviso to subsection (2) of the section 3 of Ordinance, 1972, canvassing the view that the petitions brought before the High Court under Article 199 of the Constitution arose out of proceedings in which the law applicable provided for at least one appeal, revision or

review. They were presumably of the view that the proceedings before High Court were referable to service laws where provision of appeal was available and, hence, the petitioners could not have challenged the final order before the same Court and that the present appeals were competent. After examining the law strictly with reference to the matter in dispute, we are of the view that the appellants and the petitioner cannot avail any benefit of the aforesaid proviso; firstly, because the petitions before the High Court could not be identified with “any proceedings” and secondly, that such writ petitions were not directed against any original order of any departmental authority against whom any appeal could lie in the proceedings relevant to such law. The respondents have directly challenged the vires of a regulation enforcing their fundamental rights conferred by Article 25 of the Constitution, not capable of being identified with “any proceedings” taken under any other law where any original order had been passed by any authority. We are of the considered view that the impugned judgments, falling within the ambit of the proviso, were appealable before a Bench of two or more Judges of the same High Court under subsection (2) thereof and appeals and the petition before this Court are not maintainable.

9. Mst. Karim Bibi v. Hussain Bakhsh PLD 1984 SC 344 was placed reliance upon. In this case, this Court has elaborately discussed section 3 of Law Reforms Ordinance, 1972 with particular discussion on “the proceedings” referred to in proviso to subsection (2) thereof. The principle discussed therein is in consonance with what we have arrived at but the conclusion was based on a dispute arising from proceedings under Displaced Persons (Compensation and Rehabilitation) Act of 1958 and where the authorities concerned had also passed different order. In the instant case, the conditions are not covered by proviso to subsection (2) of section 3 of the Ordinance, 1972.”

In case “Deputy Commissioner/Administrator, District Council Attock v. Lawrencepur Woollen Textile Mills Ltd” (1999 SCMR 1357) legality and propriety of a Notification imposing export tax was challenged on the ground that 30 days’ time to file objections was not made available. The writ petition was dismissed, however, learned Division Bench ignored the objection of maintainability and allowed intra court appeal.

Honorable Supreme Court held that impugned Notification, levying export tax, was in fact an order appealable to the Controlling Authority under Article 86 of the Basic Democracies Order, 1959 and section 219 of the Punjab Act XXXIV of 1975 and rule 2 of the Local Council Appeal Rules, 1961. Consequently the judgment in I.C.A. was set aside. To hold that impugned Notification was an appealable order, principle enunciated in “Iqan Ahmad Khuram v. Government of Pakistan” (PLD 1979 Kar. 610) were approved. The judgment by learned Sindh High Court was given on maintainability of writ petition, challenging vires of various Notifications, whereby right to promotion etc. was affected. It was held that the Notifications were order appealable before Service Tribunal, therefore, Constitutional jurisdiction of High Court was barred in view of bar contained in Article 212 of the Constitution. It may also be pointed out that the judgment by Learnneed Sindh High Court was upheld by the Apex Court in “Iqan Ahmad Khuram v. Government of Pakistan” (PLD 1980 Supreme Court 153). Facts of instant cases are distinguishable because the notification challenged in these petitions was not appealable before any authority, rather a notice and consequent demand was required to be raised, against which, remedies were available.

In another case of “Pakistan Oilfields Limited, Rawalpindi v. Province of Punjab, through Secretary Finance Department, Lahore and others” (2010 SCMR 328), question for determination was that as to whether if at

the time of levy of tax, the relevant statute did not provide the remedy of appeal and it was provided through a subsequent amendment, would it effect the maintainability of appeal or not, therefore, again this judgment does not apply to the instant case.

14. In view of fore-going discussion, in our opinion present appeals are caught by mischief of the proviso of Sub Section (2) Section 3 of Law Reforms Ordinance, 1972 and are **dismissed** being not maintainable.

15. Since the appeals are not heard on merits, but are dismissed on technicalities, therefore, respondents are restrained, for 20 days from today, to withdraw the amount of tax deposited by the appellants in pursuance of order dated 10.08.2016 by this Court, enabling the appellants to pursue their remedy in accordance with law.

(Shahid Jamil Khan)
Judge

(Mudassir Khalid Abbasi)
Judge

APPROVED FOR REPORTING

Judge

Judge