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Presented on 17/12/15

for H. S. M.
Assistant Registrar (D-II)

AMENDED PLAINT IN COMPLIANCE OF THE
ORDER DATED 15.12.2015.

IN THE HIGH COURT OF SINDH, KARACHI
(Original Civil Jurisdiction)

SUIT No. 2265 /2015

Popular Spinning Mills (Pvt) Ltd
311, Chappal Plaza, Hasrat Mohani Road
Off: I.I. Chundrigar Road
Karachi

Through its Director Coordination/Company Secretary
Mr. Kamran Hussain Mughal s/o
Late Nazir Hussain Mughal
CNIC 42301-1648835-9.....Plaintiff

Versus

1. PAKISTAN
Through Secretary Revenue Division and
Ex-Officio Chairman, Federal Board of Revenue
Islamabad
2. Directorate of Input Output Co-Efficient Organization
5th floor, Custom House
Karachi
Through its Director
3. Assistant Director
Directorate of Input Output Co-Efficient Organization
5th floor, Custom House
Karachi
4. Collector of Customs
Model Customs Collectorate (East)
Customs House
Karachi
5. Collector of Customs
Model Customs Collectorate (West)
Customs House
Karachi.....Defendants

SUIT FOR DECLARATION AND PERMANENT INJUNCTION

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 2265 of 2015

Popular Spinning Mills (Pvt.) Ltd. ----- Plaintiff
Versus
Pakistan & others ----- Defendants

For hearing of CMA No.16828/2015 under Order 39 Rule 1 & 2 CPC.

Date of hearing: 26.01.2016
Date of Order: 04.03.2016
Plaintiff: Through Dr. Farogh Naseem Advocate.
Defendant No. 1: Through Mr. Abdul Qadir Leghari DAG.
along with Mr. Muhammad Amir A.D. FBR
Defendant 2& 5: Through Mr. Mohsin Kadir Shahwani
Advocate.
Defendant No. 4: Through Mr. Kashif Nazir Advocate.

ORDER

Muhammad Junaid Ghaffar, J. Through instant Suit the plaintiff has sought declaration that SRO No. 565(I)/2014 dated 26.6.2014 ("565") and SRO No. 606(I)/2015 dated 30.6.2015 ("606") are completely without jurisdiction, illegal, void, ab-initio and of no legal effect with a further prayer to declare that SRO No. 565(I)/2006 dated 5.6.2006 stands revived with effect from 26.6.2014 as if it was never rescinded. Along with the plaint, the listed application under Order 39 Rule 1 & 2 has also been filed, whereby, it has been prayed that pending final adjudication of the Suit, the defendants may be restrained from collecting customs duty on the plaintiff's consignment beyond 5%. On 15/12.2015 as an interim measure a learned Single Judge of this Court had restrained the defendants from demanding customs duty

beyond 10% with further directions to release the Plaintiff's consignments upon payment of duty to the extent of 10%.

2. It is the case of the plaintiff company that in terms of SRO 565(I)/2006 dated 5.6.2006 the rate of customs duty on the raw material (clay coated board and Aluminum foil) was 5%, and on such promise and grant of exemption, the Plaintiff had established its industry. However, subsequently the rate of duty was increased to 10% in terms of SRO 565 and currently to 15% under SRO 606. According to the plaintiff such enhancement being confiscatory in nature is against the fundamental rights guaranteed under the Constitution, hence instant Suit.

3. Counsel for the plaintiff has contended that relying upon the representation made by the defendants through issuance of SRO No. 565(I)/2006 dated 5.6.2006, the Plaintiff has incurred heavy expenditure and has set up a modern and state of the art plant for the purpose of manufacturing packaging material for liquid food industry viz. dairy and juices; that an approximate expenditure to the tune of Rs. 220 million has been incurred on such promise of the defendants; that SRO No. 565(I)/2006 dated 5.6.2006 was amended through another SRO 565, whereby, the concessional rate of duty on the basic raw material i.e. Clay Coated Board and Aluminum Foil was increased from 5% to 10% and subsequently to 15% through SRO 606; that such amendment carried out through two impugned Notifications is confiscatory in nature and has crippled the entire industry of the plaintiff which is near to its closure if such enhanced duty is levied on the raw material imported by the plaintiff; that such enhancement of duty is against Article 18, 23 and 24 of the Constitution inasmuch as the plaintiff's business is no more viable, whereas, the finished item / product being manufactured by the plaintiff if imported from abroad is more cost effective and cheaper than the items locally manufactured by the plaintiff; that the plaintiff was forced to clear certain consignments by paying the duty to the extent of Rs. 63,486,696 under protest (during the period from 26.6.2014 till filing of Suit on 17.12.2015) and such amount is being claimed as refund by the plaintiff. In support of his contention the learned Counsel has relied upon the case reported in *Government of Pakistan and others V. Muhammad Ashraf and others*



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(PLD 1993 SC 176), *M/S Elahi Cotton Mills Ltd and others V. Federation of Pakistan through Secretary M/O Finance, Islamabad and 6 others* (PLD 1997 SC 582), *Messrs Amtex Limited V. Customs Excise and Sales Tax Appellate Tribunal and 4 others* (2011 PTD 602), *Molasses Trading and Export (Pvt.) Limited V. Federation of Pakistan and others* (1993 SCMR 1905), *Shah Nawaz (Pvt.) Ltd. through Director Finance V. Pakistan through the Secretary Ministry of Finance Government of Pakistan, Islamabad and another* (2011 PTD 1558).

4. Conversely, Mr. Mohsin Kadir Shehwani Counsel for defendants No.2 and 5 has contended that as per the plaintiff's own averments after increase in duty from 10% to 15% they have earned more profits as against the losses being claimed by them, whereas, the increase and decrease in the rate of customs duty is a policy matter which must not be interfered with by the courts; that there is no estoppel against the legislature as the rate of duty is structured on the basis of fiscal decisions of the Government; that such levy and enhancement if any, is not confiscatory in nature. In support of his contention he has relied upon *Government of Pakistan through Ministry of Finance and Economic Affairs and another V. Facto Belarus Tractors Limited* (PTCL 2000 CL 320), *Anoud Power Generation Ltd. and others V. Federation of Pakistan and others* (PTCL 2001 CL 277), *M/s Abdul Wahid Abdul Majid V. Government of Pakistan and others* (1993 SCMR 17), *Ch. Zulfiqar Ali V. The State* (PLD 2002 SC 546) and *Messrs N. S., Enterprises and others V. Government of Pakistan through Ministry of Finance Islamabad and others* (1997 CLC 106).

5. Similarly, Mr. Kashif Nazeer has contended that in terms of Section 31-A of the Customs Act the rate of duty applicable is the rate on which date the goods declaration is filed, whereas, the impugned Notifications were not time bound and could be amended at any point of time; that in the case of *Molasses Trading and Export Company (Pvt.) Limited and others V. Government of Pakistan and others* (2007 PTD 1005), it has been held that even profit and loss is a part of business and cannot be held to be confiscatory in nature.

6. I have heard all the learned Counsel and perused the record. It appears that the plaintiff was initially engaged in the business of textiles and thereafter in the year 2012, converted its line of business to



liquid food packaging industry for dairy and juices for which the plaintiff started importing Clay Coated Board and Aluminum Foil as its basic raw material. The precise grievance of the plaintiff is that when the industry was established, the rate of duty on the import of such raw material was 5% pursuant to SRO No. 565(I)/2006 dated 5.6.2006, and thereafter, through two impugned amendments vide SRO 565 and SRO 606, the extent of exemption has been reduced and now the plaintiff is presently liable to pay 15% Customs duty on the import of such raw material. This according to the plaintiff is confiscatory in nature and has resulted into a complete closure of the plaintiff's business being unviable due to imposition of such heavy customs duty on the basic raw material. The plaintiff's further case is that the finished product as manufactured by the plaintiff is also being imported from China and is much cheaper in the market as compared to the plaintiff's finished product, therefore, the enhancement in the rate of duty, is without any lawful authority besides being in violation of the fundamental rights guaranteed in the Constitution.

7. The question that as to whether such levy of duty or enhancement or for that matter reduction in exemption could be termed as confiscatory or expropriate in nature, and is in conflict with the fundamental rights specially Article 19, 23, 24 & 25 of the Constitution came for scrutiny before the Hon'ble Supreme Court in the case of *Government of Pakistan Vs. Muhammad Ashraf (Supra)*. In that case a plea was raised on behalf of some of the respondents (Importers) before the Hon'ble Supreme Court that imposition of regulatory duty on the import of Soya-bean Oil was wholly uneconomical resulting in tremendous loss in monetary terms, hence such levy was mala fide and Unconstitutional. The respondents had relied upon certain decisions from the Indian jurisdiction and the Hon'ble Supreme Court, at pg: 185 of the report observed as under:

From the aforesaid, the contention of Mr. Fakhruddin G. Ebrahim is fully supported by the case-law cited by him, so far as the Indian jurisdiction is concerned that any legislation whereby either the prices of marketable commodities are fixed in such a way as to bring them below the cost of production and thereby make it impossible for a citizen to carry on his business; or tax is imposed in such a way so as to result in acquiring property of violate of the fundamental right to carry on business or to hold property as unconstitutional. We were not referred to any case law contrary to what has been relied upon by the



learned Deputy Attorney General. There is no reason for taking a different view so far our Constitution is concerned and therefore, on the same principle the imposition of duty would be open to challenge qua its constitutionality or validity.

The learned Counsel for the plaintiff has vehemently argued that the Hon'ble Supreme Court has held that such an enhancement and or levy of any tax / duty can be declared as confiscatory by the Courts, therefore, in the circumstances this Court can also come to the same conclusion. However, to put the record straight it may be observed that since in those cases such issue was not dealt with by the High Court, the matters were remanded to examine such contention. On remand the matter came up before a Division Bench of this Court and the judgment is reported as ***Molasses Trading and Export Company (Pvt.) Limited and others V. Government of Pakistan and others*** (2007 P TD 1005). The learned Counsel for the plaintiff has contended that though after remand, the petitions were dismissed, but in that case per learned Counsel, the petitioners had failed to discharge the burden that such enhancement of duty was confiscatory in nature, whereas, the plaintiff in the instant case has ably demonstrated at the stage of injunctive relief by way of presenting its annual accounts for the relevant period; that increase in the rate of duty on the raw material in question is confiscatory in nature and has rendered the plaintiff's business unviable. It is pertinent to mention that in that case the petitioners were incidentally being represented by the same learned Counsel, however, with respect I may observe that the learned Division Bench in the case of ***Molasses Trading and Export (supra)*** had not only rejected such proposition on the factual aspect of the case, but had also decided the same on the legal plane by holding that neither the imposition of additional duty offends Article 18 nor the additional levy is protected any more in terms of Section 31-A of the Customs Act, whereas, the losses stated to have been sustained are incidents of risk, which every businessmen takes and the measure of duty levied could in no sense be treated as confiscatory or expropriate in nature. It would be advantageous to refer to the relevant observations of the learned Division Bench wherein it has been held as under:-



"Indeed we are conscious that Constitution of United States unlike ours does not contain guaranteed fundamental right to carry on a lawful trade and the Honorable Supreme Court has observed in *Illahi Cotton Mills V. Federation of Pakistan* (PLD 1997 SC 582) that legislation whereby prices of marketable commodities which fixed in such a way as to force manufacturers to sell them below the cost of production might offend Article 18. Nevertheless, it needs to be kept in view that all that Article 18 guarantees is the freedom to carry on lawful trade subject to the power to regulate it in the interest of free competition. Indeed the State may not impose restrictions or take measures which might prevent a citizen from carrying on such business. Nevertheless, there seems to be no obligation on the part of the State to assure every person undertaking any business a particular margin of profit and profits and losses are the normal incidents of business in a market economy. As stated above in case the petitioners were unable to pass on the burden of indirect taxes upon consumers for some time they could only blame their own luck.

Dr. Farogh Naseem was also unable to show that the levy of regulatory duty had the effect of compelling the petitioners to incur losses for a sustained period of time. On the contrary, he urged that the petitioner had imported the goods in question after calculating that such import would yield him a reasonable margin of profit, which was foiled by the sudden imposition of duty and, as such, the imposition was ultra vires. We are afraid, we are entirely unable to agree. Indeed the proposition might be sustainable on the principle laid down in *Al-Samrez* case 1986 SCMR 1917 but has completely lost force upon the insertion of Section 31-A of the Customs Act and several subsequent precedents of the Supreme Court, whereby those principles stood completely effected. In precise terms, learned counsel only attempted to resurrect a legal proposition, which has completely effect through statutory intendment and subsequent case law.

For the foregoing reasons, we are clearly of the opinion that the losses stated to have been sustained are incidents of risk, which every businessman takes and the measure of duty levied could in no sense be treated as confiscatory or expropriatory. All the petitions are, accordingly, dismissed with costs." (Emphasis supplied)

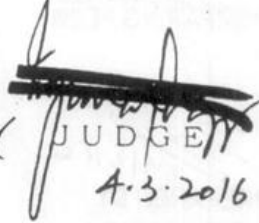
8. Thereafter the judgment in the case of *Molasses Trading & Export (Supra)* and others was once again impugned before the Hon'ble Supreme Court in the case reported as *Hassan Ali Grains (Pvt) Limited and others Vs. Government of Pakistan & Others* [2016 PTD 78], wherein, the Hon'ble Supreme after granting leave, has dismissed the appeals, by observing that "It is not necessary to reproduce the said reasoning or extracts from the impugned judgment and nor is, it necessary to repeat or regurgitate such reasoning because we are entirely in agreement with the same as well as the conclusion arrived at that the regulatory duty in question was not a confiscatory levy.

9. Moreover, it has already been stated in the pleadings by the plaintiff that they have deposited a substantial amount of Rs. 63,486,696/- (during the period when the duty was enhanced from 5% to 10% till filing of the Suit) for which they also seek refund through instant Suit, whereas, the question that the levy or enhancement is confiscatory or expropriate in nature, stands settled up to the level of the Hon'ble Supreme Court, hence no prima facie case is made out nor balance of convenience is in favor of the plaintiff, whereas, no question of any irreparable loss arises at this stage as the plaintiff has been paying the duty at enhanced rate from 5% to 10% since 26.6.2014. Even otherwise and without prejudice, the quantum of losses allegedly occurred due to impugned amending notifications is confiscatory and expropriate in nature or not, can only be decided at the trial of the Suit and not at the injunction stage, without appreciating the proper evidence so led by the plaintiff to that effect. Therefore, there appears to be no case of granting any injunctive relief. In the circumstances and in view of the dicta already laid down by the learned Division Bench in the case of *Molasses Trading and Export supra* and upheld by the Hon'ble Supreme Court in the case of *Hassan Ali Grains (Supra)* I am of the view that no case for indulgence is made out. Accordingly, listed application bearing CMA No. 16828 of 2015 is hereby dismissed.

Dated: 04.03.2016

ARSHAD/



Sd 
JUDGE
4.3.2016