

one of the two shops to be constructed on the site in accordance with law and the Rent Controller shall preferably allow him the possession of the shop which is larger in size. The appellant shall vacate the present shop within four months from today subject to his depositing rent in Court as per orders of the Rent Controller in this regard.

M. Y. H.

*Appeal dismissed.*

P L D 1983 Quetta 84

*Before Abdul Qadeer Chaudhry and Mustakhriddin, JJ*

SULEMAN HAJI AND ANOTHER—Petitioners

*versus*

THE STATE AND 2 OTHERS—Respondents

Constitutional Petition No. 64 of 1982, decided on 13th March, 1983.

(a) Civil Procedure Code (V of 1908)—

— S. 83 — Provisional Constitution Order (1 of 1981), Art. 9—Alien enemy—Debarred to file a suit or a Constitutional petition, but can defend a suit or cause and challenge order passed against him through appeal or Constitutional jurisdiction. [p. 87]A

*Messrs Associated Cement Companies Ltd. Bombay through its Duly Constituted Attorney Mr. Tariq Ali, Advocate, Karachi v. Pakistan Commissioner of Income-tax, Lahore and 7 others P L D 1972 Lah. 201 and Messrs Associated Cement Companies Ltd. v. Pakistan through the Commissioner of Income-tax, Lahore Range, Lahore and 7 others P L D 1978 S C 151 ref.*

*East Pakistan v. Allahabad Bank Ltd. and others P L D 1968 Dacca 1; Haji Muhammad v. K. B. M. Sirajul Alam Chowdhury P L D 1967 Dacca 515; In re: Reference No. 1 of 1965 P L D 1966 Kar. 160 and Guru Dass Saha v. The Deputy Custodian, Enemy Property (Lands and Buildings), East Pakistan and 3 others P L D 1969 Dacca 841 rel.*

(b) Civil Procedure Code (V of 1908)—

— O. XLI, r. 32—Appeal (civil)—Appellate Court may vary, modify or set aside judgment—Order of appellate Court final—Appeal—Continuation of proceedings and judgment of trial Court merges into order of appellate Court.—[Appeal (civil)]. [p. 87]B

(c) Pakistan (Control of Entry) Act (LV of 1952)—

— Gwadar Application of Central Laws Ordinance (XXXVII of 1960) S. 2(2) — Gwadar (Government and Administration) (Amendment) Order (XV of 1959)—Notification No. D 6329-P/52, dated 20-11-1952—Pakistan (Control of Entry) Act, 1952, *held*, made applicable to Gwadar by Ordinance XXXVII of 1960. [p. 89]C

(c) Pakistan Coast Guards Act (XVIII of 1973)—

— S. 14—Pakistan (Control of Entry) Act (LV of 1952), Ss. 6 & 3—Police Act (V of 1861)—Officers of Coastal Guard Force—Police Officers and authorised to arrest without warrant any person contravening provisions of S. 3, Act LV of 1952. [p. 90]D

(d) Pakistan Coast Guards Act (XVIII of 1973)—

— S. 14—Customs Act (IV of 1969), Ss. 169, 168(2), 180 and Central Board of Revenue Notification No. S. H. O. 30(1)/73, dated 1-4-1973—Confiscation of goods — Officers of Force have power to arrest, investigate and challan accused but have no power to confiscate goods seized by them—Procedure laid down in Ss. 168, 169 & 180, Customs Act, 1969, to be followed. [p. 91]E



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Pakistan Coast Guards Act (XVIII of 1973)—

S. 14—Customs Act (IV of 1969), Ss. 2 & 15 & 169, Criminal Procedure Code (V of 1898), S. 517—Provisional Constitution Order (I of 1981), Art. 9—Seizure of goods, confiscation of—Livestock and boats seized by Officers of Coast Guard Force—Not stolen goods nor secured from accused on their arrest or used in commission of offence—Expression “regarding which any offence appears to have been committed” in S. 517, Cr. P. C. held, not relevant that being related to cases of offence relating to property—Special provision of procedure available for adjudication and confiscation of goods seized under Customs Act, 1969—Livestock seized by Coast Guard authorities not smuggled goods—Section 15, Customs Act not attracted—Magistrate passing orders of confiscation under S. 517, Cr. P. C. in circumstances held, acted illegally and without lawful authority—Order of confiscation set aside and sale-proceeds of auction of goods by authorities restored to petitioners. [p. 91] F & G

*Basharatullah* for Appellant.

*S. D. M. Gwadar* for the State.

Respondent No. 1 in person.

*Munawar Ahmed* for Respondent No. 3.

Date of hearing: 20th December, 1982.

#### JUDGMENT

ABDUL QADEER CHAUDHARY, J.—The petitioners are Indian Nationals, and according to them, by profession they are owners of Ship-launches employed for the transport of cargo from one port to the others. The launches are registered in India. It is the case of the petitioners that for an importer in Dubai, named Abas Sanjwani his agent Messrs Mandalia & Company of air-conditioned marketing Bombay, made the purchase of buffaloes, sheep and goats. 102 buffaloes were taken on board by *Safina Al-Hashmi* and 360 sheep and goats were taken on board by launch *Basimi*. It is further stated by the petitioners that these two launches were passing by the sea side of Pakistan shores near Gwadar on 17/18 November, 1981, when they were taken into custody by a team of Coast Guard and brought to Gwadar. The Challan against 29 members of the crew was submitted under section 3/4 of the Pakistan (Control of Entry) Act, 1952 (hereinafter referred to as Act of 1952). The petitioner No. 1 and the other members of the crew were found guilty of the charge and the Sub-Divisional Magistrate, Gwadar sentenced each of them to undergo 3 month's simple imprisonment, and also *vide* his order dated 16-1-1982, directed confiscation of the two launches alongwith consignment and buffaloes, sheep and goats. It was further directed that the arrangement for the deportation of the petitioner be made through the agency of the Home Secretary, Government of Baluchistan.

The Chief Justice of Baluchistan was on tour to Turbat in February, 1982. During his visit to Jail at Turbat, a Jail Appeal was presented by the petitioner and 29 crew members (Annexure P). The High Court by its order dated 15-2-1982 held the view that Jail appeal is not maintainable and an order was made that it be treated as a revision. The same came up for hearing on 21-3-1982, in the presence of the Advocate-General, and the petition was dismissed on the same day (Annexure R-1).



The petitioners have challenged the apprehension of the accused persons, taking of two launches in custody, direction of the sale of the consignments, trial of the petitioner No. 1 and others under the Pakistan (Control of Entry) Act, 1952. The petition has been contested by the respondent.

We have heard learned counsel for the petitioners and learned Advocate-General for the State.

The learned counsel for the petitioner has formulated the following points for determination:—

- (a) The Coast Guard authorities were not competent to apprehend the petitioner No. 1 alongwith members of his crew as they have no such authority under the law.
- (b) The Pakistan (Control of Entry) Act of 1952, is not applicable to Gwadar area. As such the apprehension of the two launches, initiation of prosecution thereunder, the making of orders of conviction and sentence of accused are without lawful authority.
- (c) There is no provision in Act of 1952, for confiscation of the goods. The order of confiscation passed by the Sub-Divisional Magistrate is illegal and without lawful authority.
- (d) It is a case of no evidence. The necessary ingredients of section 3/4 of Act of 1952 are not attracted.
- (e) A preliminary objection has been taken by the learned Advocate-General that this petition is not competent under section 83 of the Civil Procedure Code. It is contended by the learned A.-G. that petitioners are Indian Nationals and they cannot sue in any Court of Pakistan without permission of the Central Government. Section 83 reads as under:—

“Alien enemies residing (in Pakistan) with the permission of the (Central Government), and alien friends, may sue in the Courts (in the Provisions), as if they were (citizens of Pakistan).

(2) No alien enemy residing (in Pakistan without such permission, or residing in a foreign country), shall sue in any of such Courts.

*Explanation*:—Every person residing in a foreign country the Government of which is at war with (or engaged in military operations against) (Pakistan), and carrying on business in that country without a licence in that behalf under the hand of a Secretary to the (Central Government) shall, for the purpose of subsection (2) be deemed to be an alien enemy residing in a foreign country.”

The learned A.-G. has referred to *Messrs Associated Cement Companies Ltd.; Bombay through its Duly-constituted Attorney Mr. Tariq Ali Advocate, Karachi v. Pakistan through Commissioner of Income-tax Lahore and 7 others* (1) and *Messrs Associated Cement Companies Ltd. v. Pakistan through the Commissioner of Income-tax, Lahore Range, Lahore and 7 others* (2). Appeal was preferred against the decision of the Lahore High Court reported in P L D 1972 Lah. 201. The facts of this case are that the petitioner-Company was a company incorporated and registered in India. In 1965, when war broke out between India and Pakistan, the petitioner was treated as an alien enemy and a Deputy Custodian of its property was appointed under rule 182 of the Defence of Pakistan Rules read with the Enemy Properties (Continuance of Emergency Provisions) Ordinance, 1969. It was held that the petitioner

(1) P L D 1972 Lah. 201

(2) P L D 1978 S C 151



was an alien enemy and he cannot sue in Pakistan's Courts. This view of the High Court was confirmed by the Supreme Court.

The authorities quoted by learned A.-G. are inapt because the petitioners in the reported cases were declared as enemy subject. The case was taken up before the High Court after 1965 war broke out between India and Pakistan. The proclamation of Emergency and the Defence of Pakistan Rules had not been withdrawn by the Government.

The learned counsel for the petitioner has met this objection by two-fold arguments:—

(i) The hostilities have ended between India and Pakistan, therefore, an Indian National cannot be termed as alien enemy; or in alternative the embargo provided under section 83 is only to institute a suit but this embargo does not apply to an alien enemy who has to defend the suit. In this context it is submitted that the petitioner No. 1 and the other accused were prosecuted and convicted. Thus they were defending the case lodged against them. After the adverse order of conviction and confiscation of their property has been made, they are entitled to move in appeal/revision or by way of Constitutional Petition to challenge the adverse order passed against them. In support of this contention he has referred to *East Pakistan v. Allahabad Bank Ltd. and others* (1), wherein it has been held that embargo under section 83 is upon prosecuting a suit and not upon defending a suit. Similar view was taken in *Haji Muhammad v. K. B. M. Sirajul Alam Chowdhury* (2) and it was held that an alien whether friend, or enemy when sued is not precluded from defending himself and has right to appeal against any decision given against him. An appeal is a mere continuation of the suit and as such appeal in such cases is nothing more than an attempt to ward off the attack launched upon him. Mr. Justice I. B. Khamisani in *In re: Reference No. 1 of 1965* (3), also took the same view. The learned A.-G. however, stated that if the petitioner is debarred to file a suit under section 83, C. P. C., as an alien enemy, the High Court cannot exercise its Constitutional jurisdiction. He has referred to P L D 1972 Lah. 201; referred to above. The same view was taken in *Guru Dass Saha v. The Deputy Custodian, Enemy Property (Lands and Buildings), East Pakistan and 3 others* (4). The overall conclusion which we have drawn from the provisions of section 83, C. P. C. and the authorities quoted above, is that an alien enemy is debarred to file a suit in the civil Courts of Pakistan and so he is not entitled even to file a constitutional petition in the extraordinary jurisdiction of the High Court. But an alien enemy can defend a suit or cause as a defendant; and he had the right to challenge the order passed against him, in such proceedings; through an appeal or in the constitutional jurisdiction of the High Court. This can be the reasonable interpretation of section 83, C. P. C. It would be unjust to hold that an alien can be sued but he cannot challenge the order passed against him, in such suit, by way of appeal. An appellate Court may vary, modify or set aside the judgment and it is the order of appellate revisional Court to which finality is attached. An appeal is a continuation of the proceedings and the judgment of the trial Court merges into the order of appellate Court.

It is now to be considered whether the petitioners are alien enemies and are debarred to sue in the civil Courts of Pakistan. The petitioner No. 1 and the accused were arrested on 17/18 November, 1981. The war between

(1) P L D 1968 Dacca 1

(3) P L D 1966 Kar, 160

(2) P L D 1967 Dacca 515

(4) P L D 1969 Dacca 841



India and Pakistan started in the year 1971. The proclamation of emergency was issued by the President on 23-11-1971 and it reads as under:—

“Whereas the President is satisfied that a grave emergency exists in which Pakistan is threatened by external aggression; Now, therefore, in pursuance of the 25th day of March, 1969, read with Provisional Constitution Order, and in exercise of all powers enabling him in that behalf, the President is pleased hereby to issue this Proclamation of Emergency.”

The Defence of Pakistan Rules were promulgated on 24th September, 1971. On 21st April, 1977, the President issued another Proclamation of Emergency and it reads as under:—

“No. F. 24(4)/77/Pub.—Whereas the President is satisfied that a grave emergency exists in which the security of Pakistan is threatened by internal disturbance beyond the power of Provincial Government to control:

Now, therefore, in exercise of the powers conferred by clause (1) of Article 236 of the Constitution of the Islamic Republic of Pakistan, the President is pleased hereby to vary the Proclamation of Emergency issued on the twenty-third day of November one thousand, nine hundred and seventy-one, and continued in force by Article 280 of the said Constitution, as follows, namely: —

In the aforesaid Proclamation, after the words “threatened by external aggression”, the words “and by internal disturbance beyond the power of a Provincial Government to control”, shall be added.”

The proclamation of Emergency was revoked on 15th September, 1977. The order of revocation reads as under:—

“No F. 46/1/71-M.—Whereas the President is satisfied that the grounds on which the Proclamation of Emergency was issued on twenty-third day of November, 1971, and continued in force by Article 280 of the Constitution of the Islamic Republic of Pakistan, and varied on the twenty-first day of April, 1977, have ceased to exist;

Now, therefore, in pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force), Order, 1977, (C. M. L. A. Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President is hereby pleased to revoke the aforesaid Proclamation of Emergency.

The emergency has ceased to exist since 15th September, 1977. The Defence of Pakistan Rules, 1977 were also repealed by means of Ordinance XII of 1977 on 15th September, 1977. The result of the Notification and the repealing Ordinance would be that there are no hostilities between India and Pakistan. As a consequence of the same the bar contained in section 83, C. P. C. is not applicable against the present petitioners.

Now, we advert to merits of the case. On the criminal side of the matter, the position is quite clear. There is no provision in Cr. P. C. analogous to section 83, Cr. P. C. The petitioners who are Indian Nationals have been apprehended in Pakistan waters. They were without valid documents. They were tried by the competent Court and convicted accordingly. The petitioners did not challenge their conviction in an appeal; and the revision petition filed by them through Jail had been dismissed by this Court. It is not disputed that they are Indian Nationals and have been arrested within the



territory of Pakistan. By section 2 of Act of 1952 entry means entry by water, land or air. The learned counsel has tried to urge that they had not been apprehended in the Pakistan waters. This argument needs no consideration as they have admitted before the learned Magistrate that they had been arrested within the Pakistan waters. We will not examine the contention that the petitioner had per force to take refuge in territorial water of Pakistan. This plea did not find favour with the trial Court. We will therefore, not enter into factual controversy.

The contention of the petitioners' learned counsel is that Act of 1952 has not been made applicable to Gwadar. The learned Advocate-General has referred to Notification No. D. 6329-P/52, dated 20th November, 1952, and states that by means of this Notification this Act was extended to the Province of Baluchistan. This argument of the learned Advocate-General has no force. By means of this Notification, the Ordinance was extended to the Province of Baluchistan, Gwadar was a part of Baluchistan States Union, and therefore it does not apply to Gwadar. The learned Advocate-General sought sufficient time to produce the Notification issued under section 6 of the Act of 1952; but he failed to produce the same. In my opinion such notification is not necessary in view of Gwadar Application of Central Laws Ordinance, 1960 (Ordinance XXXVII of 1960). By this Ordinance all Central Acts including all orders and other enactments etc. which were enforced in defunct District of Mekran of West Pakistan before 18th September, 1958, shall be deemed to have been in force in Gwadar District. To make it more clear, it was declared under section 2(2) of this Ordinance that any Central law made before or extended to the whole of Pakistan, or the whole of West Pakistan shall extend and shall be deemed to have extended to Gwadar. Act of 1952 was extended to the whole of Pakistan. It is thus clear that Act of 1952 had been made applicable to Gwadar, by this Ordinance. Under the President Order No. 15 of 1959, Gwadar was made a part of Mekran District in Kalat Division.

The next contention of the learned counsel, that the Coast Guard authorities had no jurisdiction to apprehend the accused, is also without any substance, Pakistan Coast Guard Act (XVIII of 1973) was constituted to perform the following functions:—

- (a) prevention of smuggling;
- (b) prevention of illegal immigration and to immigration from the country;
- (c) stopping enemy agents or sabotage from infiltrating into the country along the coastal areas; and
- (d) supplementing defence in war. (Section 3)

So it is the functions of the Pakistan Coast Guards not only to prevent the smuggling, but also to prevent illegal immigration to the country. Under section 14 of the Pakistan Coast Guards Act (XVIII of 1973) (hereinafter referred to as Act XVIII of 1973) the Officers and members of the force shall perform such functions of Officers of Customs as may be entrusted to them and exercise such powers under the Customs Act (IV of 1969) as may be delegated to them under section 6 of that Act for the purpose of prevention of smuggling along the coastal areas of the Provinces of Sind and Baluchistan, excepting the limits of the various ports in those areas. Under subsection (2) of section 14 of the Act of 1973 Commissioned Officers of the Force shall exercise all the powers conferred on the Officers in charge of a police station under the Police Act, 1861 (V of 1861) and under the



Code of Criminal Procedure, 1898 (Act V of 1898). In my view the Officers of the Force have been declared as Police Officers under this subsection and, therefore, under section 6 of Act of 1952 they had the authority to arrest without warrant any person who had contravened any of the provisions of section 3 of the Act of 1952.

It is next contended by the learned counsel for the petitioners that the learned Magistrate had no power to confiscate the goods after the accused had been convicted. The learned Advocate General has stated that the accused have violated the provisions of Customs Act, therefore, the goods could be seized. In order to resolve this controversy, we have to examine the various provisions of Customs Act. The Central Board of Revenue by S. H. O. No. 30(1)73, dated 4th January, 1973, entrusted the following functions of the Customs Officers to the Officers of the Force:—

Section 157 (extent of confiscation of any goods), section 158, (search on reasonable ground), section 159 (persons to be arrested may be taken before Gazetted Officer), section 160 (to screen or X-Ray bodies of suspected persons), section 161, (power to arrest) section 162, (to issue such warrant of a Magistrate on application by a Gazetted Officer of Custom), section 163 (person to search and arrest without warrant), section 164, (power to stop and search conveyances), section 165 (Empower to examine persons) section 166, (Empower to summon persons to give evidence), section 167, (power to arrest persons escaping may be afterwards or arrested) section 168, (Seizure of things liable to confiscation). Section 171, (when seizure of arrest is made, reason in writing to be given).

The Officers of the Force had the power to arrest, investigate and challan the accused under the Customs Act. They had no power to confiscate the goods seized by them. Under section 169 of the Act, things seized by the Officers of the Force shall without unnecessary delay be delivered to the care of the Officers of the Custom who has to adjudicate and confiscate the goods so seized. In the present case the Custom authorities have not taken any action for the confiscation of the goods in accordance with the Customs Act. Under section 180 of the Customs Act, no order under this Act shall be passed for the confiscation of any goods unless the owner of the goods is informed in writing of the ground on which it is proposed to confiscate the goods or to impose a penalty. Under section 168(2) where goods are seized under subsection (1) of section 168, and no show-cause notice in respect thereof is given under section 180 within two months of seizure of the goods, the goods shall be returned to the person from whose possession they were seized provided that the period of two months may for reasons to be recorded in writing be extended by the Collector of Customs by a period not exceeding 2 months. As stated above no proceedings under the Customs Act has been taken by the Custom Officers for the confiscation of the goods uptill now.

The learned counsel for the petitioners has argued that there is no provision in Act of 1952 for the seizure of the goods. The learned Advocate-General now took the stand that as the petitioners had been apprehended for violation of the provisions of Act 1952 and they had been convicted by a competent Court, the goods could be confiscated by the trial Magistrate under section 517, Cr. P. C.

Section 517, Cr. P. C. contemplates that after the conclusion of the trial the Court may make such orders as it thinks fit for the disposal of the property produced before it or in its custody or regarding which any



offence appears to have been committed or which has been used for the commission of any offence. The reasonable interpretation of section 517, Cr. P. C. is that the property or document have been produced before a Criminal Court or taken into custody during the investigation made in accordance with the provisions of Cr. P. C. The provisions regarding search of a person, place, and the production of documents are contained in sections 51, 53, 94, 95, 96, 97, 98, 99, 99-A, 103(2) and 165, Cr. P. C. Under section 170(1) when the evidence is sufficient, the case is to be sent to a Magistrate. Under section 170(2), Cr. P. C. the Officer incharge of police station shall also send to such Magistrate any weapon or other article which it may be necessary to produce before him. A criminal Court can pass an order under section 517, if the property has been seized during the investigation under the above-quoted provisions. The livestock and the boats seized by the Officers of the Force are not stolen goods. They have not been secured from the person of the accused on their arrest. They had not been used in the commission of offence. The expression "regarding which any offence appears to have been committed" is not relevant because it refers to cases of offences relating to property as in case of theft or criminal misappropriation of goods and of similar description. The words "which has been used for the commission of offence" have reference to instruments like gun, pistol etc. and these weapons have been used for the commission of offence. There is special procedure for adjudication and confiscation of the goods seized under the Customs Act. It is the contention of learned Advocate-General that the livestock seized by the Coast Guard authorities were smuggled into Pakistan. They had been brought into Pakistan waters in violation of section 15 of the Customs Act. Section 15 is not attracted as the goods specified in section 15 have not been seized from the accused persons. "Smuggle" has been defined in section 2(s) of the Customs Act as:

- (s) "Smuggle" means to bring into or take out of Pakistan, in breach to any prohibition or restriction for the time being in force, or evading payment of customs-duties or taxes leviable thereon,—
- (a) gold bullion, silver bullion precious stones, currency manufactures of gold or silver or precious stones or any other goods notified by the Federal Government in the official Gazette, in each case exceeding one thousand rupees in value;
- (b) any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs station, . . . . . and includes an attempt, abetment or connivance of so bringing in or taking out of such goods; and all cognate words and expressions shall be construed accordingly.

It is first to be determined by the competent authorities under the Customs Act that the "goods seized from the accused are smuggled articles and then the order of confiscation can be passed under the Customs Act but confiscation cannot be made under section 517, Cr. P. C. We therefore, hold that the confiscation of the property by the Magistrate under section 517, Cr. P. C. is illegal and without lawful authority. The livestock and goods had been auctioned and the sale-proceeds are lying with them. We therefore, while maintaining the order of conviction, set aside the order of confiscation of goods and direct that the sale-proceeds of the goods seized by the respondents be returned to the petitioners/accused. There would be no order as to costs.

M. Y. M.

*Petition partly accepted.*