

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Muhammad Karim Khan Agha

Spl. Cust.Ref.A. No.340 of 2013

Abdul Razzaq
Versus
The Director General of Intelligence & others

Date of hearing:	14.01.2016
Date of Judgment	26.01.2016
Applicant:	Through Mr. Sardar Faisal Zafar, Advocate
Respondent No.1:	Through Mr. Khalid Mehmood Dhoom, advocate.
Respondents No.3:	Through Ms.Dil Khurram Shaheen, Advocate.

J U D G M E N T

Muhammad Karim Khan Agha, J. This Customs Reference Application No.340 of 2013 was filed by the Applicant under S.196 of the Customs Act 1969 against the Order dated 13-8-2013 of the Customs Appellate Tribunal Bench II Karachi.

2. The brief facts of the case as per show cause notice dated 14-5-210 issued by Deputy Collector of Customs Model Collectorate of Customs (Preventive) to the Applicant are that information was received by the Directorate General of Intelligence & Investigation-FBR, Regional Office, Karachi, to the effect that huge quantity / non duty paid foreign origin ladies Art Silk Cloth (Made in India) had been dumped at Godown-I Plot No.176, Al-Habib Textile Mills Garden West, Karachi for its illegal sale and disposal in open market at Karachi and that the secreted ladies art silk cloth may be removed from the said godown at any time.

3. In pursuance of the said information, on 20.03.2010, a team of officials was constituted under the supervision of Additional Director (ASO), Directorate General Intelligence & Investigation, FBR, Karachi to foil the attempt of dumping / removal of smuggled foreign origin ladies art silk cloth from the aforesaid godown.

4. The constituted team on 20.03.2010 raided the above mentioned private godown. The occupant of the premises introduced himself as Abdul Razaq S/o Abdul Ghafar, Working as Munshi with Abdul Qadir. He further disclosed that the aforesaid premises (Godown) has been acquired by Abdul Qadir, on month rent who was the owner of ladies art silk cloth (Made in India). The Additional

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Director (ASO) in order to conduct search of the godown, in presence of two witnesses served statement under section 163 of the Customs Act, 1969, upon Abdul Razaq S/o Abdul Ghafar. Detailed search of the aforesaid godown resulted in the recovery of 54 bales and 05 lose bags, ladies art silk cloth of Indian origin, weighing 3220 kgs. Having marks of "In Transit to Afghanistan Via Karachi".

5. That during search proceedings Abdul Qadir, owner / claimant of the recovered ladies art silk cloth also joined at godown. Both of the aforesaid persons were asked to produce legal import documents in support of lawful possession and import of the ladies Art silk cloth of Indian origin. However they failed to produce any legal import documents showing clearance of recovered ladies Art: Silk against filing of goods declaration and payment of duty and taxes leviable thereon. Abdul Qadir, during recording of statement disclosed that he has purchased the recovered ladies Art. Silk Cloth from open market (Quetta) without the cover of legal import documents.

6. Since no import documents in respect of ladies art silk cloth of India origin, packed in 54 bales and 05 lose bags weighing 3220 kgs. were produced, therefore, the same after preparation of inventory and mushirnama duly signed by witnesses were seized in terms of section 168 of the Customs Act, 1969, for violation of the provision of section 2(s) and 16 punishable under clauses (8), (9), (89) (90) of subsection (1) & (2) of section 156 ibid. Notice under Section 171 of the Customs Act, 1969, was served upon Abdul Razaq S/o Abdul Ghafar.

7. At the hearing before the Deputy Collector the main defense of the Applicant was the simple assertion that the goods had been purchased in the open market and had not been smuggled with no documentary evidence being produced in support of this contention.

8. The Deputy Collector found against the Applicant by Order in Original dated 9-10-10 in the following terms at Para 5 of the Order:

"5.I have gone through the written and verbal submissions of the learned advocate of the Claimant owner and the case record. The owner has failed to submit any proof of legal possession of the goods or proof to the effect that the duty and tax has been paid on the seized foreign origin good. The facts narrated herein above lead to inference that the impugned goods are non-duty paid and without any legal import documents. I, therefore, order outright confiscation of seized ladies art silk cloth of India Origin, packed in 54 bales and 05 lose bags weighing 3220 kgs. for violation of Section 2(s) & 16 of the Customs Act, 1969 punishable under clauses (89) & (90) of Section 156 (1) ibid read with 499 (i)/2009 dated 13.06.2009."

9. The Applicant being dissatisfied with the Order in Original appealed the same under S.193 of the Customs Act 1969 to the Collector of Customs Appeals. By Order in Appeal dated 23-2-2011 the Collector up held the Order in Original.

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Again being dissatisfied with the Order in Appeal the Applicant moved further appeal under S.194 (A) of the Customs Act 1969 before the Customs Appellate Tribunal (Karachi) Bench II assailing the Order in Appeal. By Order dated 13-8-2013 the Tribunal rejected the Applicants appeal and made pertinent observations at Para 8 and 9 of its Order which are reproduced below for ease of reference.

"Para 8. The subject appeal can only be disposed off on the short point that the goods detained / seized by the officials of respondent no.1 are made in "India" (India Origin) which are not importable from India in terms of Appendix-G to paragraph -5 (B)(iii) to the Import Policy Order 2010-2011 and on the basis of cartons in which the subject goods were packed containing the marking "in transit to Afghanistan via Karachi" since the Advocate of the appellant has taken several factual and legal grounds in stereotypical manner inspite of the fact that those are irrelevant in the instant case. I will like to controvert the same for laying to rest such type of grounds often adopted by the Advocate of the appellant in similar nature of cases.

"Para 9. Notwithstanding to above, it is of vital importance to lay emphasis on the fact that the appellant right from the stage of detention/seized and adjudication proceedings failed to place on record the purchase receipt in support of his contention that he has purchased the instant goods from Quetta, instead took the plea that he has neither given or obtained any cash memo or bill from the seller of the goods, resultant, the charge leveled in the show cause notice stood established against him by virtue of the fact that he miserably failed to discharge burden of proof laid upon under Section 187 of the Customs Act, 1969 and Article 117 and 121 of Qanoon-e-Shahdat (10 of 1984) and by the Superior Judicial Fora in umpteenth reported judgment."

10. It is significant to observe at this stage that the Applicants plea had been rejected by 3 separate adjudicative bodies through speaking orders after giving the applicant a full opportunity to present his case. Never the less the Applicant being dissatisfied with the Order of the Tribunal moved a Reference Application under S.196 of the Customs Act before this Court.

11. In the Reference the Applicant in order to set aside the Tribunal Order raised the following questions of law:

- I. Whether on the facts & circumstances of the case, the goods which are treated as smuggled are importable or not in accordance with import policy order 2010-2011?
- II. Whether the packing material without 100% examination of goods can be construed as of Indian Origin?
- III. Whether auction proceeding has been conducted in accordance with auction rules prior to intimation vis a vis issuance of notice?
- IV. Whether the goods which are sold in open market without invoices can be treated as sale/purchase for bonafide purpose?

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V. Whether ignoring the earlier material directives vide order dated 25.02.2013 given to the respondents for examination of Impugned Cloth is tantamount to non-reading or mis-reading by the learned Single Member of Appellate Tribunal while passing a final judgment vide dated 09.09.2013?

12. Learned Counsel for the Applicant during his arguments mainly confined himself to the fact that the goods in question had been purchased in the open market and had not been smuggled into Pakistan as alleged by the Customs Authorities and wrongly found by the Tribunal. He pointed out that not a single piece of evidence had been produced by the Customs authorities to prove the act of smuggling and as such since the burden of proof lay on them they had totally failed in discharging it and as such the Tribunal Order should be set aside.

13. He placed reliance on the following authorities in support of his submissions:

1. (1) Pakistan and (2) The Assistant Collector, Central Excise and Land Customs, Kohat. v. Qazi Ziauddin, P.L.D. 1962 S.C. 440.
2. Mian Shafiq Alam V. The Collector Customs, 1988 M.L.D. 2085.
3. Sikandar A. Karim v. The State, 1995 S.C.M.R. 387.
4. Muhammad Saeed & another v. Collector, Customs, Central Excise, Peshawar, 2005 P.T.D. 1813.(this case only allowed leave to appeal certain questions of law and did not decide them so will not be considered)

14. On the other hand learned Counsel for the Respondent No.1 (DG of Intelligence and investigation FBR Regional Office Karachi) fully supported the Tribunal Order on all counts. He submitted that all the questions raised were more factual in nature than legal and as such could not be adjudicated upon by this Court as they were not questions of law. Even otherwise the Applicant had failed through any kind of evidence to prove that he had purchased the goods from the local market which burden of proof rested with him and by inference the goods must have been smuggled into Pakistan whilst evading the applicable customs and other duties. Learned Counsel for Respondent No.3 adopted the arguments of Respondent No.1

15. We have carefully perused the record, the relevant law and considered the submissions of the learned Counsel and the authorities cited by them at the bar.

16. At the outset we are of the view that in essence this Reference, as alluded to in Para 8 of the Tribunal's Order, and the questions in the Reference primarily concern whether the goods were purchased in the open market or were smuggled into Pakistan and which party bears the burden of proof in this respect.

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17. The offense charged is in respect of violation of S.2 (s) and S.16 of the Customs Act 1969 which for ease of reference are set out below:

S.2 (S) *"smuggle"* means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force ³²[, or en route pilferage of transit goods], or evading payment of customs-duties or taxes leviable thereon,--

- (i) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or
- (ii) manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed [one hundred and] [fifty thousand rupees] in value; or
- (iii) 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];

S.16 reads as under:

"16. Power to prohibit or restrict importation and exportation of goods.—The [Federal Government) may, from time to time, by Notification in the official Gazette, prohibit or restrict the bringing into or taking out of Pakistan of any goods of specified description by air, sea or land."

18. It is significant that it has not been denied that the goods detained / seized by the officials of respondent no.1 are made in "India" (India Origin) which are not importable from India in terms of Appendix-G to paragraph -5 (B)(iii) to the Import Policy Order 2010-2011.

19. Thus the goods in question should not have even been in Pakistan unless they had been smuggled into the Country under S.2(s).As noted earlier the key issue to be determined therefore is whether the Applicant smuggled the goods into Pakistan as claimed by the Customs authorities or whether the Applicant purchased them in the local market from Quetta and therefore was not responsible for smuggling them into Pakistan and which party bore the burden of proof in this respect.

20. According to the Applicant the burden of proof lay on the Customs authorities to prove that he had smuggled the goods into Pakistan which they had

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failed to do because they had simply seized the goods from him in Pakistan which he had purchased in the open market without any evidence that he had actually smuggled in the goods.

21. In this respect he relied on (1) **Pakistan** and (2) **The Assistant Collector, Central Excise and Land Customs, Kohat. v. Qazi Ziauddin, P.L.D. 1962 S.C. 440** which at P.440 stated as under:

“Section 177-A requires reasonable belief on the part of the person seizing the goods that an act to defraud the Government of duty has been committed. If a person purchases goods in an ordinary market then in the absence of any suspicious circumstances or some definite facts leading to that inference the Customs Officer is not entitled to a reasonable belief that the Government has been defrauded of the duty payable on the goods. The ordinary method of the Import of goods from outside into Pakistan is that they come through the Customs barrier and the duty payable is in fact paid. The presumption, therefore, with respect to any goods which may be sold in the open market in the absence of an indication to the contrary would be that duty has been paid on them.”

22. This case however is distinguishable from the present case since it concerned goods which were importable into Pakistan. Furthermore customs had acted on a tip off which lead to the discovery of the goods at a Godown in Karachi where the goods were found in cartons marked “In Transit to Afghanistan Via Karachi” which gave rise to a reasonable belief that the goods had been smuggled and no duty had been paid on them.

23. Reliance was also placed on **Mian Shafiq Alam V. The Collector Customs, 1988 M.L.D. 2085** which held as under on P.2087.

“Having accepted the validity of the cash memo, it is not understood how the learned Collector of Customs (Appeals) placed the onus on the petitioner to prove that duties had been paid on the said second hand air-conditioner instead of turning to the actual seller of the said air-conditioner, which was Khan Engineers and Company, Peshawar. In S.A. Haroon’s case P L D 1967 S C 458 at 460, the Supreme Court has held that the condition precedent for the exercise of jurisdiction by the Collector of Customs is not merely to show that the goods have been imported, but that they have been illegally imported. In respect of items of general use, such as, air-conditioners, tape recorders, electric appliances, etc., which are sold and resold in the open market, both new and old, great inconvenience will be caused to the public if second-hand goods are seized in the hands of bona fide purchasers and they are asked to show documentation to prove that duties thereon have been paid. It is not enough in these cases to merely show that goods seized which are in second-hand condition is of foreign origin, but that there is reasonable basis to believe that they were illegally imported by the person from whom they have been seized.”

24. Again this case is distinguishable from the facts and circumstances of the present case since in this case the accused was able to produce a cash memo to

show who he had purchased the goods from. Hence, prima facie he had been able to show that he had not smuggled in the goods.

25. Further reliance was also placed on **Sikandar A. Karim v. The State, 1995 S.C.M.R. 387** where the Hon'ble Supreme Court held as under on P.407:

"If the items alleged to be smuggled by the prosecution were available freely in the open market and imports of such goods were not banned in the country, a presumption may arise that these goods were lawfully brought in the country unless contrary is shown."

26. Again this case is distinguishable from the facts and circumstances of the present case because the import of the goods in question were banned and hence no presumption would arise. Furthermore, although it was different from the present case in that it was a case for bail significantly it was held at P.389

"Unlike an ordinary criminal case where burden of proof is always on the prosecution to prove its case against the accused person beyond reasonable doubt, section 156(2) of the Customs Act provides that where goods specified in clause (s) of section 2 of the Act or in a notification issued thereunder, are seized under the Act in the reasonable belief that an act to defraud the Government of any duty payable thereon or to evade any prohibition or restriction for the time being enforced in respect of such goods has been committed, the burden of proving that no such act has been committed is on the person from whose possession the goods are seized. It is, therefore, **quite clear that a person accused of an offence under section 156(1) (8) of the Act has to discharge the initial burden of showing that the goods recovered from his possession were neither smuggled nor their possession was unlawful.**"(bold added)

27. As such none of the cases cited by the Applicant are of much relevance to his stance that the burden of proof lies on the Customs authorities. In fact the portion of the **Sikander A. Karim** case cited above would tend not to support the Applicants contention.

28. The Customs Act 1969 is a special law and it is well settled that if the provisions of a special law are in conflict with the general law e.g. Cr.PC then the Customs Act 1969 will prevail.

29. Reliance is placed on **Kamran Industries V Collector of Customs (PTCL 1996)** which found as under at CL15

"Section 187. A special law (Customs Act, 1969) or a particular statute can provide for a distinct regime of rules of evidence than contained in general law (Qanoon-e-Shahadat, 1984).--

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There is little doubt that a special law or a particular statute can provide for a distinct regime of rules of evidence than contained in general law. In fact the law goes on as far as providing that the laws of evidence can be altered even by mutual consent and contract."

S.187 of the Customs Act 1969 reads as under:

"187. Burden of proof as to lawful authority, etc.--When any person is alleged to have committed an offence under this Act and any question arises whether he did any act or was in possession of anything with lawful authority or under a permit, licence or other document prescribed by or under any law for the time being in force, **the burden of proving that he had such authority, permit, licence or other document shall lie on him.**" (bold added)

30. As provided in S.187 of the Customs Act it is clear that at least initially the evidentiary burden of proof falls upon the Applicant.

31. The question of the initial evidentiary burden of proof falling on the applicant was decided in the case of **Kamran Industries V Collector of Customs (PTCL 1996)** which found as under on CL 15:

"Scope of section 187. Section 187 covers two situations which we state as follows:-

- (a) when a person is charged with an offence under the Customs Act, the burden of proof is cast upon him to show that he had the lawful authority to commit that act,
- (b) when a person is found in possession of any goods the burden of proof is cast upon him to show that he was holding such goods under some lawful authority, permission or licence, etc.

In situation (a) the question whether the burden of proof solely lies upon the petitioner to disprove allegations of mis-declaration and mis-description leveled by the Customs authorities and whether the Customs authorities are under no obligation to lead evidence and discharge any onus of proof. This part of Section 187 of the Customs Act perhaps appears to be contrary to the general principle of the law of evidence contained in Article 117 of the Qanun-e-Shahadat that who so ever alleges existence of particular fact must prove the same.

On a closer scrutiny of the provisions of Section 187 and the case law settled by our courts on the subject it appears that in such a situation it is only the evidential and tactical burden of proof which is cast upon the accused while the legal burden to bring home the allegations remains with the prosecution. (bold added)

Situation (b) provides that where a person is found to be in possession of certain goods which fall under a prohibited category or which in an unlawful manner find place in the possession or custody of the accused. In such cases the burden is upon the accused to show that he falls under some exemption or exception to hold such goods. This type of eventuality as envisaged and stated in situation (b) above is essentially a statement of the general principle of the law of evidence contained in Article 121 of the Qanun-e-Shahadat that who so ever claims to fall under a preferential or exempt or excepted category must show that he fulfils that condition to fall within that category. This obviously should not be confused with the

factum of possession for which no presumption or burden of proof has been spelt out, in view whereof the possession itself has to be proved independently by the prosecution beyond all reasonable doubt.

32. The evidential and tactical burden being initially placed on the accused in a Customs offense is now well settled law as is the principle that the accused only needs to show some evidence to prima facie discharge his evidential burden and thereafter the same will shift on the Customs authorities.

33. In the present case therefore the initial evidentiary burden fell on the Applicant to show that at least prima facie he had purchased the goods in question from the open market in Quetta from a third party and thus he could not be liable for smuggling and/or violating S.16 of the Customs Act 1969.

34. In this case the Applicant was not able to produce a single document or other piece of evidence to show that he had purchased the goods in question from a third party in the open market. Only his bare assertion was on record. Thus as he had failed to discharge his initial evidentiary burden proof we find that he is liable for the offense charged.

35. Furthermore, it may also be noted that the goods in question were found on (a) the basis of an intelligence report (b) were banned for import in Pakistan (c) were found in a godown in Karachi belonging to the Applicant (d) the Applicant admitted that the goods were his and the goods had marked on their cartons "In Transit to Afghanistan Via Karachi". In addition as a matter of common sense a person who purchased a high quantity of high value goods from a third party would be expected to have in his possession at least some kind of receipt of payment bearing in mind that the goods were marked made in India. Taken as a whole all of the above would tend to suggest that the goods had been smuggled by the applicant into Pakistan and the relevant customs duties had been evaded in violation of law.

36. The upshot of the above discussion leads us to the conclusion that firstly the matter is mainly dependent on a finding of fact recorded by the forums below i.e. "the goods in question are of Indian Origin", and in these proceedings, per settled law, we cannot upset such findings of fact, whereas the questions proposed on behalf of the applicant are not properly drafted which could be answered by this Court. In the circumstances we would reframe the Question of law, which according to us is a material question involved in the instant case, in the following terms:-

"Whether in the facts and circumstances of the case, the Customs Appellate Tribunal was justified in holding that the goods in question are smuggled goods and the applicant has failed to discharge the burden of

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proof as to lawful authority for being in possession of the same under Section 187 of the Customs Act 1969."

In view of hereinabove findings as recorded on the subject controversy, we would answer the same in the *affirmative*, in favor of the respondent and against the applicant.

37. Accordingly Reference Application is dismissed. The Registrar of this Court is directed to send a certified copy of this order to the Customs Appellate Tribunal in terms of Section 196(5) of the Custom Act, 1969, for information.

Dated: 26.1.2016