

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Special Custom Reference Application No.124 of 2010**

**Present:**

**Mr. Justice Aqeel Ahmed Abbasi.**

**Mr. Justice Muhammad Junaid Ghaffar.**

**Director General Pakistan Cost Guards ----- Applicant**

**Versus**

**Iqbal Afghani ----- Respondent**

**Special Custom Reference Application No.125 of 2010**

**Director General Pakistan Cost Guards ----- Applicant**

**Versus**

**Salman Riazuddin ----- Respondent**

**Date of hearing: 07.05.2015 & 21.9.2015**

**Date of judgment: 24.11.2015**

**Applicant: Through Mr. Nazar Hussain Dhoon  
Advocate.**

**Respondent Through M/s Mir Nawaz Khan Marwat &  
Khalid Nawaz Khan Marwat Advocates.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** The applicant being aggrieved by order dated 16.4.2008 passed by the Customs Appellate Tribunal Karachi in Appeal No. 484 & 485 of 2001, has proposed the following questions, which according to the applicant are questions of law arising out of the order of Customs Appellate Tribunal as referred to hereinabove. On 18.1.2011 notice was ordered by this Court to

consider the following question(s) of law, as well as on application for condonation of delay filed on behalf of the applicant under Section 14(1) of the Limitation Act bearing CMA Nos. 1118 of 2010 and 1120 of 2010 respectively in Reference Applications No. 124 of 2010 and 125 of 2010:-

- a) Whether Central Board of Revenue can intervene and reopen the case under Section 195 of the Customs Act, 1969 when the case was decided by the Additional Collector (Customs) and remedy in shape of appeal before Appellate Tribunal was available under Section 194-A to the Customs Act, 1969?
- b) Whether or not Central Board of Revenue could remand the case to the adjudicating authority other than the original adjudicator?
- c) Whether or not a person having right of appeal can seek his remedy by way of revision as provided for in Section 195 of the Customs Act?
- d) Whether or not Saddar area of Karachi is within the jurisdiction of Pakistan Coast Guards in the light of the decision of the Hon'ble Supreme Court of Pakistan i.e. PLD 1978 Karachi page 1110?
- e) Whether or not Section 2(s) 16 read with Section 156(I)(8) and (89) of the Customs Act, 1969 is attracted in the instant case?
- f) Whether Chairman Customs Tribunal can appeal against Referee Judge under Section 195-C of the Customs Act?
- g) Whether Collector Customs (Adjudication) can reopen the case under Section 195 of the Customs Act?
- h) Whether the provisions of Section 195 of the Customs Act are in essence a supervisory jurisdiction whereby a supervisor forum or functionary is empowered to oversee the functioning of a subordinate forum and is distinguishable from the power vested in Adjudicating Authority of first instance?
- i) Whether Member Technical has a jurisdiction to differ with Member Judicial on law points?"

2. Learned Counsel for the respondent at the very outset has drawn our attention to the fact that both the aforesaid Reference Applications are hopelessly time barred as the order of Customs Appellate Tribunal is dated 16.4.2008, and the aforesaid Reference Applications have been filed on 4.6.2010, whereas, the application for

condonation filed under Section 14 of the Limitation Act, 1908, do not explain the cause of delay with any justifiable reasons, hence both the reference applications are liable to be dismissed. While confronted, the learned Counsel for the applicant has contended that after a split judgment of two members of the Customs Appellate Tribunal dated 9.3.2007, the applicant had preferred Special Custom Reference Application No. 375 & 376 of 2007 before this Court on 2.8.2007, on first opening day of Court and within the limitation period of 90 days, and during pendency of such Reference Application(s), the learned Referee Judge of the Customs Appellate Tribunal, who was seized of the matter after its referral by the Chairman, Customs Appellate Tribunal, had passed order dated 16.4.2008, whereby, the learned Referee Judge has concurred with the findings of Member (Technical) recorded in Judgment dated 9.3.2007. Learned Counsel has referred to order dated 20.5.2010 passed in Customs Reference Application No. 375 of 2007 and has contended that the Court through such order had allowed filing of fresh Reference, leaving the question of its maintainability open and to be decided on its own merits. Learned Counsel has also referred to the application for condonation of delay supported by affidavit of the Deputy Assistant Judge Advocate General (Legal Officer) of applicant and has contended that since the applicant was pursuing the remedy against the split judgment before this Court, therefore, the delay if any, in filing aforesaid Reference Applications after passing of the order by the Referee Judge, may be condoned and the Reference Applications be decided on merits. Learned Counsel on merits has contended that Central Board of Revenue was competent in terms of Section 195 of the Customs Act, 1969 to reopen any order passed under Section 179 as supervisory jurisdiction is conferred on CBR.

Learned Counsel has further submitted that though the applicant had a right of appeal under Section 194-A of the Customs Act before the Customs Appellate Tribunal, but, was also entitled to approach CBR for reopening of the Order in Original under Section 195 of the Customs Act, 1969. Learned Counsel finally contended that, even otherwise, the Chairman of Customs Appellate Tribunal had erred in law by sending the matter to Referee Judge (Member Judicial) for opinion after the split decision, whereas, he ought to have decided the same by himself in terms of Section 194(C)(5) of the Customs Act, 1969.

3. We have heard both the learned Counsel and perused the record and at the joint request of both the learned Counsel, the aforesaid Reference Applications are being finally decided at Katcha Peshi Stage. Apparently, there appears to be delay in filing of aforesaid Reference Applications and for that reason, the learned Counsel for the respondent has raised a preliminary objection with regard to maintainability of aforesaid Reference Applications as being barred by limitation, therefore, we would take up this issue first and will decide the same before dilating upon merits of the case.

4. Record shows that a Show Cause Notice dated 14.12.1999 was issued to the respondents whereafter, Order-in-Original bearing No. 440 and 441 of 2000 were passed by the Additional Collector of Customs, HQ Pakistan Coast Guards, Karachi, on 21.3.2000, whereby, the said Show Case Notices were vacated in favor of the respondents. Against such order by the Additional Collector, the applicant had approached the Collector of Customs (Preventive), with a request to reopen the matter again by invoking Section 195 of the Customs Act, however, the Collector of Customs (Preventive), vide

letter dated 15.9.2000, regretted such request and advised them to prefer an appeal against such orders under Section 194-A of the Customs Act, 1969, before the Customs Appellate Tribunal. It further appears from the record that the applicant had thereafter, filed appeals before the Customs Appellate Tribunal bearing Nos. 235 and 236 of 2000 on or about 30.9.2000, and had simultaneously, also preferred an application before the Central Board of Revenue in terms of Section 195 of the Act *ibid*, for reopening of the case. The said appeals were either pending or had been withdrawn (*record is silent about its withdrawal date*), when the Member (Customs), Central Board of Revenue, had passed order dated 13.1.2001, whereby, while exercising powers under Section 195 of the Customs Act, 1969 the Order in Original bearing No. 440 and 441 of 2000 were reopened, against which the respondent had preferred Appeals bearing No. 484 and 485 of 2001 before the Customs Appellate Tribunal, and a split decision vide order dated 9.3.2007 was passed, wherein, the Member (Technical-I) had allowed the appeal, whereas, the Member (Judicial-I) did not concur with the view of learned Member (Technical). On such split decision, the matter was referred to Chairman Customs Appellate Tribunal in terms of Section 194(c)(5) of the Customs Act, 1969, who then referred the matter to another Member for its opinion, whereafter the Referee Judge (Member Judicial-III) vide order dated 16.4.2008, while concurring with the findings recorded by Member (Technical-I) in its order dated 9.3.2007, had allowed the appeal. Accordingly, the appeal stood allowed in favour of the respondents by a majority of two to one. Perusal of the record reflects that the applicant after passing of the split order dated 9.3.2007, notwithstanding that no adverse order was in field against the applicant, had preferred Special Customs Reference Application No.

375 & 376 of 2007 in which on 20.5.2010 the following order was passed:-

“Learned Counsel for the appellant submits that the order impugned through present reference was a split order and in fact no appeal lies against such order, on account of some confusion the instant reference was submitted in respect thereof, however since after referral of the matter to a Referee Judge, the matter has subsequently been decided by the Tribunal and therefore the applicant is now required to file an appeal against such order and requests that the applicant may be allowed to withdraw the present reference to enable the applicant to file a fresh reference in respect of subsequent order.

We would, therefore, dismiss the present reference as withdrawn. The applicant may however, if permissible under the law, file a fresh reference, maintainability whereof shall be decide on its own merits.”

5. After dismissal of the Reference Application(s) as referred to hereinabove, the applicant has filed the aforesaid Reference Applications on 4.6.2010 on the basis of a photocopy of order(s) dated 9.3.2007 and 16.4.2008 along with application for condonation under Section 14(1) of the Limitation Act, 1908. On perusal of such application it transpires that the applicant has failed to disclose as to when it came to their knowledge, after having filed Reference Application bearing No. 375 of 2007, that the matter after its referral to the third Member, had been finally decided by the Referee Judge. The applicant has also failed to disclose as to how and in what manner they had received order(s) including order dated 9.3.2007 as well as order dated 16.4.2008. Perusal of the record further reflects that on 8.2.2011, the applicant had obtained a certified copy of order of the Referee Judge dated 16.4.2008 and has placed the same on record through statement on 7.8.2011. Further, the applicant has also failed to disclose as to the exact delay in filing the aforesaid Reference Applications of which the condonation is being sought

under Section 14 of the Limitation Act, 1908. The relevant portion of the application with regard to receiving of the orders(s) is as under.

3. That on 14.12.2000 Member Board of Revenue heard the appellant as well as respondent by giving full opportunity to both the parties. After considering all aspects of the case Member Board of Revenue set aside the judgment passed by Additional Collector (Adjudication) order in original dated 21.8.2000 and remanded the case for denovo consideration by the collector Customs namely Razia Sultan.

4. That the remand order of Member Board of Revenue dated 13.1.2001 was challenged by respondent under section 194(a) before Bench No.1 of Customs and Excise Tribunal at Karachi on 13.1.2001 where the proceedings were conducted and on 9.3.2007 Member Judicial of the said Tribunal rejected the appeal of the respondent whereas Member Tribunal wrote an order differing with Member Judicial allowed the appeal, that the Tribunal No.1 despatched the judgment dated 9.3.2007 to all concerned and including the appellant which was received on 18.5.2010 under section 194B(3). It is noteworthy that the Tribunal is supposed to send the judgment only on disposal of appeal but in this case they deviated from the mandatory procedure as only split judgment had been passed and the same was referred to Chairman Customs, Excise and Taxation Tribunal at Islamabad who referred the matter to a Member of Tribunal No.2 appointing him as a Referee Judge who entered upon the reference under section 195(C) which is not authorized by law.

5. That since Tribunal No.1 had dispatched the judgment to the appellant, the same was sent to Ministry of Law, Federal Government at Islamabad, who instructed their Federal counsel namely Sofia Saeed to file cross Reference Application against the judgment of Tribunal No.1 in the High Court of Sindh under section 196 of the Customs Act. Accordingly, the Federal Counsel filed the requisite appeal on 9.8.2007 and thus the appeal was filed within 90 days as prescribed.

6. That the appeal was numbered as 375/2007 by the High Court of Sindh and remained on Katcha Peshi when Referee Judge despite the knowledge of appeal pending in the High Court of Sindh proceeded and passed the judgment on 16.4.2008 and gave the judgment supporting the opinion of Member Technical of Tribunal No.1. However no further action was taken by the Chairman Customs, Excise and Taxation Tribunal Islamabad after the pronouncement of order. Although as per procedure prescribed in Section 194(C)(5) he had appointed the Referee Judge to break the tie of split judgment of the tribunal No.1 and therefore, was required the procedure prescribed in section 194-C(5) of Customs Act.

7. That on 27.10.2009 when Appeal No. 375/2007 was fixed for katcha peshi the matter was brought to the notice of Hon'ble Bench of the High Court of Sindh about appointment of the Referee Judge and whether the Chairman Excise and Taxation Tribunal has the authority to do so and for the discussion of other legal points the Hon'ble Division Bench ordered the issuance of Notice on the respondent to conduct further proceedings.

8. That it is noteworthy that several State Counsels have appeared in the matter from time to time and eventually i.e. Nazar Hussain Dhoon, Advocate Supreme Court was authorized by Pakistan Coast Guards to contest the appeal on their behalf. Thereafter the brief was examined to argue the matter before the Division Bench headed by Mr. Justice Maqbool Baqar. The Hon'ble Division Bench was apprised of the fact that on account of mistakes

and violations of prescribed procedure, confusion was created by the Hon'ble Tribunal No.1 Karachi by not proceeding with the matter properly as without final disposal of appeal, they sent the split judgment dated 9.3.2007 to all concerned including appellant as required under section 194(b)(3) and thereafter the Hon'ble Chairman Excise and Taxation Tribunal neglected to go by the prescribed law and did not take any action after the Referee Judge had announced the Judgment. Therefore under these circumstances, the Hon'ble Division Bench of High Court of Sindh was requested to allow the appellant to file fresh appeal according to law and condone the delay which has taken place due to no fault of the appellant. The Hon'ble Division Bench allowed the request but advised to file application for condonation of delay which is being done accordingly. (*Underlining is in the original text*)

6. It is pertinent to observe that period of limitation as provided under Section 196 of the Customs Act 1969 for filing a Reference Application against the order of the Customs Appellate Tribunal is 90 days, whereas the order of the Referee Judge as reflected from the record was issued somewhere on 18.4.2008. Perusal of the said order dated 16.4.2008 passed by the Referee Judge, further reflects that the departmental representative of the applicant namely Major Nadeem was present before the learned Referee Judge on the date of hearing i.e. 25.2.2008, therefore, it cannot be said or argued that the applicant had no knowledge that the matter was being heard by the Referee Judge. The applicant instead of pleading ignorance about legal procedure, should have been vigilant enough to participate in the appellate proceedings before Referee Judge, and also to pursue its further remedy, by first withdrawing the earlier misconceived Reference Application(s) bearing No. 375 & 376 of 2007, and to file fresh Reference Application(s), within the period of limitation, against the final disposal of appeal by the Referee Judge vide order dated 16.4.2008. We have also not been assisted by the learned Counsel for the applicant as to when did, the applicant exactly come to know about the order of the learned Referee Judge dated 16.4.2008. We have summoned the case file of Reference Application 375 of 2007, and on perusal of the order sheet, it reflects that on 27.10.2009, the

Court in presence of Deputy Attorney General, through whom till that date, the applicant was being represented, had observed ***that the Chairman seems to have referred the matter to another Member (Judicial-III) who has agreed with the views of Member (Technical)***. It nowhere reflects from perusal of the application for condonation as referred to hereinabove that on which date the applicant got knowledge for the first time about passing of the order dated 16.4.2008 by the Referee Judge, from which date the limitation period has to start. The applicant has admitted about knowledge of passing of order dated 27.10.2009 (Para-7), on which date the Court had recorded that the Referee Judge has passed an order in the matter. At least on this date it came into the knowledge of the applicant that some order had been passed by the referee judge in the matter. Therefore, without prejudice, we may observe that it was incumbent upon the applicant to obtain a certified copy of the order dated 16.4.2008 and file Reference application and to seek condonation of delay. However, this was not done. It is also reflected from the record that on 29.1.2010, Mr. Ch. Jamil Advocate had filed power on behalf of the applicant in Reference Application No. 375 of 2007 and had sought time to prepare the brief, whereafter, the Court had directed the office to score off the name of Standing Counsel from the file cover. Therefore, on this date i.e. 29.1.2010, the applicant had knowledge regarding passing of order by the Referee judge dated 16.4.2008, whereas, the aforesaid Reference applications are even time barred from this date. The contention raised through application for condonation by the applicant that since the Office of Deputy Attorney General / Standing Counsel had been representing them and have failed to properly assist and file Reference application is

also belied from the facts as stated hereinabove, as they had themselves engaged a private Counsel on 29.1.2010.

7. It therefore follows that the applicant has miserably failed to show reasonable explanation for above inordinate delay in filing reference application(s) within the prescribed period of limitation as provided under law. On the contrary, it has emerged that applicant department did not show any due diligence in filing the aforesaid reference applications within time, though it was in their knowledge at the latest by 29.1.2010, that the referee judge had passed orders on 16.4.2008. Admittedly, the above reference applications have been filed beyond the period of limitation of 90 days as provided under Section 196 of the Customs Act, 1969, whereas, no reasonable explanation has been offered for such delay, which could otherwise, be considered as a ground to exercise any discretionary relief in favor of the applicant for condoning the period of limitation in filing of the aforesaid Reference Applications. An impression has been given on behalf of the applicant that it came to their knowledge for the first time somewhere on 20.5.2010, and was immediately brought to the knowledge of the Court, whereafter; the said Reference Application bearing No. 375 of 2007 was dismissed. We are afraid that the record does not support such factual assertion of the applicant, whereas, the conduct on the part of the applicant reflects upon their casual, rather grossly negligent attitude towards legal matters, which does not otherwise require this Court to exercise any discretion in its favour for condoning the period of limitation, whereas, the reference application(s) appear to be hopelessly time barred.

8. In view of hereinabove facts and circumstance of the case, we are of the view that both the aforesaid Reference Applications have

been filed after the expiry of 90 days as provided under Section 196 of the Customs Act, 1969, whereas no plausible justification has been advanced which could convince us to condone the delay in filing of the aforesaid Reference Applications. It is settled legal position that right of appeal, and for that purpose the remedy of filing a reference under the Customs Act, is a statutory right, whereas, any period of limitation as prescribed under such special enactment, has to be construed strictly, and any discretion in this regard has to be exercised with due care and only in appropriate cases, so that a right accrued in favor of the other party, may not be impinged or intruded on flimsy grounds of ignorance of legal procedure or fault on the part of some officer or Counsel. Reliance in this regard may be placed on the case of ***Ali Muhammad through Legal Heirs Vs Chief Settlement Commissioner & Others (2001 SCMR 1822)***. Similarly, it is also a settled proposition that insofar as limitation is concerned, the Government departments (like the applicant), *cannot claim to be treated in any manner differently from an ordinary litigant, and in fact, the Government enjoys unusual facilities for the preparation and conduct of cases and its resources are much larger than those possessed by ordinary litigants, whereas, delay of each day has to be explained.* Reliance in this regard may be placed on the case of ***Commissioner of Income Tax Vs. Rais Pir Ahmed Khan (1981 SCMR 37)***, ***Federation of Pakistan Vs Niaz Ahmed (1997 SCMR 959)*** and ***Central Board of Revenue Vs. Raja Industries (Pvt) Limited (1998 SCMR 307)***. Accordingly, we are of the view that both the above Reference applications are liable to be dismissed as being time barred. In view of such position, we do not deem it appropriate to give our response to the questions of law which have been raised

in respect of the merits of the case. Both the aforesaid Reference Applications are hereby dismissed as being time barred.

9. Registrar of this Court is directed to send a certified copy of this order with the seal of this Court to the Customs Appellate Tribunal at Karachi for information in terms of Section 196(5) of the Customs Act 1969.

JUDGE

JUDGE

ARSHAD/