

IN THE HIGH COURT OF SINDH AT KARACHI

C.P No.D-3518 of 2011.

Present:-

Mr. Justice Sajjad Ali Shah, Chief Justice

Mr. Justice Muhammad Junaid Ghaffar

M/s. Empire Electronics.....Petitioner

v/s

Collector of Customs & another.....Respondents

Date of hearing: 19.11.2015

Date of judgment: 05.01.2016

Petitioner: Through Mr. Khwaja Naveed Ahmed,
Advocate.

Respondents No.1 & 2: Through Mr. Muhammad Khalil Dogar,
Advocate.

Mr. Asim Mansoor, DAG.

J U D G M E N T

Muhammad Junaid Ghaffar J.:- Through instant petition, the petitioner has impugned Order-in-Original No.20 of 2011 dated 23.09.2011, whereby the Diplomatic Bonded Warehouse license issued to the petitioner, has been cancelled in addition to outright confiscation of goods lying in the warehouse, with further directions for payment of warehousing surcharge in terms of Section 98 of the Customs Act, 1969.

2. Briefly, the facts as stated are that the petitioner had been granted a license for warehousing of diplomatic goods vide License No.PWL 1/91-DIP, whereafter, a Show Cause Notice dated 25.01.2011 was issued for cancellation proceedings under Section 13(3) of the Customs Act, 1969

read with Rule 344 of the Customs Rules, 2001 and for contravention of Section 32(1) and 32(A) of the Customs Act, 1969 punishable under clause 14 and 14-A of Section 156(1) of the Customs Act 1969. The petitioner replied to the Show Cause Notice, whereafter, the impugned Order-in-Original has been passed, which has been challenged through instant petition.

3. Learned Counsel for the petitioner has contended that the impugned order is not appealable under terms of Section 194-A of the Customs Act, 1969 before the Customs Appellate Tribunal as it does not fall within any of the category of orders as provided in sub-section (1) of Section 194-A of the Customs Act and therefore having left with no other remedy, the petitioner has filed instant petition which is maintainable before this Court. On merits learned Counsel has contended that the impugned order has been passed without jurisdiction, as the Collector of Customs, at the relevant time, did not enjoy any powers of adjudication in terms of Section 179 of the Customs Act, 1969, whereas, instant proceedings were initiated by the Collector of Customs under Section 13 of the Act for cancellation of the petitioner's license, however, the Collector has taken upon himself the adjudication exercise and has also confiscated the warehoused goods and has further directed for payment of warehousing surcharge for which the Collector of Customs has no jurisdiction in the matter. So far as merits of the case are concerned, the learned Counsel has contended that the petitioner has not committed any violation as alleged in the Show Cause Notice as the goods in warehouse were found intact except a small quantity, which had occurred through theft/pilferage and such theft was accordingly informed in time to the Customs Authorities, even before issuance of show cause notice, therefore, nothing could be alleged against the petitioner.

4. Conversely, Counsel for respondents has contended that instant petition is not maintainable as the Statute provides for an appeal before

the Customs Appellate Tribunal, whereas, the petitioner has made an attempt to seek re-export of goods lying in the warehouse on the basis of forged letter of Ministry of Commerce and such conduct/act of the petitioner falls within the provisions of Section 32 of the Customs Act, 1969 and therefore, impugned order is correct in law. Insofar as the authority of Collector of Customs for initiating adjudication proceedings is concerned, the Counsel has referred to Section 195 of the Customs Act, 1969 and has contended that the Collector of Customs is the final supervisory body of the Collectorate, therefore, has all the powers to adjudicate such matters.

5. On 11.3.2015 this Court, while considering the fact that an important issue had been raised in the instant matter, as to whether the Collector of Customs can initiate suo-motu proceedings of adjudication under Section 195 of the Customs Act, in absence of any decision passed by a sub-ordinate authority, had appointed Mr. Khalid Jawaid Khan, Advocate as an Amicus to assist this Court on the said controversy. Learned Amicus had briefly assisted the Court on 21.04.2015 and had made his submission to the effect that insofar as Section 195 of the Customs Act, 1969 is concerned, it does not confer any original jurisdiction to the Collector of Customs, and merely provides for supervisory jurisdiction in respect of orders passed by the sub-ordinate officers. Insofar as maintainability of this petition is concerned, learned Amicus had supported the same by relying on a Judgment passed by Division Bench of this Court in the case of ***M/s. Khatri Brothers through Proprietor vs. Federation of Pakistan through Secretary Revenue Division and Chairman Federal Board of Revenue, Islamabad (2010 PTD 1225)***.

6. We have heard the both learned Counsel, perused the record as well as the submissions made by the learned Amicus. By consent instant petition is being finally decided at katcha peshi stage. Insofar as the

objection with regard to the maintainability of instant petition is concerned, it appears that the proceedings in question were initiated by the Collector of Customs through Show Cause Notice dated 25.1.2011 and were primarily based on the allegation that the petitioner had misused the facility of storage of diplomatic goods and such proceedings were initiated pursuant to powers conferred on the Collector of Customs through Section 13 of the Customs Act, 1969, which reads as under:

“13. Power to licence private warehouses.- (1) At any warehousing station, the Collector of Customs may, from time to time, licence private warehouses wherein dutiable goods may be deposited ³[without payment of customs-duty.]

(2) Every application for a licence for a private warehouse shall be made in such form as may be prescribed by the Collector of Customs.

⁴[(3) A licence granted under this Section may be cancelled by the Collector of Customs for infringement of any condition laid down in the licence or for any violation of any of the provisions of this Act or any rules made there under, after the licensee has been given proper opportunity of showing cause against the proposed cancellation].

(4) Pending consideration whether a license be cancelled under sub-section (3), the Collector of Customs may suspend the licence.”

7. It further appears from perusal of the Show Cause Notice that in such proceedings, allegations were also attributed against the petitioner for having contravened the provisions of Section 32 and Section 98 of the Customs Act, 1969 and while passing the impugned Order in Original, penal action in terms of Section 156(1) of the Act *ibid*, was also initiated. It would not be out of place to mention that under the Customs Act, appeals against all sorts of orders passed under the Act, are provided in section 193 and sub section (1) of 194-A of the Customs Act, 1969. However, since in the instant matter, the impugned order has been passed by the Collector of Customs, against which no appeal lies before the Collector of Appeals as contemplated under Section 193, it is only Section 194A, which is relevant for the present discussion and the same, at the relevant time read as under:

[194-A Appeals to the Appellate Tribunal.--(1) Any person [or an officer of Customs] aggrieved by any of the following orders may appeal to the Appellate Tribunal against such orders:-

[(a) * * *]

[(ab) an order passed by the Collector (Appeals) under

section 193;]

[(b) * * *]

(c) an order passed under section 193, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Collector of Customs under section 195[* * *]

[(e) an order passed in revision by the Director-General Customs Valuation under section 25D, provided that such appeal shall be heard by a special bench consisting of one technical member and one judicial member.]

8. Perusal of the aforesaid provision reflects that the category of cases mentioned in sub-section (1) does not provide for an appeal against an order passed by the Collector of Customs, while exercising Powers under Section 13 of the Customs Act, 1969, whereas, insofar as an order passed by the Collector under section 195 of the Act is concerned, on perusal of the impugned order we are of the view that the same was not passed under section 195 of the Act *ibid* by the Collector of Customs, as the same was initiated on the basis of a Show Cause Notice by the Collector himself, and not by exercising the powers to re-open an order already passed by a subordinate officer, as contemplated under section 195 of the Act. Therefore it appears *prima facie*, that the impugned order is not appealable before the Customs Appellate Tribunal under Section 194-A of the Customs Act 1969. A Learned Division bench of this Court in the case of ***Khatri Brothers (supra)*** while dealing with a more or less similar situation, wherein, the impugned order was passed in terms of Rule 103 of the Customs Rules, 2001, by the Collector of Customs as an appellate authority in respect of Licenses issued to the Customs Agent, while recalling/reviewing its earlier order of dismissal of petition, as being not maintainable, has been pleased to hold that an order passed by the Collector of Customs, does not fall within any of the category of orders mentioned in Section 194-A of the Customs Act, 1969 and therefore, a petition would be maintainable before this Court, against such orders passed by the Collector of Customs. The relevant finding of the learned Division bench reads as under:-

“9. From a perusal of the impugned order we have seen that it is not an order passed by the Collector (Appeals) in accordance with the provisions of section 193 but an order passed by the Collector of Customs exercising his jurisdiction of appeal under the proviso to sub-rule (2) of the rule 103 of Customs Rules, 2001 and therefore the impugned order does not fall under clause-(ab) (sic) of section 194. So far clause (c) is concerned it relates to the orders under Section 195 of the Customs Act. From a perusal of this Section it is seen that these orders can be passed suo-motu by the Board or Collector of Customs after examining the records of any proceedings under the Act and if the Board or Collector of Customs is not satisfied as to the legality or propriety of any decision or order passed by the subordinate officer then they may pass such order as they deem fit. From a perusal of the impugned order we have seen that this is not an order passed under Section 195 of the Customs Act.

10. We are, therefore, of the considered opinion that the order passed by the Collector Appraisalment or any other Collector in accordance with powers vested to him under the proviso to sub-rule (2) of rule 103 of the Customs Rules, 2001, is not an order passed either by Collector (Appeals) under Section 193 nor an order passed by the Board or Collector of Customs under Section 195 and therefore no appeal can be filed against such order before the Tribunal under Section 194-A of the Customs Act.”

9. Since in the instant matter the impugned order has been passed by the Collector of Customs for cancellation of license granted under Section 13 of the Act, *ibid*, we are of the considered view that insofar as instant petition is concerned, the same is maintainable before this Court in view of the fact that no appeal is provided against such orders under the Customs Act, 1969 including under section 193 and section 194A of the Customs Act.

10. Adverting to the merits as well as the legal objections raised on behalf of the Petitioner, to the extent, that the Collector of Customs does not have any power of adjudication as contemplated under Section 179 of the Customs Act, 1969, including confiscation of goods and enforcing recovery of warehousing surcharge under Section 98 of the Act, it would be advantageous to refer to the provisions of Section 179 as it was relevant at that time, which reads as under:-

[179 Power of adjudication.--(1) Subject to sub-section (2), in cases involving confiscation of goods or imposition of penalty under this Act or the rules made thereunder, the jurisdiction and powers of the Officers of Customs in terms of amount of duties and other taxes involved, excluding the conveyance, shall be as follows:-

- | | | |
|-------|----------------------|--|
| (i) | Additional Collector | without limit |
| (ii) | Deputy Collector | not exceeding [eight] hundred thousand rupees. |
| (iii) | Assistant Collector | not exceeding [three hundred] thousand rupees |

Perusal of the aforesaid provision reflects that the Collector of Customs does not figure out in the hierarchy provided for adjudication of cases, involving confiscation of goods and imposition of penalty under the Customs Act, 1969. Whereas, admittedly the present proceedings, as discussed in the earlier part of the judgment were initiated by the Collector of Customs under section 13 of the Customs Act, for cancellation of the petitioner's license. It appears that though the impugned order has been passed while finalizing such proceedings under Section 13 of the Customs Act, 1969, however, while doing so, the goods warehoused in the bonded premises, allegedly beyond the stipulated period, as provided under section 98 of the Customs Act, 1969, have also been confiscated under clause 14 & 14A of Section 156(1) of the Act, in addition to cancellation of petitioners license. Therefore, insofar as the impugned order is concerned, the same needs to be examined as to whether, while carrying out proceedings for cancellation of license under section 13(3) of the Customs Act, the Collector of Customs, could have passed any order for confiscation of goods for which apparently he had no jurisdiction as provided under Section 179 of the Act. On a threadbare examination of the impugned order, as well as the show cause notice, it appears that the proceedings have been finalized on the basis of some letter which according to the respondents was furnished by the petitioner from Ministry of Commerce, which was found to be a forged letter and for such reasons, Section 32 of the Customs Act was also invoked in addition to Section 13 and Rule 344 of the Customs Rules, 2001 in the show cause notice. It is a settled proposition of law that if a mandatory condition for the exercise of jurisdiction by a Court is not fulfilled, then the entire proceedings that follow, suffer for want of jurisdiction. The Customs Act in and of itself, provides for confiscation of goods and a mechanism for adjudication of cases along with the pecuniary limits of the respective officers under section 179 of the Act, whereas, it did not confer, at the relevant time, any such powers on the Collector of Customs. The argument that in terms of

Section 4 of the Act, the Collector is empowered to carry out and exercise such duties as are conferred upon any officer sub-ordinate to him, may be a valid argument for the purposes of exercising powers on the administration side, however, when the question of adjudicating an offence is involved, we do not see that such powers can be exercised by the Collector himself, as he has been specifically excluded from the category of officers as mentioned in Section 179. This appears to be consciously omitted / excluded, and therefore, it cannot be said that by virtue of Section 4 of the Act, the Collector can exercise powers of Adjudication as the same have been conferred on his sub-ordinate officers. Since we do not see any role assigned to the Collector of Customs for exercising any powers of confiscation of goods as provided under section 179 of the Act, the impugned order to that effect, whereby, the goods in question have been confiscated, does not appear to be correct and lawful. Therefore, in our view the impugned order to the extent of outright confiscation of goods cannot be sustained as the same has been passed as an adjudicating authority in terms of section 179 of the Customs Act which at the relevant time did not confer any jurisdiction on the office of the Collector of Customs, hence; it is hereby set-aside. Moreover, if the current position of section 179 of the Act *ibid* is examined, it appears that since Adjudication Collectorate has now been established as an independent and separate Collectorate, the powers of adjudication has now been conferred on the Collector of Customs without any limit.

11. Insofar as cancellation of license and the proceedings under section 13 of the Act are concerned, we may observe that grant of licence to any person is always subject to rules as well as discretion with regard to its renewal with the authority, who has issued the licence. A licensee for that matter cannot claim its continuous renewal as a matter of right. The record reflects that there are some serious allegations against the petitioner for having violated the terms and conditions of the licence as

well as the rules governing issuance of such license. The Collector of Customs, after providing an opportunity of hearing and filing of reply to such show cause notice, has passed a well reasoned order and has exercised discretion vested in it under the law, whereby, the licence has been cancelled for violation of the rules and we do not see any justifiable reason to interfere with such portion of the order as apparently the goods have stayed in the warehouse beyond the stipulated period without any permission or extension in accordance with law, and which amounts to violation of the conditions of grant of license. Moreover, it has also been alleged that some forged letter had been placed on record seeking Re-export of warehoused goods. In the circumstances, we do not see any reason to interfere in such exercise of discretion, which otherwise requires a further probe and enquiry as to the allegations and its reply on a factual plane, which cannot be entertained and decided in writ jurisdiction, therefore, the impugned order to the extent of cancellation of the petitioner's licence appears to be unexceptionable and is hereby upheld.

12. The upshot of the above discussion is that insofar as the impugned order to the extent of outright confiscation of goods in terms of clause 14 & 14A of Section 156(1) of the Customs Act, is concerned, the same cannot be sustained, being without jurisdiction and is hereby set-aside, whereas, the payment of warehousing surcharge is mandatory if otherwise not exempted or remitted under the Act, as and when the goods are removed or cleared from the warehouse and does not require any such adjudication. It is further held that the Collector of Customs can only initiate proceedings of cancellation of license granted under section 13 of the Act, by him, but cannot adjudicate the matter with regard to confiscation of goods and imposition of penalty which can only be done by the officers mentioned / categorized in section 179 of the Customs Act. In the circumstances, the respondents, may either initiate fresh proceeding(s), if permitted under the law, without prejudice to the rights which may have

accrued to the petitioner, or *in the alternative* shall give an option to the petitioner to shift the said goods to another Bonded Warehouse, as provided under section 98(4) of the Customs Act, 1969 who may seek its release or re-export from the concerned authorities in accordance with law.

13. Petition stands allowed partly in the above terms.

Dated: 05.01.2016

Judge

Chief Justice