IN THE HIGH COURT OF SINDH AT KARACHI

SPL. CUS. R. A. Nos.572 & 573 of 2011

Present:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Abdul Maalik Gaddi.

The Additional Director,
Directorate General of Intelligence &
Investigation-FBR, Regional Office,
Karachi. _____ **Applicant**

Versus

Member (Technical),
Customs, Federal Excise & Sales Tax,
Appellate Tribunal, Bench-II, Karachi
and another _____ **Respondents**

Date of hearing: 24.08.2016

Date of judgment: 24.08.2016

Applicant: Through Mr. Muhammad Khalil Dogar, Advocate

Respondents: Through Mr. Aqeel Ahmed, Advocate.

JUDGMENT

Aqeel Ahmed Abbasi, J: Since the aforesaid two Spl. Customs Reference Applications have been filed against two orders passed by the Customs Appellate Tribunal, Bench-II, Karachi, in Customs Appeal Nos.H-463/2011 and H-464/2011, relating to confiscation of oil and the oil tanker, whereas, one common Show Cause Notice was issued to the respondent for confiscation of oil as well as the oil tanker on which such oil was being transported, whereas, the applicant has formulated common questions, therefore, by consent, both the Reference Applications are being heard and disposed of through this common judgment. The applicant initially formulated 03 questions in S.CR.A. No.572/2011, whereas, in S.C.R.A. No.573/2011 seven (07) questions,

however, it appears that during pendency of these References vide order dated 21.12.2011 in both the cases, at the request of the learned counsel for the applicant, the permission was granted to re-frame the questions which may be arising from the impugned order passed in the instant case.

2. Pursuant to such order, the applicant filed the amended questions in S.C.R.A. No.572 of 2011, which reads as follows:-

i. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has failed to appreciate and consider the material evidence available on record to the effect that seized goods (foreign origin diesel oil), at the relevant time of seizure were being transported in oil tanker No.TTA-703, under the cover of a bogus shipment advice No.69873569, dated 08.02.2010, purportedly issued by M/s PSO, which on verification was found to have not been issued by M/s PSO.

ii. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has failed to appreciate the fact that oil tanker No.TTA-703, was not the registered fleet list of PSO at the time of interception and seizure of the same carrying smuggled diesel oil.

iii. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, while concluding the impugned Order-in-Appeal No.H-463 of 2009, dated 28.02.2010, has seriously erred in law and failed to understand that 14,000 liters of HSD Oil was not purchased from approved Oil Marketing Company as provided under SRO 766(I)/2009, dated 04.09.2009 and that Oil Tanker No.TTA-703, was exclusively utilized for the transportation of 14,000 liters of foreign origin/smuggled HSD Oil, which was liable for outright confiscation for violation of the provisions of Section 156(1)(89) & 157(1), (2) of the Customs Act, 1969, read with SRO 499(I)/2009, dated 13.06.2009?

3. Similarly in SCRA No.573 of 2011 following amended questions have been formulated:-

i. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has failed to appreciate and consider the material evidence available on record to the effect that seized goods (foreign origin diesel oil), at the relevant time of seizure were being transported in oil tanker No.TTA-703, under the cover of a bogus shipment advice No.69873569, dated 08.02.2010, purportedly issued by M/s PSO, which on verification was found to have not been issued by M/s PSO.

ii. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has failed to appreciate the fact that oil tanker No.TTA-703, was not the registered fleet list of PSO at the time of interception and seizure of the same carrying smuggled diesel oil.

iii. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, while concluding the impugned Order-in-Appeal No.H-464 of 2009, dated 28.02.2010, has seriously erred in law and failed to understand that 14,000 liters of HSD Oil was not purchased from approved Oil Marketing Company as provided under SRO 766(I)/2009, dated 04.09.2009?

iv. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has seriously erred in law and failed to understand that HSD Oil is a notified item, in terms of SRO 566(I)/2005, dated 06.06.2005, amended vide SRO(I) of 2010, dated 11.02.2010, which is liable for outright confiscation for violation of the provisions of Section 2(s), 16, punishable under clause (8) and (89) of sub Section (1) of Section 156 of the Customs Act, 1969?

v. Whether, the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has seriously erred in law and failed to appreciate that SRO/Notification 118(1)/83, dated 12.02.1983, read with Section 177 of the Customs Act, 1969, only deals with possession of some quantity of certain goods in the border area adjacent to the frontier of Pakistan with India and Iran and the aforesaid provisions of law neither has any nexus with the said case nor act as a bar on interception of smuggled goods inside the country?

vi. Whether, the impugned Order-in-Appeal passed by the learned Member (Technical), Appellate Tribunal, Bench-II,

Karachi, based on misreading of evidence is sustainable under the law?

4. Learned counsel for the applicant submits that Customs Appellate Tribunal, Inland Revenue, has failed to appreciate that the respondent could not discharge its onus regarding possession of HSD oil in terms of Section 187 of the Customs Act, 1969, which infact was oil of Irani origin, hence the same was smuggled oil in terms of Section 2(s) read with Section 16 of the Customs Act, 1969 and the same was liable to be confiscated by the Customs Authorities. It has been further contended by the learned counsel that during confiscation of the subject oil and vehicle, the Driver of the vehicle instead of showing the import documents, escaped from the scene, whereas, a fake transhipment advice of PSO was found in the dashboard of the vehicle, which was meant to hoodwink the Customs Authorities. Per learned counsel, the import and supply of petroleum products including petrol and HSD oil is not permissible in open market except through authorized oil companies and distributors/dealers i.e. petrol pumps, who are issued license in this regard, whereas, in the instant case, the respondent was carrying the subject oil without proper authorization and sale receipt or transhipment advice from the oil companies. Per learned counsel, the impugned order is liable to be set-aside, whereas, the questions arising from the order passed by the Customs Appellate Tribunal are questions of law, which may be answered against the applicant in favour of the respondent.

5. Conversely, learned counsel for the respondent at the very outset submits that the questions proposed through instant Reference Applications as well as questions duly amended by the applicant/department in both the cases do not arise from the impugned order passed by the Customs Appellate Tribunal in the instant case, nor the same give rise to any legal controversy, as according to learned counsel, the decision of the Customs Appellate Tribunal is based on

finding of facts. Per learned counsel, the allegations of smuggling against the respondent, on the face of record are false and frivolous and the same are based on no evidence whatsoever, whereas, onus regarding lawful possession of subject oil in terms of Section 187 of the Customs Act, 1969 was satisfactorily discharged by the respondent during adjudication proceedings, where all the details and documents were produced in respect of subject oil. It has been further contended by the learned counsel for respondent that none of the ingredients of Section 2 (s), 16 of Section 156 (89)(90) are attracted under the facts and circumstances of instant case, as the Customs Authorities, while confiscating the oil and the vehicle, acted in violation of the express provisions of Customs Act, 1969, as neither any independent witness in terms of Section 103 Cr.P.C. was associated with the alleged confiscation and the preparation of the Musheernama of recovery nor any notice was issued to applicant regarding such allegations. Learned counsel further argued that the confiscated oil was not even sent for laboratory test to ascertain as to whether such oil was imported oil, which could possibly be smuggled by the respondent, whereas, according to learned counsel, such oil was not imported oil and was purchased from the authorised dealer i.e. New Kandiyaro Petroleum Service Kandiyaro, who issued sale invoice in respect of confiscated oil, which was also produced before the Adjudicating Authority, who after detailed scrutiny of the documents and by considering all factual and legal aspect of the case was pleased to drop the charges of smuggling against the respondent and released the consignment as well as the vehicle unconditionally. Learned counsel for the respondent further submits that none of the questions as proposed hereinabove arise from the impugned order passed by the Customs Appellate Tribunal, for the reason that the proceedings initiated by the Collector Customs, Hyderabad, under purported exercise in terms of Section 195 of the Customs Act, 1969 were without lawful authority, whereas, through impugned order passed by the Customs Appellate

Tribunal the same has been declared as illegal and without lawful authority, however, per learned counsel, applicant has not proposed any question in this regard, therefore, both the Reference Applications are misconceived and liable to be dismissed.

6. We have heard the learned counsel for the applicant and the learned counsel for respondent and perused the impugned order passed by the Customs Appellate Tribunal as well as by the authorities below and have also examined the relevant legal provisions with their assistance. It will be advantageous to reproduce the points as determined by the Customs Appellate Tribunal for decision in the instant cases as reflected in para-7 of the impugned order passed by the Customs Appellate Tribunal in S.C.R.A. No.573 in Customs Appeal No.H-464/2011, which read as follows:-

> "7. Arguments heard and case record examined by this forum. Following questions need to be answered in order to arrive at correct finding in this case by this forum:-
>
> i) Whether the goods can be confiscated outright under sub-section (8), (9), (89) and (90) of section 156(1) of the Customs Act, 1969 simultaneously?
>
> ii) Whether the origin of the subject diesel can be determined on the basis of physical examination by the seizing agency without recourse to chemical test or analysis of seized diesel from a recognized laboratory?
>
> iii) Whether the determination of the origin of diesel is a mandatory requirement before its confiscation particularly when the charge of smuggling in breach of section 2(s) of the Customs Act has been leveled?
>
> iv) Whether the purchase receipt of the goods (HSD) issued by the seller M/s New Kandiyaro Filing Station, Kandiyaro was got verified and was not objected by the seizing agency?
>
> v) Whether the subject oil (HSD) was seized at National Highway Babarloe which is within the municipal limits of District Sukkur?

vi) Whether the requirements pertaining to nomination of independent mushirs in terms of Section 103 Cr.P.C. were observed at the time of seizure of the goods (HSD)?

vii) Whether the photo copy of documentary evidence i.e. PSO transshipment advice No.69873569 dated 08.02.2010 mentioning vehicle/oil tanker registration No.TTC-703 is sufficient proof for establishment of charge of smuggling in breach of section 2(s) against the Appellant?

viii) Whether the Collector was justified to reopen the instant case by exercising jurisdiction under section 195 of the Customs Act, 1969 in accordance with the law?"

7. The Appellate Tribunal has dealt with aforesaid issues in detail in the impugned judgment by giving separate reasons as contained in Paras No.8 to 13 of its judgment, perusal of which reflects that on the basis of material available on record, finding on facts has been recorded, according to which, the applicant could not establish the allegation of smuggling against the respondent. Whereas, on the other hand, the respondent discharged initial burden regarding lawful possession of the subject oil in terms of Section 187 of the Customs Act, 1969. It has been further observed that the HSD oil was seized at National Highway within the local limits of District Sukur, whereas, it was not even sent for Laboratory test to ascertain its flashpoint and other properties which are different in case of local oil and the Iranian (smuggled) oil nor any effort was made to ascertain the origin of seized oil. Respondent on the other hand produced the purchase invoice No.4241 dated 09.02.2010 of New Kandiyaro Petroleum Service in respect of subject oil which was being transported from one filling station to other, which fact has not been disputed by seizing authority. In addition to finding on merits of the case relating to allegation of smuggling, it has been further held that the Collector of Customs, Hyderabad was not legally authorized to invoke the provisions of Section 195 of the Customs Act, 1969, without pointing out any illegality or impropriety in the order passed by the Adjudicating Officer, whereas, there was no evidence to support the allegation that subject oil was smuggled HSD oil. The charge of smuggling being a Criminal Charge requires stringent proof and evidence which is required to be confronted by seizing authority before holding the owner or the person found in possession of such oil, liable to be penalized for such offence, whereas, in the instant case, on mere presumptions and by taking different view on same set of material and evidence already adjudicated upon, revisional powers in terms of Section 195 have been invoked, which cannot be sustained in law. Learned counsel for the applicant could not assist this Court as to how such

finding of facts as recorded by the Adjudicating Authority and the Customs Appellate Tribunal is either erroneous or based on misreading and non-reading of the evidence. It may be observed that while exercising reference jurisdiction under Section 196 of the Customs Act, 1969, this Court has to examine and decide only such questions of law, which may arise from the order passed by the Customs Appellate Tribunal and cannot decide the questions of facts unless such finding on facts is found to be perverse or contrary to the record, as the Appellate Tribunal is the final fact finding forum as provided under the law. Moreover, in the instant case, a question, which could possibly arise from the impugned order passed by the Customs Appellate Tribunal relating to authority and jurisdiction of Collector Customs to invoke the provision of Section 195 of the Customs Act, 1969, has neither been raised nor argued by the learned counsel for applicant either before Appellate Tribunal or before this Court during the course of hearing the reference application.

8. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that the questions as proposed by the applicant department are questions of fact, whereas, no questions of law arise from the impugned order passed by the Customs Appellate Tribunal nor such questions give rise to any legal controversy, which could be resolved by this Court under its reference jurisdiction in terms of Section 196 of the Customs Act, 1969. Accordingly, both the Spl. Custom Reference Applications merit no consideration, which are hereby dismissed in limine along with listed applications.

J U D G E

J U D G E

Nadeem