

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No.D-2099 of 2013

Present : Aqeel Ahmed Abbasi, and
Mrs.Ashraf Jahan, JJ.

Date of hearing : 29.8.2018

Petitioner : M/s.Ahmed CNG Station through
Mr.Muhammad Afzal Awan, Advocate.

Respondents : The Federation of Pakistan through
Mr.Mir Hussain Abbasi, Asst. Attorney
General.

The Collector of Customs and others
through Mr.Iqbal Khurram, Advocate.

JUDGMENT

Mrs.Ashraf Jahan, J:- Through this petition, the Petitioner has impugned orders-in-original No.130/2012 and 131/2012 passed by the Additional Collector Customs, Model Collectorate of PACCS.

2. The facts in a nutshell, as disclosed in the petition, are that the Petitioner is regular importer of CNG Cylinders and had imported a consignment of cylinders on 13.3.2012. The consignment was duly assessed by the Customs Department under Section 80 of the Customs Act, 1969 (herein after referred as "the Act"), the leviable duty and taxes were paid, and vide order-in-original No.24270-21052012 it was observed that the subject goods were importable. After clearance of the goods from the Customs charge the same were sold to the various customers by the Petitioner. Above order was never challenged by the Customs Authorities, therefore, it attained finality.

3. This being the position the Petitioner imported second consignment of cylinders and after payment of leviable duty and

taxes the same was cleared. Likewise, third consignment was also imported, but to the utter surprise of Petitioner the Customs Department initiated proceedings under Section 179 of the Customs Act regarding second consignment and passed order-in-original No.130/2012 dated 31.12.2012 for outright confiscation of goods and a penalty of Rs.500,000/= was also imposed. The third consignment also met with the same fate and another order-in-original No.131/2012 was passed by the Respondents. Not only this, but Respondent No.5 further initiated recovery proceedings and issued notices for recovery of penalty of Rs.500,000/= in each case, in absence of any violation or mischief on the part of Petitioner. As per case of Petitioner no alternate, adequate and efficacious remedy was available in the circumstances of the case, therefore, present petition was filed for declaring both the orders-in-original, referred to above, as void.

4. Notice of this petition was given to the Respondents, who filed their comments, wherein they denied the case of the Petitioner and stated that Petitioner has approached this Court against the orders-in-original passed by the adjudicating authority under Section 179 of the Act on 31.12.2012 without challenging the same in appeal under Section 193 of the Act, therefore, the said orders have attained finality. Thus, the subject petition is not maintainable and is liable to be dismissed. It is further the case of Respondents that as per Import Policy Order prevalent at the relevant times regarding import of CNG Cylinders this Court, vide judgment dated 05.3.2013 in C.P. No.D-4320/2012, has already held that the same were banned. The earlier consignment of CNG Cylinders designed for installation in vehicles was cleared due to the concealment of material facts through Customs' Computerized System as per self-assessment.

Subsequently, when the matter came to the knowledge of Customs Authorities, it was reopened and orders-in-original were passed. However, despite the communication of said orders neither the penalty has been paid nor the banned goods were surrendered by the Petitioner.

5. Learned Counsel for the Petitioner has argued that both the orders-in-original No.130/2012 and 131/2012 have been passed without lawful authority, hence liable to set-aside under Article 199 of the Constitution. Per learned Counsel, Petitioner was a bona fide importer of CNG Cylinders, and has imported the CNG Cylinder and Conversion Kits etc. as per Import Policy Order, whereas, GDs filed by the petitioner were duly assessed and consignments were also cleared accordingly, however, Customs Authorities, while acting contrary to law, have re-opened the case of petitioner on the allegation of misdeclaration and passed the two impugned orders both dated 31.12.2012, therefore, both the orders are coram non-judice, hence liable to be set aside.

6. Conversely, learned Counsel for the Respondent has argued that petition is not maintainable and liable to be dismissed with costs, as according to learned Counsel, remedy of appeal provided under the Act against impugned Orders-in-Original has not been availed, whereas, material facts have been conceded by the petitioner. Per learned Counsel, GDs filed by the petitioner were never subjected to assessment proceedings as the same were processed on the basis of self-assessment through computer WEBOC system, whereas, it was re-opened on the basis of concrete evidence and material after Notice to the petitioner.

7. We have considered the arguments advanced by both the learned Counsel, and have also perused the record with their assistance, which reveals that the Petitioner has challenged the two Orders-in-Original No.130/2012 and 131/2012 passed by the Additional Collector Customs, which are admittedly appealable orders under the Customs Act, 1969. It is also matter of record that before passing of these orders-in-original, Show Cause Notices were issued to the Petitioner, which were duly responded by the petitioner through his representative, whereafter, above orders were passed, however, Petitioner has neither disclosed these facts in his petition nor annexed the copies of Show Cause Notices along with the petition on the contrary, in para-13 of the Memo of petition it has been stated that petitioner has no adequate and efficacious remedy against two impugned orders. It is pertinent to note that both orders-in-orders were passed on 13.12.2012, whereas, instant petition was filed on 16.05.2013, after expiry of the period provided for filing an appeal under the Customs Act, 1969, whereas, no reason or justification for abandoning the statutory forum has been given by the petitioner.

8. It is settled legal position that extra ordinary Constitutional jurisdiction of High Court under Article 199 of the Constitution cannot be invoked in all cases as a matter of right, course or routine, unless there is violation of fundamental rights guaranteed under the Constitution, or principles of Natural justice, or an aggrieved party can demonstrate that the impugned order, action or inaction of a Public Functionary suffers from jurisdictional defect or the same is totally illegal and there is no other adequate alternate remedy available in law. Conditions mentioned in Article 199 of the Constitution are meant for the purposes of regulation of Court's jurisdiction and availability of other remedy is one of such limitation.

Where a Statute creates a right and also provides mechanism for its enforcement, including the right of appeal, the party complaining of breach of such Statute, must first avail the remedy provided by Statute for such breach before invoking the Constitutional jurisdiction of this Court by mere dint of drafting the petition while alleging malafide on the part of Public Functionary, or illegality and jurisdictional defect in the impugned order or decision, in order to justify their approaching this Court directly under Article 199 of the Constitution, while bypassing the alternate statutory remedy.

9. When learned Counsel for the Petitioner was confronted with hereinabove legal position, and was also required to assist the Court as to why, petitioner failed to challenge the impugned orders by filing appeal under law, learned counsel failed to give any reasonable justification, nor could explain as to why, the petitioner did not approach the Court promptly, and has chosen to challenge the recovery Notices issued pursuant to impugned Orders-in-Original, after expiry of period of limitation provided for filing an appeal.

10. The Hon'ble Supreme Court, in number of decisions on the issue of maintainability of a Constitutional Petition, particularly in tax matters, where remedy of appeal is provided in law, has been pleased to hold that an aggrieved party has no discretion to ignore the provisions of appeal and to file Constitutional Petition, as the Constitutional jurisdiction is not designed and intended to be used as a substitute for a regular appeal or to be equated with the regular appeal. Reliance in this regard is placed upon the case of **Khalid Mehmood v. Collector of Customs, Customs House, Lahore (1999 SCMR 1881)**, wherein, it has been held as under:-

“ As to bar of jurisdiction, it is to be noted that Article 199 of the Constitution opens with word to the effect that the High Court may exercise its powers under such Articles only “if it is satisfied that no other adequate remedy is provided by law”. Adequacy of the alternative remedy, therefore, if there is another remedy available, should always attract the attention of the High Court.

Of such alternative remedies also there are some, which would still leave the jurisdiction of the High Court virtually unaffected, if the order, complained of, is so patently illegal, void or wanting in jurisdiction that any further recourse to or prolongation of the alternative remedy may only be counter-productive and, by invocation of Article 199 the mischief can forthwith be nipped in the bud. In such matters, of course, neither the alternative remedy would be adequate nor bar of jurisdiction in the Sub-Constitutional Legislation may come in the way of the High Court in exercising its Constitutional jurisdiction.

There are other matters, however, where the Constitutional jurisdiction under Article 199 cannot be so readily resorted to. One such, falling in this category, would be matters amenable to the jurisdiction of an exclusive Tribunal, mandated by the Constitution itself. Another, which readily comes to the mind, would be disputes under a statute, postulating the appellate or revisional jurisdiction to reside either in the High Court itself or directly in the Supreme Court. An example, essentially relevant to the first, would be the Service Tribunal where the Tribunal is mandated by the Constitution of Pakistan namely, Article 212, thereof and where an appeal lies directly from the Tribunal’s decision to the Supreme Court. Obviously, the High Court should be very slow in entertaining disputes covered by the jurisdiction of such a Tribunal even in matters where the High Court’s jurisdiction cannot be taken away e.g. acts which are void, without jurisdiction or coram non iudice. In such cases of ouster, the High Court would consider it a better exercise of its discretion not to interfere. More or less a similar principle applies where an exclusive Tribunal or a regular Court has jurisdiction in a matter but the legislation, creating such Court or forum or conferring jurisdiction on the same, also ends up by providing

appellate or revisional jurisdiction to the High Court itself. Obvious examples could be civil and criminal proceedings, emanating under the Code of Civil and Criminal Procedure, Income Tax References, Customs Appeals etc. In such matters, where the High Court itself is the repository of the ultimate appellate, revisional or referral powers, conferred by the relevant statute, it is in the rarest of cases that the High Court may be persuaded to entertain a Constitutional petition and to enforce the Constitutional remedy in preference to its own appellate, revisional or referral dispensation arising in course of time.”

Further reliance can also be placed in the case of **Syed Match Company Limited v. Authority under Payment of Wages Act and others (2003 SCMR 1493) and Export Promotion Bureau v. Qaiser Shafiullah (1994 SCMR 859)**.

11. In view of above factual and legal position, and while relying upon the above decisions of the Apex Court, we are of the considered opinion that Petitioner has approached this Court with unclean hands, bypassing the statutory remedy of appeal after expiry of the period of limitation provided for filing an appeal, however, without any lawful justification. Accordingly, present petition merits no consideration, which was dismissed vide our short order dated 29.08.2018, with cost of Rs.10,000/-, and these are the reasons of our short order.

JUDGE

JUDGE

Karachi :

Dated: _____