

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 534 of 2008

[Messers Mehran Associates v. Federation of Pakistan and others]

Date of hearing : 07.03.2018
Date of Decision : 07.03.2018
Plaintiff : M/s Mehran Associates, through M/s Ghulam Ahmed Khan and Fahmida Khanam, Advocates.
Defendant No.1 : Nemo.
Defendants 2-5 : The Collector of Customs and 3 others, through Mr. Shahid Hussain Qureshi, Advocate.

Case law relied upon by Plaintiff's counsel

1. 2005 S C M R page-1950
[*Azizullah v. Jawaid A. Bajwa and others*]
1. 2016 P T D page-518
[*Mubishar Pesh Imam v. Federation of Pakistan and others*]

Case law relied upon by Defendants' counsel

Other Precedents:

1993 S C M R page-1533

[*Independent Newspapers Corporation (Pvt.) Ltd. and another v. Chairman, Fourth Wage Board and Implementation Tribunal for Newspaper Employees and others*]

- Law under discussion:**
1. Constitution of the Islamic Republic of Pakistan, 1973.
 2. Customs Act, 1969.
 3. Law of Torts.
 4. Limitation Act, 1908 (“Limitation Law”).
 5. Civil Procedure Code, 1908 (“CPC”).
 6. General Clauses Act, 1897.

J U D G M E N T

Muhammad Faisal Kamal Alam, J.: - Present suit has been filed against the Defendants, who are all Officials of Customs Department,

except Defendant No.1, the Federation of Pakistan. Plaintiff contains the following prayer clause(s)_

- “a) That the consignment covered by Bill of Entry bearing Bond Execution No.B-312/7/81/2003/PB dated 7.7.2003 consisting of 960 Cartons of Blue Cow brand Sweetened Condensed Filled Milk valuing US\$ 14820/- equivalent to Pak Rs.8,74,653/- when stored in bonded warehouse was valid for consumption upto 15.04.2004 and was imported in accordance with the law.**
- b) Declare that defendants action in with-holding clearance of goods on exbond Bill of Entry filed by Plaintiff on 06.10.2003 which caused total loss of goods was accessioned by gross negligence or willful act of defendant officers.**
- c) Declare that the defendants are liable to pay damages claimed by Plaintiff in a sum of Rs.15,58,325.37/- caused in the result of the goods becoming unfit for human consumption and bank mark up on the aforesaid amount at 1.5% per month from 08.04.2006 till the date of actual payment.**
- d) Any other relief which this Honourable Court deems fit and proper in the circumstances of the case.”**

2. On issuance of summons, the matter was initially contested by the Defendants by filling their exhaustive Written Statement, in which the claim of the Plaintiff has been denied.

3. On 13.12.2010, the following Issues, proposed by the Plaintiff, were adopted by the Court_

- “1. Whether Cow Brand Condensed Milk of Singapore origin packed in 960 Cartons was valid for home consumption and still had 6 Months and 10 days in its expiry at the time when these were warehoused in Bond under Customs custody and control pending clearance upon payment of taxes?**

2. *Whether Show Cause Notice was issued on 30.03.2004 after 5 Months and 24 days of filing of exbond bill of entry for its clearance, when expiry for consumption of condensed milk was due on 15.04.2004?*
3. *Whether Show Cause Notice dated 30.03.2004 alleged that the consignment is a 'REIMPORTED CONSIGNMENT?'*
- 3A. *whether suit is barred by Section 217 of Customs Act?*
5. *Whether reply to Show Cause Notice produced the Quarantine Certificate No.53 to identify and confirm the description of imported goods?*
6. *Whether three identical consignment of the other importers between the period from 6.10.2003 (date of plaintiff's filing of exbond bill of entry) and 12.4.2004 (date of Judgment of order in original) were cleared by Defendants without any objection?*
7. *Whether Order in original was issued on 13.03.2004, received by Plaintiff on 16.4.2004, whereas the condensed milk in Bond had already expired for consumption on 15.04.2004?*
8. *What should the decree be?"*

4. Despite opportunities, the Defendants did not lead the evidence, as is also reflected from the Final Report submitted by the learned Commissioner on 23.04.2014, which was taken on record on 29.09.2014 but without any objection from the either side.

5. The case in nutshell is that the Plaintiff imported a consignment of 'Blue Cow Sweetened Condensed filled Milk' manufactured by Singaporean Company, viz. F & N Funds Pte. Ltd., from Singapore. 960 Cartons were imported, which eventually could not be cleared due to the dispute arose between the Plaintiff and the Defendants.

6. Mr. Ghulam Ahmed Khan, Advocate along with Ms. Fahmida Khanum, Advocate, while representing the Plaintiff, has argued that the goods were importable under the prevailing Import Policy of year 2003-2004 and particularly under Article 6(14) of the said Policy. It is the case of Plaintiff that the subject goods did not suffer from any restriction as mentioned in the afore-referred Import Policy, yet the subject goods were not allowed to be released by Defendant No.3, who was the then Additional Collector of Customs.

7. Mr. Shahid Hussain Qureshi, Advocate, who is the Associate of Mr. Amjad Javaid Hashmi, the learned Counsel for the Defendants, though initially sought adjournment on the ground that his senior is not well today, but this request is declined, because record of earlier dates shows that ample opportunities and indulgence were shown to the Defendants to proceed with the matter. Adjournment is also opposed by Plaintiff's side on the ground that element of hardship is involved and even otherwise the Defendants have not led the evidence. Mr. Shahid Hussain Qureshi argued that the Defendants have exercised the jurisdiction in a proper manner, as is evident from their pleadings.

8. Arguments heard and record perused.

9. My findings on the above Issues are as under_

FINDINGS

ISSUE NO.1.	_____	Affirmative.
ISSUE NO.2.	_____	Affirmative.
ISSUE NO.3.	_____	As under.
ISSUE NO.3A.	_____	Negative.
ISSUE NO.5.	_____	Affirmative.
ISSUE NO.6.	_____	Affirmative.
ISSUE NO.7.	_____	As under.
ISSUE NO.8.	_____	Suit decreed with costs.

REASONS

ISSUES NO.3(A)

10. Since the learned counsel for the Defendants has raised the question of maintainability of this suit, thus it is to be addressed in terms of Section 217 of Customs Act, 1969. Issue No.3(A) is taken up first.

11. It is argued by Mr. Shahid Hussain Qureshi, learned counsel for the Defendants that the officials of Customs Department, in the present case the Defendants No.2 to 5, enjoy the statutory immunity in view of Section 217 of the Customs Act, 1969, because they acted within the parameters of law, particularly when the Defendant No.3 had passed a speaking order (Order-in-Original No.18 of 2004) after taking into the account the case of the Plaintiff and also provided him an opportunity of hearing. He further submits that the present suit may be dismissed.

12. On the other hand, learned counsel for the Plaintiff has argued that the above Order-in-Original was admittedly set aside by the learned Customs, Excise & Sales Tax Appellate Tribunal at Karachi (the “**Tribunal**”) by its order dated 04.02.2006, which has been produced in the evidence as Exhibit P/17. It has been further argued that the learned Appellate Tribunal has given a finding that the action of the Customs Officials / Defendants was illegal. This argument has substance, in particular when no appeal was filed against this order, the same has attained finality. It is not disputed as also evident from the record that the Plaintiff’s side also invoked the jurisdiction of learned Federal Tax Ombudsman (“**FTO**”) under Federal Tax Ombudsman Ordinance, 2000, which also resulted in favourable recommendation for the Plaintiff, but on the representation of the present Defendants, under Section 32 of the above statute before the President, the decision of the FTO was reversed, though on an unusual consideration. However, it is further mentioned in the

operating part of the said order of the President, which is available at page-171 (Exhibit P/21 of the Evidence File), that parties are at liberty to file their claim in the Court of Law.

13. The above decision is of 27.11.2007, whereas the present plaint was presented on 15.04.2008, that is, within five months from the date of above order. On a query, learned counsel for the Plaintiff submits that the present case is not hit by limitation as the time prescribed for bringing such type of action is one year in terms of Article 22 read with Article 29 of the Limitation Act, 1908. Learned counsel has placed reliance on the Judgment of *Mubishar Pesh Imam (supra)*, wherein it is held that ***“the protection of Section 217 of Customs Act, 1969, is only available when the actions of Customs Officials are bona fide and not otherwise”***. Another Judgment of the Honourable Supreme Court has also been cited by the learned counsel for the Plaintiff in support of his arguments reported in **2005 S C M R page-1950 (ibid)**.

14. In view of the undisputed fact that the earlier Order-in-Original of Defendant No.3 was set aside by the learned Tribunal, which attained finality, I am of the view that the present proceeding is not hit by Section 217 of the Customs Act, 1969, and is maintainable. However, it is clarified that whether or not the Plaintiff is entitled to any relief is to be seen after appraisal of the evidence and record, which is discussed in the following paragraphs. Issue No.3A is answered in **Negative**.

ISSUES NO.1 AND 2:

15. The bill of entry, which is an undisputed document for the subject goods, has been exhibited as P/10, which shows the details of the subject product. The date of import of the subject product is 25.06.2003, under H.S. Code No.1901-9090; the valuation / price of the product is mentioned as

US\$ 16830, which at that time comes to Pak Rupees 874,653/- (Rupees Eight Lac Seventy Four Thousand Six Hundred Fifty Three only), however, the goods were inbonded on 07.07.2003. Similarly, the date of manufacturing and date of expiry is also not disputed as is evident from the original tin / can itself, which was produced in the evidence and photographs of its relevant portion, has been exhibited as P/25, available at page-183 of the Evidence File. **Date of production is mentioned as 15.04.2003 and date of expiry is 15.04.2004.** The same fact has also been mentioned in the Written Statement of the Defendants. Therefore, when the Plaintiff imported the said goods on 25.06.2003, still ten months were left in the expiry of the subject product. It is also not disputed that first Show Cause Notice was issued to the Plaintiff on 30.03.2004-Exhibit P/11; that is, when only fifteen days remained in the shelf life (expiry) of the subject product, which was promptly replied after three days by the Plaintiff while denying the allegations of the Defendants. It is also pertinent to discuss here, which again is an undisputed position, that bill of entry for exbonding the goods and its onward clearance for home consumption was filed on 14.07.2003, but the subject goods were not cleared. This bill of entry has been exhibited as P/10. Therefore, being an undisputed factual and legal position, which is proved from the documentary evidence produced by the Plaintiff's side, the Issues No.1 and 2 are answered in **Affirmative**, in the above terms and particularly Issue No.2 that when the Show Cause Notice dated 30.03.2004 was issued to the Plaintiff, the expiry date of subject product was almost due on 15.04.2004.

ISSUE NO.3:

16. Issue No.3 is not relevant for deciding the present controversy in view of the afore-referred decision of learned Customs Appellate Tribunal,

which attained finality and whereby the Order-in-Original based on the Show Cause Notice dated 30.03.2004 was adjudged as illegal.

ISSUES NO.5 AND 6:

17. The reply dated 03.04.2004 of the Plaintiff (Exhibit P/13) did accompany by the Quarantine Certificate No.53, which fact has never been challenged in the evidence.

18. The Plaintiff in order to build up his case on the point of discrimination, has led the evidence and produced bill of entries of other importers, who imported the same consignment of different manufacturers having the identical H.S. Code / PCT (Pakistan Customs Tariff) heading. These bills of entries are produced in the evidence as Exhibit P/22, P/23 and P/25. Per learned counsel, these bills of entries are of same period as is evident from the record itself. I have examined the record of these bills of entries relating to other consignees / importers and the arguments of learned counsel for the Plaintiff carries weight that they are round about the same time; first bill entry is of 28.06.2003, the second one is of 02.07.2003 and the third one is of 31.07.2003. This shows that the same goods / products of other importers were cleared by the Customs Department. Accordingly, Issues No.5 and 6 are answered in **Affirmative** and in favour of the Plaintiff and against the Defendants, that the acts of Defendants were also discriminatory vis-à-vis the Plaintiff.

ISSUE NO.7:

19. It is the case of Plaintiff that Order-in-Original, which was later set aside by the afore-referred decision of the Tribunal, was received by the Plaintiff on 16.04.2004, that is, after expiry of the shelf life of the subject product. This contention has been disputed by the learned counsel for the Defendants. If the arguments of the Defendants' side is accepted, even then

it does not improve the case of Defendants, as the date mentioned on this Order-in-Original is 13.04.2004, that is, two days before the shelf life of the subject product was to be ended / expired. This means that even if the same was to be challenged by the Plaintiff before the higher forum, it could not be done because the subject matter of the case had already been destroyed. Due to the unreasonable and arbitrary attitude and act of the Customs Officials (Defendants) the subject goods did not remain fit for marketing and human consumption. This issue is also answered accordingly, but against the present Defendants.

ISSUE NO.8:

20. The Plaintiff has claimed a sum of Rs.15,58,325.57/- (Rupees Fifteen Lac Fifty Eight Thousand Three Hundred Twenty Five and Fifty Seven paisas) towards damages, although the undisputed value of goods at that relevant time was Pak Rupees 874,653/-. On a query, learned counsel for the Plaintiff submitted that the claimed amount includes charges paid by the Plaintiff to Bank towards opening of L.C. (Letter of Credit) as well as to the Clearing and Forwarding Agent; who though also appeared as one of the witnesses of the Plaintiff, but he did not testify anything about his charges. It is a settled rule for awarding special damages that the same is to be granted only when the claimant, the Plaintiff in the present case, demonstrates and proves in the evidence the specific loses, including the particulars and details of loses for claiming the special damages. I am afraid that this important component is absent in the present case; because the Plaintiff has not produced evidence, including documentary in support of his claim of paying fees / charges to the Bank, Clearing Agent and incurring other expenditure. Having said this, the unrefuted / unchallenged evidence of Plaintiff and particularly the documentary evidence produced by him, proves that when the product was imported its

value was Pak Rupees 874,653/- as also mentioned in the bill of entry. More so, the conduct and action of the Defendants is also deplorable, because they had complete knowledge about the shelf life / expiry date of the subject product, yet instead of expediting the entire process, they delayed it. Another proven fact as discussed hereinabove, that also leads to the conclusion that the delay on the part of Customs Officials / Defendants No.2 to 5 was deliberate, because the other importers of the same product / goods were allowed to import and their goods were cleared / released. Not only this, even Defendant No.3 in his Order-in-Original, which was subsequently set aside by the learned Tribunal, has mentioned that the case of the Plaintiff does not fall within the ambit of mis-declaration or false statement. This further proves the *bona fide* of the Plaintiff. There is plethora of case law on this point and is now a statutory requirement and obligation of Government functionaries including the Defendants that they have to act fairly, reasonably and justly, *inter alia*, in terms of Section 24A of the General Clauses Act, 1897. Not only this, the Honourable Apex Court in its celebrated Judgment handed down in the case of **Independent Newspapers Corporation** (*ibid*) held, that even in certain cases, the excessive use of lawful power, itself becomes unlawful. This is what exactly has happened in the present case, as also decided by the learned Tribunal in its afore-referred order, which is a finding of fact, that later attained finality. Defendants No.2 to 5 are guilty of violating the fundamental rights of the Plaintiff as enshrined in Articles 4, 18 and 25 of the Constitution, relating to the equality before law and freedom of trade and business.

The reported decision of the Honourable Apex Court in the case of Azizullah (*supra*) as relied upon by the Plaintiff's counsel, is applicable to the facts of present case, *inter alia*, as in the reported decision also the damages were awarded against the Customs Officials, who wrongly

confiscated the goods of the Petitioner (of the reported decision) and prosecuted him. The relevant portion of the reported decision is reproduced herein under_

“ The public functionaries must act and discharge their duty quite fairly and in accordance with law and if a willful wrong is done to a person by a public functionary and in consequence to such wrong, he has suffered mental torture and agony or physical injury or financial loss, he would be entitled to be reasonably compensated by way of damages in accordance with law and the Court must determine the proper damages keeping in view the nature of wrong done and loss caused.”

21. Though I am not inclined to grant special damages to the Plaintiff, but it is surely entitled for the proven damages. Therefore, I decree the present suit of the Plaintiff in the sum of Rupees 874,653/- (Rupees Eight Lac Seventy Four Thousand Six Hundred Fifty Three only) with 10% mark up from the date of institution of the instant suit till realization of the amount, which should be recovered from the salaries of Defendants No.2, 3, 4 and 5 as they are jointly and severally liable to pay the above amount of damages.

22. In view of the above, the Plaintiff is also entitled to the cost of the present suit.

Judge

Karachi dated: 07.03.2018.

Riaz / P.S.*