THE HIGH COURT OF SINDH AT KARACHI

DATE | ORDER WITH SIGNATURE OF JUDGE(S)

Present:
Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Agha Faisal

Special Customs Reference Application No.284 of 2017

The Collector of Customs, MCC Port Muhammad Bin Qasim
Versus
M.M. Four Mills (Pvt.) Limited & Another

Special Customs Reference Application No.285 of 2017

The Collector of Customs, MCC Port Muhammad Bin Qasim
Versus
Masoom Four Mills (Pvt.) Limited & Another

Special Customs Reference Application No.286 of 2017

The Collector of Customs, MCC Port Muhammad Bin Qasim
Versus
M.M. Marine Services (Pvt.) Limited & Another

Special Customs Reference Application No.287 of 2017

The Collector of Customs, MCC Port Muhammad Bin Qasim
Versus
M.M. Marine Services (Pvt.) Limited & Another

Special Customs Reference Application No.288 of 2017

The Collector of Customs, MCC Port Muhammad Bin Qasim
Versus
Ahmed Enterprises & Another

For the Applicant **Dr. Shah Nawaz Memon, Advocate**

Date of hearing: **29.01.2021**

Date of Order: **29.01.2021**

O R D E R

Muhammad Junaid Ghaffar J.- Through these Reference Applications, the Applicant has impugned Judgment dated 06.03.2017, passed by the Customs Appellate Tribunal, at Karachi, in Customs Appeals Nos.K-1423/2016 and other connected matters (Five Cases), proposing various questions of law.

However, on 14.09.2020, while confronted, learned Counsel for the Applicant had pressed only question No.4 which reads as under:-

> "Whether on payment of regulatory by the respondents / importers, can the respondents/importers be absolved from the charge of mis-declaration which was made by them by mis stating the date of arrival of the vessel and thus fraudulently filing the GD which could not have been filed otherwise?

2. Learned Counsel for the Applicant has read out the impugned Judgment and submits that the Tribunal as well as the Adjudication Authority have failed to appreciate the facts and law inasmuch as this was a case wherein the respondents in connivance with each other, had attempted to evade payment of Regulatory duty, which otherwise was payable on the import of goods in question. According to him, this case falls within the contemplation of Section 32 of the Customs Act, 1969, ("**Act**"); hence, consequently penal action was warranted.

3. We have heard the learned Counsel and perused the record. It reflects that the case of the Applicant Department as discernable from the show cause notice is that the respondents in connivance with each other, concealed actual facts regarding expected time of arrival ("**ETA**") of the vessel and filed some wrong date in the online system, so as to evade levy of Regulatory applicable with effect from 7.11.2014. It is their case that by filing the VIR (Vessel Information Report) on 06.11.2014, an attempt was made to get the Goods Declaration filed and processed along with payment of duty, whereas, subsequently on 07.11.2014, regulatory duty was levied by the Federal Government. According to the Applicant, this attempt of filing wrong ETA / VIR was an attempt to evade levy of regulatory duty; hence, an action was initiated under s.32 of the Act. However, it reflects from the show cause notice that the same was issued on 03.03.2015, whereas according to show cause itself, the matter pertained to 6.11.2014 and even before issuance of the show cause notice, all duties and taxes had been paid / recovered. On such basis the Adjudicating Authority, after going through the record and the contention of the respective parties, passed the Order-in-Original in the following terms:

> "7. I have gone through the case record and considered written as well as verbal arguments putforth by the respondent and the DR. The

allegation of the department that the respondents tried to circumvent the cancellation of VIR / IGM within 24 hours of non-arrival of the vessel as laid down in Rule 412 of the Customs Rules, 2001 by filing a GD or claiming an Index number is not found to be a violation of any provision of the Customs Act, 1969 or the Rules made thereunder. In my view, there was a flaw in the Computerized Clearance System that made this situation possible as the system should be such that on non-arrival of a vessel within 24 hours of filing of IGM, the same shall stand cancelled automatically alongwith any GD that may have been filed. There are no two opinions that whatever is not prohibited, is allowed. The contention of the respondent that the principal M/s Kazcom Pte Ltd Singapore had informed through email dated 04.11.2014 that the Estimated Time of Arrival (ETA) is 06.11.2014 and accordingly, WeBOC System was updated is in contrast with the Log Book record of the ship, but it is a normal business practice that VIR/IGM and ETA are fed on the basis of dates provided by the principal to the shipping agent irrespective of the Log Book of the ship. Hence, it is not a deviation from the norms and practice of the business. The allegation that the respondents were well aware that the Federal Government is imposing Regulatory Duty w.e.f. 07.11.2014 is also not sustainable as far as Customs Act, 1969 is concerned, as it is not a violation of any provision of the same.

8. Para 3 of the Show Cause Notice states that "all the duties and taxes attempted to be evaded have been recovered by the MCC Port Muhammad Bin Qasim, Karachi". The respondents pleaded that the legitimate revenue of the Government has already been paid and they do not contest payment of Regulatory Duty and other taxes to the tune of Rs. 28,584,542/-. This has been confirmed by the DR vide letter No SI/MISC/128/2014-PQ-COU dated 06.04.2016. *In my view, the importer or the clearing agent has not violated any provision of the Customs Act, 1969 or the Rules made thereunder, therefore, no penal action is warranted against them. However, for violation of Rule 412 of the Customs Rues 2001, for not intimating non-arrival of vessel within 24 hours of ETA, a penalty of Rs. 10,000/- (Rupees Ten Thousand) as prescribed under the said Rule is imposed on the shipping agent i.e. Respondent No.3.*"

4. The Applicant being still aggrieved impugned the same before the Appellate Tribunal, who vide Impugned Judgment has dismissed the appeal filed by the Applicant in the following terms:

"05. Final hearing in the case was conducted on 24.01.2017, 13.02.2017 & 15.02.2017 when Mr. Sajjad Rizvi, A.C & Mr. Rana Arsalan, A.O, appeared on behalf of the appellant. They reiterated the grounds given in the appeal and prayed for setting aside the impugned Order and declaring that the respondents are liable for charges of mis-declaration, hence 'heavy' penalties be imposed upon the respondent. Respondent was represented by Mr. Pervez Iqbal, Advocate, Mr. M. Younis Rao, Advocate, Ms. Erum Naz, Advocate & Mr. Shamshad uz Zaman, Manager. They stated that the due regulatory duty and taxes amounting to Rs. 28,584,542/- and penalty of Rs.10,000/- had already been paid and the impugned Order has rightly concluded that we had not violated any provision of the law. They urged for dismissing the appeal as not maintainable.

06. Record of the case has been examined and contents of the appeal have been considered. *It is observed that M.C.C, Port Qasim*

> *has filed this appeal not for the levy/charge or recovery of any duty/taxes short-paid or not paid by the respondent(s). The appeal is rather against the findings of the adjudication officer that the respondent was not responsible for any deviation or fault in providing the Expected Time of Arrival (ETA) of the vessel carrying their imported wheat.* Impugned Order is examined in light of the facts on record and it is found to have rightly concluded that the appellant(s) have not violated any provisions of the Customs Act, 1969 or the Rules made thereunder. Hence imposition of penalty amounting to Rs. 10,000 under rule 412 of the Customs Rules, 2001 is found to be the only penal action due again them. In view of what has been observed above all the appeals bearing Nos. K1420/2016, K-1421/2016, K-1422/2016, K-1423/2016 & K-1425/2016 are dismissed and as a result the impugned Orders0in-Original No.683 & 695/2015-16 dated 09.05.2016 are hereby upheld as legally founded."

5. Perusal of the aforesaid findings reflect that insofar as the Adjudication officer is concerned, he has observed that the offence, if any was only to the extent of wrong filing of an estimated date of arrival of the vessel, whereas, the allegation that respondents were aware of levy of any regulatory duty with effect from 7.11.2014 has neither any substance; nor it attracted any penal provisions of the Act as alleged. It was further observed that all duties and taxes stands paid even before issuance of show cause notice; hence, none of the provisions of the Act have been allegedly violated by the Respondents, whereas, the Respondent No.3 who had the responsibility to file correct ETA of the vessel, has been penalized for violation of Rule 412 of the Customs Rules, 2001. The said order has been maintained by the Appellate Tribunal on the ground that the Appeal has been filed only to the extent of gravity of the penal action which according to the Applicant did not commensurate with the alleged offence. It is settled law that imposition of penalty is the discretion of the adjudicating authority and barring exceptional circumstances, it must not be interfered with. Here, we do not see any such exceptional circumstances warranting interference in the discretion so exercised. In our considered view the two forums below have arrived at a correct and just conclusion as admittedly at the time of issuing show cause notice duties and taxes already stood recovered; hence, no further enforcement of duties and taxes could have been made in terms of s.32 ibid. It was only the quantum of penalty which was then a matter for the Adjudicating authority to decide after exercising proper discretion, which in the instant mater has been done. In our considered view, the findings of the two forums below are

correct and does not warrant any interference by this Court; nor the question of law, so proposed as above, is relevant. We have not been able to understand as to how the show cause notice was issued when the Applicant by itself had admitted that much before issuance of the show cause notice, the amount of duty in question was already paid. Para 6 of the show cause notice reads as under:

> "Now therefore, in the light of above reported facts, M/s. M.M. Flour Mills (Private) Limited, (NTN: 3814743), M.M. Tower, 3-C, Khayaban-e-Ittehad, Phase-II, DHA, Karachi, clearing agent, M/s. Everluck Enterprises (CHAL No. 2599) and shipping agent M/s. M.M. Marine Services (Pvt) Ltd., *are called upon to show cause as to why payment of evaded duty and taxes amounting to Rs. 28,584,542/- may not be recovered from them* and penal action as warranted under the aforementioned provisions of law may not be taken against them."

6. Perusal of the aforesaid allegations reflects that the respondents were called upon to show cause as to why the evaded amount of duty and taxes may not be recovered from them and penal action, as warranted under the aforementioned provisions of law, may not be taken against them. Firstly, we may observe that this allegation per-se was unwarranted inasmuch as admittedly it is not a case of making any recovery of the alleged evaded amount of duty and taxes, as at the time of issuance of show cause notice, it was already paid and recovered. Hence, there was no question for calling upon the respondents to make payment of any duty and taxes. Secondly, even if there was a case of imposition of any penalty, then an appropriate action ought to have been initiated against the shipping agent, who has allegedly filed a wrong estimated time of arrival of the vessel. This again is notwithstanding that even otherwise, how could a person be show caused merely for filing a wrong date of an estimated arrival. Estimate by itself is not a final conclusion; hence, on this account also we do not see as to how the show cause notice could have been sustained. As to implication of two other Respondents (Importer and Clearing Agent) in the same show cause notice, it is only a bald allegation of connivance without any substantial material on record.

Finally, it has been stated in the show cause notice that offence alleged was punishable under Clause (1), (3), (14) and (14A) of Section 156(1) of the Act. Insofar as Clauses (14) and (14A) are concerned, in our considered view they have no relevance

inasmuch as this case does not fall within the contemplation of Secton 32 *ibid*. Hence, no offence could be alleged so as to making it punishable under clause (14) and (14A). As to Clauses (1) and (3) it may be noted they provide a maximum penalty of Rs.50,000/- and Rs.25,000/-, respectively, whereas, the Adjudicating Authority after exercising his discretion has already imposed penalty of Rs.10,000/-, though for alleged violation of Rule 412 of the Customs Rules. As already observed there is nothing before us; nor even before the Tribunal, to interfere with such exercise of discretion in imposition of penalty. We are of the view that the Appellate Tribunal was justified by not interfering in the order of the Adjudicating Authority; hence, no case is made out by the Applicant.

7. In view of herein above facts and circumstances of the case, no question of law arises out of the Judgment of the Appellate Tribunal, whereas, we do not see any reason to interfere with the order of the Adjudicating Authority and maintained by the Tribunal; hence, these reference Applications being misconceived are dismissed in limine. Office is directed to send copy of this order to the Appellate Tribunal in terms of Section 196(5) of the Act and shall also place a copy of the same in all connected Reference Applications.

JUDGE

JUDGE

Khuhro/PA