IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special C.R.A. No. 2502 of 2015

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Special C.R.A. No. 2503 of 2015

Date	*Order with signature of Judge*

Present:

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

12.03.2019:

Sardar Muhammad Ishaque, advocate for the applicant.
Mr. Muhammad Rafique, advocate for the respondent.

ORDER

1. The above two Reference Applications have been filed against the combined judgment dated 23.05.2015 passed by the Customs Appellate Tribunal, Bench-I, Karachi in Customs Appeals No. K-1707/2014 and K-1708/2014, whereas, in both the References, initially four common questions were proposed, however, after having read out the proposed questions, learned counsel for applicant candidly conceded that proposed questions have not been drafted properly, whereas, except Question No.3 in both the above References, which according to learned counsel, is questions of law, arising from the combined impugned judgment passed by the Customs Appellate Tribunal, the applicant will not press the remaining questions, which reads as under:-

> *"Whether the Customs Appellate Tribunal was justified to decide the appeal against the department without considering that the seized HSD oil was smuggled as notified vide SRO 566(I)/2005 dated 06.06.2005. Therefore the smuggled goods as defined under section 2(s) of the Customs Act 1969 as well as the conveyance*

used for the transportation of the same were liable to outright confiscation under section 156(I)89 and 157 of the Customs Act 1969 read with clause (a) and (b) of preamble to SRO 499(I)/2009 dated 13.06.2009."

2. Learned counsel for the applicant submits that the Customs Appellate Tribunal has erred in law and fact, while setting-aside the orders of adjudication in the instant matters, as according to learned counsel, the respondent failed to discharge the burden of proof, nor could produce any authentic documents to show that the HSD oil seized by the applicant department from the possession of the respondent was lawfully imported oil and not the smuggled oil. It has been further contended by the learned counsel that at the time of issuance of Notice under Section 171 of the Customs Act, 1969, due to inadvertence, lesser quantity of HSD oil has been shown, however, after proper examination, it was learnt that following quantity was found in the tankers:-

i) Foreign origin POL Product 40,000 Liters alongwith Hino Oil Tanker bearing Registration No.TKM-729; &

ii) Foreign origin POL Product 40,000 Liters alongwith Hino Oil Tanker bearing Registration No.TTC-909.

It has been prayed by the learned counsel, that the impugned order passed by the Customs Appellate Tribunal in the instant case may be set-aside and the above question as proposed through instant Reference Applications may be answered in 'Negative' in favour of the applicant and against the respondent.

3. Conversely, learned counsel for respondent has vehemently opposed the contention of the learned counsel for the applicant and submits that instant Reference Applications are misconceived and not maintainable as no question of law arise from the impugned judgment passed by the Customs Appellate Tribunal, which is

based on finding of facts. It has been further contended by the learned counsel for respondent that question proposed hereinabove is also not a question of law, for the reasons that the Customs Appellate Tribunal, after having examined the entire facts and the relevant record adduced before the adjudicating authority, as well as the material placed before the Tribunal, at the time of hearing the appeal, the Customs Appellate Tribunal has been pleased to hold that the Customs Authorities have failed to discharge the burden of proof in terms of Section 187 of the Customs Act, 1969, nor could establish the allegations of smuggling against respondent, who had produced all the relevant documents, including pay orders for payment of the auctioned diesel, auction receipts alongwith delivery orders and treasury challans in respect of HSD oil, seized by the applicant. It has been further contended by the learned counsel for respondent that the Customs Appellate Tribunal has also been pleased to hold that the applicant department has not been able to prove that the quantity as mentioned in the documents produced by the applicant in both the oil tankers i.e. 28000 liters and 30000 liters, for which, preferably, documents were produced by the respondent were in access of the declared quantity. On the contrary, it has been held by the Customs Appellate Tribunal that the quantity was enhanced by the applicant at the time to preparing the seizure report to justify the allegation of smuggling against respondent. Learned counsel for respondent has read out the judgment passed by the Customs Appellate Tribunal and has also relied upon case law as cited by the Customs Appellate Tribunal in the impugned judgment and submits that instant Reference Applications are misconceived and liable to be dismissed in limine.

4. We have heard the learned counsel for the parties, perused the record with their assistance and also gone through with the judgment passed in the instant matters. It will be advantageous to reproduce the relevant findings of the Customs Appellate Tribunal in the impugned judgment as contained in Para: 24 to 29 to avoid the facts and finding recorded thereon by the Customs Appellate Tribunal, which reads as follows:

> "*24. Under aforesaid observations the contents of the Show Cause Notice mentioned thereon are not specific in nature nor the seizing agency comply the proper provisions of law to establish the charge against the respondent. By doing so, the seizing agency/respondents did not discharge the burden cost on them and not shifted it on to the respondent. It is for the prosecution to establish through the independent iota of evidence that the goods were smuggled or brought in to the country through unauthorized route or otherwise. Unfortunately, the same aspect was never controverted in this particular case nor any efforts were made, all allegations allegedly raised by the department are afterthought and not been mentioned in the Show Cause Notice. On the other side the appellant produced the iota of evidence alongwith the documents related with the said seized HSD oil and submitted before the competent authority for showing their bona fide, this type of evidentiality as envisage, to be determined where the burden of prove and disprove the allegations leveled by the Customs authorities, where the Customs Authorities are under no obligation to lead evidence and discharge any onus to prove. This part of liability reflects the responsibility under section 187 of the Customs which in fact imposed the embargo on the parties to shift their burden of proves and as such appellant has done accordingly. It has been observed by the Hon'ble High Court in case reported in PTCL 2008 CL 126, that vague, unspecific and too general Show Cause Notice may not enable the reader or the notified person to make out or clearly identify the particular clause/sub-section or the reasons etc applicable to the case. Also Article 117 and*

118 of Qanun-e-Shahadat appears to be contrary to the general principle of law, what-so-ever alleges must be proved. Supreme Court of Pakistan has settled this legal issue ruling that a void Show Cause Notice shall result into an equally void order, "It is now a well settled law, that where the initial order or notice was void, all subsequent proceedings, or superstructures build on it were also void. Where any adverse finding was given in the adjudication order on allegations or contentions or findings which are not incorporated in the show cause notice, the entire proceedings would be rendered as void for reason of breach of natural justice, which was breach of law as held by the [Supreme Court in Anisa Rehman v. P.I.A. 1994 SCMR 2234]". In this particular case for reasons better known to the department even having the knowledge Department fail to comply with the provisions of law which are mandatory to comply with. However, on close scrutiny of the evidences available on record as well as submission and arguments extended by both the parties, the department failed to perform the duty under such situation where it is the only initial evidence to prove the burden through documentary evidence.

25. It is the mandatory requirement under Section 180 of the Customs Act, 1969 that the Show Cause Notice shall be issued for all proper, lawful and legal adjudication of any mater when there is no charge allegedly made or constituted against the owner. The confiscation of the goods of imposition of penalty on any person is barred under the law. Consequently, adjudicating officer could not pass order for confiscation of the goods. It is a legal lacuna which cannot be cured at all. In view of the pronouncements made by the august Supreme Court of Pakistan in the case of Haji Abdullah Jan and other (1994 SCMR 749). It is well settled principle of law that, if the law had prescribed method for doing a thing in a particular manner such provision of law is to be followed in letter and spirit and achieving or attaining the objectives performing or doing of a thing a manner other than provided by law would not be permitted, same vide also decided in the hall

mark judgment of Director, General of Intelligence and Investigation and others v. M/s Al-Faiz Industries (Pvt.) Ltd. and others reported as PTCL 2008 CL. 37.

26. Even otherwise, coming towards the aspect of charges attributed against the respondent through show cause notice, Section 2(s) clearly depicts that smuggling means bringing into or take out of Pakistan in breach of any prohibition or restriction for time being in force (enroute pilferage of transit goods) or evading payment of customs duties and taxes leviable thereon. Scrutiny of document clearly reveals that neither the impugned goods were banned, nor brought form unauthorized route (verified documents are privy to it) nor any duty was evaded on this account, therefore, Section 2(s) of the Customs Act, 1969, is not attracted in this case and the respondent denies any violation. Similarly, Section 16 of the Customs Act, 1969, has not been violated. The penal clause which was invoked for violation of Section 2(s), Section 156(1)(89) is not relevant as the impugned goods are not smuggled by any standard as the relevant documents are on record. Similarly, no violation of Section 3(1) of Import and Export (Control) Act, 1950, is visible as the goods were lawfully imported complying all the dictates of law.

27. The principle of law that the state functionaries have no power and authority to conduct fishing and roving inquiries without possessing any definite and proper information, just in hope to unveil some concealment and illegality on the part of the tax payer/citizen. In other words, before embarking upon any inquiry the state functionary must already possess some definite material so as to establish any illegal action having been taken by the citizen. It is imperative to place on record that equity is the soul of the law in dispensation of justice, in the instant matter, the respondent has furnished the substantial evidence in support of their case. The Honourable Supreme Court of Pakistan in a hallmark judgment namely Imtiaz vs. Ghulam Ali reported as PLD 1963 SC 382 laid

down the rule that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All the technicalities have to be avoided unless it is essential to comply with them on ground of public policy. Any system which by giving effect to the form not to the substance defeats substantive rights is defective to the extent. The ideal must always be a system that gives to every person what is his right under the law.

28. Sub-section (2) of Section 157 fo the Customs Act, 1969, means that the term "shall also be liable to confiscation" does not mean liable to confiscation automatically. The Discretion given to the authority to confiscate the goods or vehicle must be exercised on sound judicial principles. If the words 'liable to confiscation' give a discretion to the confiscating authority to deprive a person of his property, then it follows that this discretion must be exercised upon the principles of natural justice; that it to say, the persons sought to be deprived of the property must be given notice to show cause, they must be furnished with adequate opportunity of putting forward their point of view and the same must receive due consideration. In the instant matter no show cause notice was issued to the owner of the vehicle and he was not given any opportunity to explain his point of view. Therefore, as per the dictum of law no one should be condemned unheard. Furthermore, according to one of principles now well accepted, no person should be deprived of his property by way of penalty unless it is clear that he is in some measure responsible for assisting or furthering the commission of the offence committed an no innocent persons should be unjustly punished or deprived of his property. Indeed, there was no indication even that the owner of the vehicle was also involved. If that be so, then it is difficult to appreciate on what basis even a reasonable suspicion could arise as to the complicity of the appellant. There is nothing on record which shows any collusion between the owner of the vehicle and the owner of the goods. In the absence of any proof on the record, it is not

in accordance with law to hold such vehicle as part of the act which is prohibited by the way. Therefore, it is established that the said vehicle is not deliberately part of the act which is forbidden by law.

29. Hence keeping in view, all such observations made above and strength of judgments passed by the superior courts noted above in conformity of aforesaid observations made thereon, we are of the considered view that the proceedings in the subject case are infested with patent deficiencies and violations of statutory requirement, regarding issuance of show cause notice, all subsequent proceedings and orders passed thereon tantamount to substantive illegalities, adequate breach of natural justice has been equated with breach of law and super structure built thereon are hereby declared illegal, void, ab-initio and accordingly set aside, both appeal are therefore allowed as prayed with no order as to cost."

5. From perusal of hereinabove findings as recorded by the Customs Appellate Tribunal, it is clear that impugned judgment is based on finding of facts, wherein, it has been categorically held that respondent has discharge the burden of proof in terms of Section 187 of the Customs Act, 1969 by producing the relevant documents, relating to the seized oil, which included letter issued by the Assistant Director, Directorate of Intelligence & Investigation-FBR, Quetta vide dated 01.07.2014 for the release of the both the oil tankers, delivery order dated 10.07.2014 issued by the Assistant Director, Directorate of Intelligence & Investigation-FBR, Quetta, paid Treasury Challan in the sum of Rs.23,10,000/-. Moreover, the learned counsel for the applicant while confronted to explain the reason for the different quantity of oil in the Show Cause Notice and seizure report and to justify the difference between the quantity of seized HSD oil in the Notice under Section 171 of the Customs Act, 1969, and enhanced quantity at the time of issuance of seizure

report. The process of seizure and the disputed quantity of HSD oil as reflected in Show Cause Notice and seizure report makes the proceedings dubious, whereas, the onus to prove the allegations and the charge of smuggling HSD oil could not be discharged by Customs Authorities, as documents and evidences produced by the respondents could not be falsified or disproved.

6. We do not find any substance in the instant Reference Applications, which is accordingly, dismissed and the question hereinabove is answered '***AFFIRMATIVE***' against the applicant in favour of the respondent. Consequently, the applicant is directed to release the seized HSD oil to the respondent No. 2 and 3 within 15 (fifteen days' from the date of this order.

7. Both the aforesaid Reference Applications stand dismissed alongwith listed applications.

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