IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special C.R.A. No. 684 of 2019
a/w.
C. P. No. D – 4996 of 2019

Date	Order with signature of Judge

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan.

Fresh Case [SCRA No. 694/2019]

1. *For orders on office objection No. 25.*
2. *For orders on Mic. No. 3253/2019.*
3. *For hearing of Main Case.*
4. *For orders on Misc. No. 3254/2019.*

Priority [C.P. No. D - 4996/2019]

1. *For hearing of Main Case.*
2. *For hearing of Misc. No. 21800/2019.*

14.02.2020:

Ms. Masooda Siraj, advocate for applicant in SCRA No.684/2019 & for respondent in C.P.No.D-4996/2019.

Ms. Dil Khurram Shaheen, advocate for respondent in SCRA No.684/2019 & for petitioner in C.P.No.D-4996/2019.

Mr. Usman Hadi, Assistant Attorney General.

ORDER

1. Through instant Special Customs Reference Application, five questions have been proposed, however, after having readout the proposed questions, learned counsel for the applicant submits that the applicant will press ***"Question No. 3"*** only, which is the main question of law arising from the impugned judgment dated 23.04.2019 passed by the Customs Appellate Tribunal, Bench – III, Karachi in Customs Appeal No. K-459/2018/899. The question reads as follows:-

> *"3. Whether the learned Appellate Tribunal while concluding impugned judgment has seriously erred in law and failed to appreciate that production of registration book by the possession holder in respect of the smuggled vehicle was not "lawful excuse" to discharge burden of proof as envisaged under clause (89) of sub-section (1) of Section 156 of the Customs Act, 1969?"*

2. After having read out the above proposed question and the impugned judgment passed by the Customs Appellate Tribunal as well the Order-in-Original No.358/2017-18 passed by the Collector Customs (Adjudication-I), Karachi in the instant case, learned counsel for the applicant submits that the Customs Appellate Tribunal was not justified to hold that respondent has discharged the burden of proof with regard to lawful possession of the subject vehicle, which according to learned counsel for the applicant, was a smuggled vehicle as respondent was not in a possession of import documents. It has been further contended by the learned counsel for the applicant that the documents, upon which, reliance has been placed by the Customs Appellate Tribunal in the impugned judgment, were not produced before the Customs Appellate Tribunal, therefore, finding as recorded by the Customs Appellate Tribunal with regard to lawful possession of the subject vehicle in favour of the respondent, is contrary to the facts and law. It has been prayed that the impugned judgment may be set-aside and the question proposed hereinabove may be answered in 'NEGATIVE' in favour of the applicant and against respondent.

3. Conversely, Ms. Dil Khurram Shaheen, advocate appearing on behalf of the petitioner in connected C.P.No.D-4996/2019, waives notice and submits that since she is fully conversant with the facts of the instant case, therefore, she is willing to assist this Court on the facts and legal issues involved in the instant case. It

has been contended by the learned counsel for the respondent that respondent is a subsequent purchaser of the vehicle, which was originally imported by the Consulate General of Malaysia at Karachi vide GD No.KAPR-HC-81866 dated 16.11.2009, whereafter, after complying with all codal formalities, exemption certificate issued by the Ministry of Foreign Affairs from payment of duty and taxes, subject vehicle was registered under diplomatic number i.e. CC-1379. Per learned counsel, since the subject vehicles was imported under diplomatic privilege, therefore, exemption in duty and taxes were required to be paid, hence, the contention of the learned counsel for the applicant that it was not a duty paid vehicle, is misconceived in facts and law. It has been further contended by the learned counsel that thereafter the Embassy of Malaysia sought permission to sale the subject vehicle, which was allowed by the Ministry of Foreign Affairs on 15.01.2015 in terms of SRO 577(I)/2006. Consequently, the subject vehicle was sold out to a private person and registered in the name of Pak-China Fish Meals against No.BFQ-187. Per learned counsel, the relevant documents were produced before the Customs Authorities, which have been discarded without any lawful justification. It has been contended that the impugned judgment is based on finding of fact, whereas, the applicant is disputed such fact without any factual and legal basis. Per learned counsel, the question proposed hereinabove is a question of law and facts, which cannot be decided by this Court, while exercising its reference jurisdiction. It has been alternatively argued that if the question proposed may be treated as mix question of law and fact, the same may be answered in 'NEGATIVE' against the applicant and in favour of the respondent.

4. We have heard the learned counsel for the parties, perused the record and also gone through the impugned judgment passed

by the Customs Appellate Tribunal with their assistance as well as the proposed question, and also examined the legal provision relating to discharge of burden of proof in the instant case. From perusal of the impugned judgment passed by the Customs Appellate Tribunal, it transpires that scrutiny of entire facts and relevant documents produced before the Customs Appellate Tribunal have been made, whereafter, finding of facts have been recorded by the Customs Appellate Tribunal with regard to aforesaid facts as stated by the learned counsel for the respondent relating to originally import of the subject vehicle by the Consulate General of Malaysia at Karachi and subsequent sale of subject vehicle, after completion of all codal formalities and no objection from the Ministry of Foreign Affairs in this regard. It will be advantageous to reproduce the relevant finding of the Customs Appellate Tribunal as contained in Para: 5 to 7 of the impugned judgment, which reads as follows:-

> *"05. Record of the case has been carefully examined and the argument putforth by the appellant and respondents have been duly considered. In the instant matter the impugned order was passed on 11.11.2017, whereas the appeal before Tribunal was filed on 25.04.2018, as such there is delay of 104 days in filing the appeal. The appellant prayed for condonation of delay. The matter of condonation was examined in the first instant. The perusal of show cause notice and the original order shows that these were endorsed to the appellant at his given address, however the proceedings were concluded in his absence. The appellant claims that none of these notices, communications were serviced to him, this is also recorded by the learned adjudication authority that the earlier notices were returned back undelivered. The appellant has produced copies of posts from other government departments, which are duly delivered to his address. The responding departments vide their parawise comments though vehemently contested the issue of limitation, but they*

could not provide evidence of service of notice in terms of section 215 of Customs Act, 1969. Further, keeping in view that the order is passed behind the back of appellant, the delay in filing of appeal was condone to protect the legitimate right of the appellant.

06. It is the case of responding department that since the possession holder had not submitted the import documents, therefore, the vehicle was seized deeming the same as smuggled. The learned adjudicating authority confirmed the assertions of seizing agency and ordered for outright confiscation of the impugned vehicle. It is an admitted position that the vehicle is duly registered with MRA under registration No.BFQ-187, which was confirmed by MRA. Further examination through Forensic Division confirmed that there was no tampering with chassis number. As such there were no reasonable grounds for presuming that the vehicle was smuggled. It has been held by Hon'ble Karachi High Court vide 2008 PTD 525 that Registration Book was sufficient proof of ownership and that burden to prove otherwise was on the customs authorities. It is accordingly held that the seizing department just acted on self conceived presumption rather than on solid reasoning.

07. The appellants have demonstrated, duly supported with documents that the impugned vehicle was originally imported by Consulate General of Malaysia, at Karachi vide GD No.KAPR-HC-81866 dated 16.11.2009 against exemption certificates issued by Ministry of Foreign Affairs. The vehicle was registered under diplomatic number CC-13-70. Since the vehicle was imported under diplomatic privilege, free of duty and taxes, therefore, the seizing department was at fault to look for the vehicle in data of commercially imported vehicles. Later the Embassy of Malasia sought permission for sale of the said vehicle which was allowed by Ministry of Foreign Affairs on 15.01.2015 in terms of SRO 577(I)/2006. The vehicle was accordingly sold to a private person and consequently registered in the name of Pak-China Fish meal against the NO.BFQ-187. The aforementioned elaborate

> *documentary trail amply establishes that the vehicle was lawfully imported into the country, the assumption by seizing agency were unfounded. In their parawise comments the responding department has taken a stance that the copies of Goods Declaration, the exemption certificates etc are not certified copies. These objections are not tenable at this stage. The appellants have effectively discharged burden of proof in terms of section 187 of the Customs Act, 1969. The responding department could have checked Customs House record resting under SI/Misc/Priv/21/-VIII(WeBOC) for confirmation of Goods Declaration and all connected documents. We accordingly hold that the Original Order is not sustainable as it is based upon presumption, hence the same is set aside. The responding department is directed to return the vehicle to appellant."*

5. From perusal of hereinabove findings as recorded by the Customs Appellate Tribunal, it appears that respondent has successfully discharged his onus to prove the lawful possession of the subject vehicle, whereas, the Customs Authorities has miserably failed to disallow such assertion of respondent and has not been able to produce any relevant document, which justify its instance that either the subject vehicle was not lawfully imported or the documents produced by the respondent, are forged, fake or fabricated and there has been no allegation with regard to tempering of documents, chassis number in the instant case, therefore, we do not find any substance in the instant Special Customs Reference Application, which is devoid of any merits, therefore, dismissed in limine alongwith listed applications. Resultantly, the Question No.3 proposed hereinabove is answered in "***AFFIRMATIVE***" against the applicant and in favour of respondent.

6. At this juncture, learned counsel for respondent, who is appearing on behalf of the petitioner in connected petition i.e.

C.P.No.D4996/2019, submits that she does not press connected petition provided that the applicant department may be directed to release the subject vehicle i.e. "*BMW (7 Series) E66 760 Li Car having Registration No.BFQ-187 [Karachi]*", after proper verification and identification to the petitioner.

7. Accordingly, connected petition i.e. C.P.D-4996/2019 stands dismissed as not pressed alongwith listed application, however, with the directions to the applicant department to release the subject vehicle to the respondent/owner, after proper verification and identification within seven days' of this order

JUDGE

JUDGE

A.S.