IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. 548 of 2014 along with CP No.672 of 2000

Date	Order with signature of Judge

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

Applicant:	**Fauji Cement Company Limited Through Mr. Mayhar Kazi Advocate.**
Respondents:	**Deputy Collector of Customs (Appraisement-v), MCC Appraisement-V, Custom House, Karachi Through Mr. Khalid Rajpar Advocate.**
Date of hearing:	**25.02.2021.**
Date of Judgment:	**10.03.2021.**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through Reference Application, the Applicant has impugned Judgment dated 13.06.2014 passed by the Customs Appellate Tribunal at Karachi proposing various Questions of Law; however, after directions of the Court, the Applicant filed re-phrased / amended Questions of Law on 24.09.2018, whereas, the petition has been filed challenging an Order in Original No.SI/MISC/90-VI/AUDIT dated 27.12.1995 on the ground that controversy regarding status of goods being manufactured locally was already pending before this Court and an application was filed seeking permission to withdraw the statutory appeal pending before the Collector Appeals. The rephrased questions of law in the Reference Application reads as under: -

> "1. Whether Customs General order (CGO) 17/1994 could be applied retrospectively given that Letter of Credit (LC) was opened on 01.10.1994?
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> 2. Whether dicta of judgment dated 07.03.2014 passed by Honorable Supreme Court in Civil Appeal No. 1801/2005 applies to all shipments of plant and machinery imported by the Applicant, regardless of date of import and LC opening?
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> 3. Whether the Applicant's compliance with the conditions of SRO 484(I)/92 dated 14.05.1992, grant of NOC dated 29.05.1993 by Ministry of Industries and import license dated 15.07.1993, signing of contract with supplier and opening of LC on 06.10.1994 created vested rights?
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> 4. Whether the Applicant by giving undertakings against which shipment of plant and machinery were released, can be treated to have forfeited the benefit to which it is legally entitled exemption?
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> 5. Is the Applicant entitled to be treated consistently with other cement manufactures who imported plant and machinery during same period and availed benefit of same exemption notification?"

2. Learned Counsel for the Applicant has contended that the Tribunal has erred in law by simply relying on certain orders passed against the Applicant in earlier round of litigation, whereas, the facts of that case were materially different; that the Judgment reported as **Fauji Cement**[1] was in respect of an entirely different set of facts; hence, not applicable; that the NOC dated 29.5.1993 issued by the Ministry of Industries at the time of opening of Letter of Credit was valid for all legal purposes and as per the said NOC the goods were not manufactured locally at that point of time; hence, the Applicant was entitled for exemption under the SRO in question; that CGO 17/1994 was promulgated on 30.10.1994 through which the list of locally manufactured goods was notified, whereas, the Letter of Credit was established by the Applicant on 06.10.1994 and therefore, the Applicant was protected under the doctrine of vested rights; that any undertaking given by the Applicant at the time of import does not bind the Applicant to abide by decision of FBR inasmuch as there is no estoppel against the law; that SRO 484(I)/1992 dated 14.05.1992 (**SRO 484**) does not stipulate as to how it is to be determined that what goods are manufactured locally or not, and therefore, any undertaking of the Applicant cannot be used so as to bind the Applicant to abide by FBR's decision; that the decision of the Special Committee constituted for the purposes of determination of goods in question being manufactured locally or otherwise was set aside[2] by a learned Division Bench of this Court; hence, the said Committee's decision is no more valid; that this is notwithstanding the fact that though subsequently, the Division Bench's Judgment was set aside by consent but still the matter was remanded by the Hon'ble Supreme Court to the original authority for deciding the issue which impliedly means that such report cannot be treated as binding and the matter was open, whereas, the Applicant's right to contest the same cannot be taken away. By relying upon reported cases[3] he has prayed for answering the questions in favor of the Applicant.

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[1] Fauji Cement Co. Ltd. V. Appellate Tribunal (2004 P T D 621)

[2] Judgment dated 18.05.2000 in C. P. No. D-1244/1997

[3] Pakistan Muslim League (N) V. Federation of Pakistan and others (P L D 2007 SC 642), Muhammad Ikhlaq Memon v. Zakaria Ghani and others (P L D 2005 SC 819), Irshad Ali v. Province of Sindh through Home Secretary and 3 others (2015 PLC CS 283), Commissioner Income tax V. Habib Bank Limited and ANZ Grindlays Bank PLC (2014 S C M R 1557), Zarai Taraqiati Bank Limited and others V. said Rehman and others (213 S C M R 642), Justice Muhammad Farrukh Irfan Khan, Judge, Lahore High court, Lahore V. Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary affairs Division government of Pakistan Islamabad and 4 others (P L D 2019 SC 509), Muhammad Hussain and another V. Muhammad Shafi and others (2004 S C M R 1947). Mian Bashir Haider v. Mrs. Nur Jehan Kirmani (1984 S C M R 730), Muhammad Tahir V. Abdul Latif and 5 others (1990 S C M R 751) and Muhammad Hussain V. Fazal Haq and another (P L D 1974 Lahore 208).

3. On the other hand, learned Counsel for the Department has supported the impugned judgment and has contended that the judgment in the **Fauji Cement (supra)** case was subsequently upheld by the Hon'ble Supreme Court[4] against which Civil Review Petition was also dismissed[5]; hence, no case is made out by the Applicant; that despite lapse of so many years even after adjudication of the case, the Applicant has failed to deposit the amount in question; that the Applicant gave an undertaking to abide by the decision of FBR in respect of the goods being manufactured locally or not; hence, is liable to pay the adjudged amount. He has prayed for dismissal of the Reference Application.

4. We have heard both the learned Counsel and perused the record which reflects that the Applicant imported 32 consignments of machinery and equipment for its cement plant and sought release of the same by claiming exemption in terms of SRO 484 which provides exemption from duty and sales tax on plant and machinery with a condition that it shall not be manufactured locally. The Letter of Credit was established on 06.10.1994 as contended and when the goods were imported by that time CGO 17/1994 was issued which provides a list of locally manufactured goods. The exemption was claimed by the Applicant on the ground that the Mistry of Industries at the relevant time vide its NOC dated 29.5.1993 had certified that the imported goods were not manufactured locally and on that basis the contract was established, whereas, the Department's case is that when Goods Declaration(s) (or bill of entry as the case may be) were filed and assessed, CGO 17/1994 was in field and therefore, the Applicant was not entitled for exemption on the imported plant and machinery in question. It was further objected that the NOC was issued in respect of exemption SRO which stood rescinded; hence, no more valid under SRO 484. It appears that when objection was raised by the concerned Collectorate, the Applicant approached the then Central Board of Revenue who vide its Letter dated 09.04.1995 directed release of the consignments in question on undertaking by the Applicant to the effect that it will abide by the decision of CBR, that whether the goods were being manufactured locally or not. Thereafter, CBR issued Letter dated 09.05.1996 whereby, it was stated that a Committee was constituted and according to their findings three lists showing the items manufactured locally were enclosed and directed the Collector to recover the duties and taxes on items identified as manufactured locally while

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[4] (2014 SCMR 949)

[5] vide order dated 16.9.2014 in Civil Review Petition No.80 of 2014

the rest may be treated as not manufactured locally. The Applicant was aggrieved by such decision of CBR and initially filed Writ Petition No. 237/1997 before the learned Lahore High Court, Rawalpindi Bench, which was disposed of due to lack of territorial jurisdiction, where after, the Applicant filed C.P.No.D-1244/1997 before this Court. It further appears that on 30.04.1998 an interim order was passed in the said petition which reads as under: -

> "Examined the impugned order (administrative) of the Central Board of Revenue dated 09.03.1996, with which are appended the findings of a committee constituted by the Board in the shape of three lists showing the various items manufactured locally. The learned Counsel for the Petitioner says that the undertaking rendered by the Petitioner at the time of import of the goods binds the petitioner but at the same time it has to be shown that the goods of the kind imported at the time were being manufactured on the date the invoice of purchase was issued and that cannot be deciphered either from the impugned order or the lists attached with it.
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> *It is agreed between the learned counsel that the CBR from such committee as aforesaid or any other committee to be constituted by it having like expert as would obtain an opinion whether on the date of the invoices involved the relevant machinery was or was not being manufactured in Pakistan*. The outcome to be communicated to this Court within a month's time and the petition to be laid in Court if necessary during the summer vacations themselves." (emphasis supplied)

5. Perusal of the aforesaid order reflects that as per the Applicant's own statement that though the undertaking was binding; but at the same time it has to be shown that the goods in question imported at the relevant time were being manufactured on the date the invoices of purchase were issued and for that the impugned order of CBR was unclear. The Court, by consent, further ordered formation of any other Committee so as to obtain any opinion in respect of the above and the outcome was to be communicated to this Court. It further appears that pursuant to the interim order as above a Committee was constituted with the assistance of Engineering Development Board who after detailed deliberation and investigation furnished its report to CBR dated 13.10.1998[6] categorically specifying the machinery and equipment into two, and provided a list of machines which were manufactured locally at the time of invoice and thereafter, duties and taxes were calculated required to be paid on the locally manufactured machinery. The said report clearly reflects that the Applicant was given due opportunity while making such determination[7]. The report of the committee was though finalized; however, the said Petition was argued on merits, without relying upon the said report, and was then allowed in favor of the Applicant vide Judgment dated 18.05.2000 by relying on a Division

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[6] Placed by respondents via statement dated 15.12.1998 in petition file.

[7] Through Mr.Wasim Ibrahim, Syed Salman Zaidi, Shahid Ghazanfar, Mir Khawar Saleem and Brig. Mazhar in its 3rd meeting on 27.8.1998

Bench Judgment of the Peshawar High Court in Writ Petition No. 583/1995; however, the said Judgment of this Court was then impugned before the Hon'ble Supreme Court along with various identical matters and while setting aside the impugned judgments vide order dated 21.12.2010 the following directions were passed:-

> "In view of the fair stand taken by the learned counsel for both the parties, these appeals are partly allowed, the impugned judgments passed in all these appeals are set aside, all the respondents in Civil Appeals No. 1946/2000, 1258/2000 & 1307/2001 and appellant in Civil Appeal No. 1802/2005 shall file their respective replies to the show cause notices issued to them subject matter of these appeals within twenty days from today and the Competent Authority shall decide the matter within sixty days but not later than 07.03.2012. Needless to observe that if anyone does not submit the reply within the aforesaid period, it would be open for the Competent authority to proceed as mandated in law."

6. Thereafter, fresh notice was issued and the matter was adjudicated and has come before this Court after exhausting remedy of two Appeals before the Collector of Customs (Appeals) and the learned Tribunal. It is noteworthy that both the forums below have given their finding against the Applicant, whereas, the reply to the notice, and the memo of both appeals is silent as to stance of the Applicant in respect of the committee's finding regarding local manufacturing status of the machinery. It appears that the Applicant had accepted such determination and started taking legal objections, without overcoming this hurdle of a factual determination. The first and foremost question is that whether CGO 17/1994 would be applicable on the Applicant's imported machinery and equipment. The Applicant's case is that since Letter of Credit was opened prior to promulgation of this CGO, whereas, earlier the Ministry of Industries had given them certification that the imported plant, machinery and equipment was not manufactured locally and therefore, the list annexed with CGO 17/1994 would not have an overriding effect. However, in our considered view, for the present purposes this is not of much relevance and even if the contention of the Applicant to this effect is accepted, it would not have any bearing on the Applicant's case. It is not in dispute that at the relevant time the exemption was denied to the Applicant (for whatever reasons) who then approached CBR, and obtained a favorable order for release of the machinery and equipment provisionally by furnishing an undertaking. In the undertaking, it was clearly provided that in case the decision of CBR is not in their favor, they bind themselves to pay the duties and taxes as applicable at the time of import of the goods in question. And this was dependent on the decision that whether the goods in dispute are locally manufactured for the purposes of exemption under SRO 484. Though the

Applicant's stance and contention that there being no estoppel against the law, is not disputed nor it can be so; however, this is not relevant for the present purposes and the Respondent's case is not premised merely on such an undertaking. The Applicant in its own Petition had come before the Court and got an ad-interim order for reconstitution of a Committee, which then investigated the matter and have partially decided the issue in favor of the Applicant. These facts are a matter of record and cannot be disputed or disturbed in this Reference jurisdiction. It would be advantageous to refer to the findings and narration of these facts by the Collector of Customs (Appeals) in his order which reads as under: -

> "3. Briefly, facts of the case as stated in the impugned order are that the appellant imported 32 consignments of machinery & equipment (list of such consignments is enclosed as an integral part of this order), stated to be meant for installation of a Cement Plant, having production capacity of 3000.00 Tons per day. The Petitioner sought release of the said consignment (machinery & equipment) in terms of SRO 484(I)/92 dated 14.05.1992 which was issued by the Federal Government under Section 19 of the Customs Act, 1969 & exemption / concession of customs duty & sales tax was available subject to certain conditions, limitations & restrictions and according to the said notification one of the condition was that the exemption shall not be available to such imported machinery & equipment, the substitute of which are manufactured locally. According to the said aforesaid notification the exemption was available to such plant & machinery as is not manufactured locally. The consignments imported by the appellant containing various items which were hit by CGO 17/94 dated 30.10.1994 being locally manufactured items, therefore, initially the assessment was made / proposed for payment of duties & taxes at standard rates, however, on importer's request the erstwhile Central Board of Revenue now Federal Board of Revenue (hereinafter "CBR") vide letter C. No. 78-79/Mach/1/73 dated 09.04.1995, allowed release of the consignments on the importers' undertaking to the effect that they will abide by the decision of the CBR, that whether these consignment i.e. machinery equipment are locally manufactured items or not. On release of every consignment the importers submitted "Undertaking" and explicitly undertook that "they will pay the duties & taxes leviable thereon in case any adverse decision is taken by the CBR on the subject". And whereas, subsequently the CBR, after consulting the matter with the concerned quarters, had issued letter No. 3/1/Mach/96 dated 09.05.1996 addressed to Collector of Customs (Appraisement) in the subject case whereby it was stated that a committee was constituted by the Government and according to their findings three lists showing the items manufactured locally are enclosed therewith for each unit and directed the Collectorate to recover the duties and taxes on items identified as manufactured locally while the rest may be treated as not manufactured locally. Being aggrieved with the said CBR's decision, the appellant filed Writ Petition No. 237/1997 before the Honorable Lahore High Court, Rawalpindi Bench, which was, however, disposed off owing to territorial jurisdiction and retuned in original for presentation before Honorable High Court of Sindh. The appellant filed C. P. No. 1244/1997 before Honorable High Court of Sindh with the following prayer:
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> (i) That the impugned order of Central Board of Revenue, Government of Pakistan, Islamabad, contained in their letter C. No. 3/1/1Mach/96 dated 09.05.1996 and all subsequent orders / instructions issued in pursuance thereto be declared to be without lawful authority and of no legal effect;
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> (ii) That plant machinery and equipment imported or being imported under import License No. W403036 dated 15.07.1993 in respect of which NO Objection Certificate was issued by the Ministry of

Industries, Government of Pakistan be exempted from Customs duty and Sales Tax, under the provisions of SRO 484(I)/92 dated 14.05.1992.

(iii) That demurrage charges wroth about rupees 103 million recovered from the Petitioner Company due to illegal and arbitrary detention of their goods at Karachi Port be reimbursed to the petitioner recovery.

(iv) That the Collector Customs, Karachi in the meanwhile, be instructed to release any shipments held up for want of payment of Customs duty / Sales Tax against Indemnity Bonds;

(v) That an ad-interim injunction may be granted restraining the respondents to take any action detrimental to the interest of the Petitioner Company or by holding any investigations in the aforesaid maters till the final disposal of this Writ Petition.

(vi) Any other relief which this Hon'ble Court deems just and proper under the circumstances of the case may also kindly be granted."

During the course of hearing the Hon'ble Sindh High Court has passed an interim order on 30.04.1998. The operative part of which reads as under: -

> "Examined the impugned order (administrative) of the CBR dated 09.03.1996, with which are appended the findings of a committee constituted by the Board in the shape of three lists showing the various items manufactured locally. The learned Counsel for the Petitioner says that the undertaking rendered by the Petitioner at the time of import of the goods binds the petitioner but at the same time it has to be shown that the goods of the kind imported at the time were being manufactured on the date the invoice of purchase was issued and that cannot be deciphered wither from the impugned order or the lists attached with it.
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> It is agreed between the learned counsel that the CBR from such committee as aforesaid or any other committee to be constituted by its having like expert as would obtain an opinion whether on the date of the invoices involved the relevant machinery was or is not being manufactured in Pakistan. The outcome to be communicated to this Court within a month's time and the petition to be laid in Court if necessary during the summer vacations themselves."

That in compliance with the above said order dated 30.04.1998 passed by the Hon'ble Sindh High Court, the CBR provided a list of equipment & machinery imported by the Petitioner *along with the relevant invoices for the period September, 1994, to June 1995 to the Engineering Development board, the following was constituted by the Vice Chairman / Chief Executive Engineering Development Board on 06th July, 1996.*

1.	Mr. Javed Akhter Paracha Coordinator-EDB	Convener
2.	Engr. Abdur Razzaque Dry. General Manager-EDB	Member
3.	Engr. Amjad Pervez Dy. General Manager-EDB	Member
4.	Representative of CBR.	Member
5.	Mr. Masroor Rashid DESCON Engg. Pvt. Ltd.	Member
6.	Mr. Tahir Jan DESCON Engg. Pvt. Ltd.	Member

> *The aforesaid committee, after detailed deliberations & investigations had submitted their final report to the Secretary (Machinery) CBR, Islamabad, vide their report No. EDB009/01/98-17 dated 13.10.1998, mentioning / classifying the machineries and equipment into two categories i.e. manufactured locally at the time of invoicing or not manufactured locally. That as per findings I(sic) report of the aforesaid technical committee, constituted in compliance of the Honorable Sindh High Court 's order dated 30.04.1998, the duties & taxes involved on the items classified to be as not manufactured locally were calculated as Rs. 98,21,415/-, and after having deducted the said amount i.e. Rs. 98,21,415/-, from the previously calculated amount of customs duties i.e. Rs. 34,70,48,483/-, the net amount recoverable from the Petitioner i.e. Fauji Cement Company (the appellant) was worked out to Rs. 33,72,27,068/-.* However finally Honorable High Court of Sindh decided the case vide order dated 18.05.2000 against the department. Being aggrieved with the above mentioned orders of Honorable High Court of Sindh, department filed Civil Appeal No. 1258 of 2000 before the Honorable Supreme Court of Pakistan. The Honorable Supreme Court of Pakistan heard the consent of the counsels of both the parties. The Honorable Supreme Court of Pakistan has disposed of the subject petition / appeal vide order dated 21.12.2011. the operative portion of the order is reproduced below for ease of reference.
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> "In view of the fair stand taken by the learned Counsel for both the parties, these appeals are partly allowed, the impugned judgments passed in all these appeals are set aside, all the respondents in Civil appeals No. 1946/2000, 1258/2009 & 1307/2001 and appellant in Civil Appeal NO. 1802/2005 shall file their respective replies to the show cause notices issued to them subject matter of these appeals within twenty days from today and the Competent Authority shall decide the matter within sixty days but not later than 07.03.2012. Needless to observe that if anyone does not submit the reply within the afore-referred period, it would be open for the competent authority to proceed as mandated in law."

7. Therefore, from the aforesaid facts, it cannot be disputed that Applicant gave its consent; rather it was the Applicant's own contention that the decision of CBR rendered earlier was without involving the Applicant and without formation of a proper Committee. Subsequently, the Committee was constituted by Engineering Development Board which in fact is under the Ministry of Industries on whose earlier NOC was being relied upon by the Applicant. The said Committee gave its findings which is a matter of record and as per the findings of the said Committee, it was officially determined that which of the machinery and equipment in dispute was being manufactured locally or not. In fact, Applicant's partial claim was even accepted by the said Committee. In that situation, we are of the view that neither it is a case of applying CGO 17/1994 on the Letter of Credit established prior to its promulgation; nor is a case of estoppel against the law. It is a determination by a fact finding committee constituted through an order of this Court in a Constitutional Petition which has not been successfully challenged any further and the findings of this Committee being factual in nature, cannot even otherwise be agitated before us in this Reference Application. Though the learned Division Bench had allowed the

Constitutional Petition[8] of the Applicant; but that was merely done on the basis of a Judgment given by the learned Peshawar High Court and had not dilated upon the findings of the committee which was constituted by the learned Division Bench through its own interim order, whereas, the said report was on record of the case file. Be that as it may, the said Judgment of the Division Bench was then set-aside with the Applicant's consent and matter was remanded to the Adjudicating Authority with directions to contest the same before appropriate forum. All along the report of the committee formed pursuant to the order of this Court has remained in field and nothing has been brought before us to even remotely suggest any shortcomings in the report of the said committee. This is not withstanding, that even otherwise, we in our limited jurisdiction are not in position to disturb this finding of fact; nor a case to that effect has been made out. In our view when the matter was remanded by the Hon'ble Supreme Court, it was incumbent upon the Applicant to get such report of the Committee overturned or modified. One must not lose sight of the fact that it was on the Applicants own request that another Committee was constituted by a learned Division Bench of this Court; therefore, now altogether discarding the said report on the ground that CGO 17/1994 is not applicable would not be a proper course to adopt in these proceedings. This, in fact, was never the case in hand, and primarily appears to be an attempt to twist admitted facts. This stance of the Applicant appears to be altogether misconceived and is an attempt to wriggle out from the report of the said committee, which in fact the Applicant has not been able to dislodge in any manner. It must also be kept in mind that the said report, has even, to a certain extent agreed with the stance of the Applicant. Insofar as the present proceedings are concerned, they emanate from the very departmental proceedings initiated at the request and with the consent of the Applicant, wherein, the Applicant has not been able to disturb the findings of the said Committee; hence, in this Reference jurisdiction there appears to be no Question of Law which could otherwise have been arisen from the orders of the Tribunal or for that matter of the Collector Appeals. This is notwithstanding that the Collector Appeals as well as the learned Tribunal have given their own opinion on issues raised before them including legal questions raised by the Applicant; however, when we examine the entire facts as available in this case, it appears to us that all these Questions of Law now being raised by the Applicant are not relevant for the present purposes as there is a factual determination

[8] Judgment dated 18.5.2000 in CP No.1244/1997

viz.a.viz. locally manufactured status of the goods in question which has been done by a committee constituted pursuant to the request of the Applicant by a learned Division Bench of this Court.

8. Coming to the argument that the Tribunal was not justified in deciding the Appeal by merely relying upon the earlier judgment[9] as it involved a different set of facts is concerned, we may observe that even it was so, the law point[10] decided by the learned Division Bench of this Court, duly approved by the Hon'ble Supreme Court[11] fully applies to the issue in hand that we in our Reference jurisdiction cannot decide factual aspects, which in the instant case has been decided against the Applicant by both the forums below that the goods were being manufactured locally at the relevant time, including from the date of invoice as contended on behalf of the Applicant in their petition.

9. As to the connected petition[12] it may be observed that the same is wholly misconceived inasmuch as it was filed after availing remedy of an appeal under the hierarchy as available under the Customs Act with a request to permit its withdrawal and adjudication of the Order in Original via a petition; hence, not maintainable, is accordingly hereby dismissed.

10. To conclude we may observe that in the given facts and circumstances of the case, any deliberation on the issues except as above would be an exercise in futility as the basic question regarding the status of goods being manufactured locally stands determined, whereas, in our Reference jurisdiction under s.196 of the Customs Act, 1969, the same cannot be attended to; therefore, in our considered view no question of law arises out of the order of the Tribunal; hence, this Reference Application is devoid of merits and is hereby dismissed.

11. The Reference Application as well as the petition as above are hereby dismissed.

Dated: 10.03.2021

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[9] Fauji Cement Co. Ltd. V. Appellate Tribunal (2004 P T D 621)

[10] "..In the instant case there is definite finding of fact recorded by the learned Tribunal to the effect that the appellant were not entitled to exemption because of kind machinery imported by them, was also being manufactured locally. The judgment in C.P.No.1244 of 1997 does not touch this issue at all. In view of the above, we are constrained to observer that only a question of fact being involved in respect of which there is concurrent finding of appropriate Tribunal, it is not possible to interfere under section 196 of the Customs Act. The appeal is accordingly dismissed."

[11] (2014 SCMR 949)

[12] C.P.No.672/2000

J U D G E

J U D G E

Arshad