IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Applications Nos. 64 to 66 of 2020

Date	Order with signature of Judge

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

Applicant(s): **Collector of Customs**
Through Mr. Khalid Rajper Advocate.

Respondents: **Samiullah Sheikh and others**
Through Ms. Dil-Khurram Shaheen Advocate.

Date of hearing: **25.03.2021.**

Date of Order: **25.03.2021.**

O R D E R

Muhammad Junaid Ghaffar, J.- These Reference Applications have been filed by the Applicant Department impugning order dated 08.10.2019, passed by the Customs Appellate Tribunal Bench-III, Karachi in Customs Appeal Nos. K-1458/2018, K-1062/2019 and K-1063/2019 proposing the following questions of law:-

"1. Whether the impugned order was passed within the para meters of law of natural justice?

2. Whether the Customs Appellate Tribunal is the product of the Customs Act, 1969? If yes, then can it go beyond the charter of this Act and the regulations made thereunder?

3. Whether the learned Appellate Tribunal misconstrued Section 156(1) of the Act by waiving off the personal penalties?

4. Whether the Currency / Foreign Bills is a notified item in terms of SRO 566(I)/2005?

5. Whether the learned Appellate Tribunal erred in law by misconstruing SRO 499(I)/2009 dated 13.06.2009 and allowing release of goods falling under clause(s) of Section 2 of the Customs Act, 1969?

6. Whether the presence of express admission of guilt, by Respondent No. 1, proves "mens rea" in the instant case?

7. Whether mens rea is manifestly visible, did the learned Appellate Tribunal erred in law by waiving off the personal penalties, as envisaged in Section 156(I) of the Act?

8. Whether the learned Appellate Tribunal erred in law by ignoring the violation of section 139, to be punished under clause (70) of Section 156(I) of the Customs Act, 1969?'

2. Learned Counsel for the Applicant has read out the order and submits that earlier this Court in SCRA No. 123/2019 vide order darted 16.03.2021, though has been pleased to dismiss the Reference Applications of the Department in respect of the same legal issue; however, the facts in the present case are somewhat different inasmuch as the Respondents were involved in smuggling of currency and the entire attempt by them in entering the restricted area as well as the seizure of the currency was recorded in closed circuit TV, whereas, the Respondents were habitual and were continuously traveling abroad by carrying currency time and again. He has further argued that the adjudicating authority had also imposed penalty upon Respondents, therefore, according to him, the above order of this bench is distinguishable in facts and the proposed Questions of Law be answered in favour of the Department.

3. On the other hand, learned counsel for respondents has supported the impugned order and has relied upon order dated 29.10.2020 passed in Special Customs Reference Application No. 54/2010 and order dated 29.5.2014 passed by another Bench of this Court in Special Customs Reference Application No.153/2012 and has prayed for dismissal of these Reference Applications with further directions to the Department to implement the order of the Tribunal.

4. We have heard both the learned Counsel and perused the record.

5. Insofar as, the controversy as raised before us is concerned, it appears that in identical terms earlier Special Customs Reference Application No.54 of 2010 was decided by this Court and the learned Tribunal has only followed the earlier judgment of this Court. The relevant finding of the Tribunal reads as follows:-

> *"6. Arguments heard and record carefully perused. We also gone through the contents of notification/circular No.F.E.2/98-SB dated 21.07.2998 issued by the State Bank of Pakistan and supplied copies of judgments of Honourable High Court of Sindh, this Tribunal and lower forums on subject issue. All the above forums have allowed release of US $ 10,000/- or equivalent amount in other foreign currencies or in Pakistani currency to the appellants, therefore, We feel no hesitation in allowing the release of US $ 10000/- to the each appellant No.1&2 being permissible limit in accordance with the aforementioned notification/circular issued by the State Bank of Pakistan and also order that the currencies in excess be treated as confiscated. The respondent is directed to return US $ 10,000/- to the each appellant No.1 & 2 in Pakistani currency at the rate which will be prevailing on the day when respondent returns the above mentioned amount to the each appellant. The rest of the amount is*

> *outrightly confiscated. The order-in-original is amended to the extent of release of US $ 10,000/- to each appellant No.1 & 2 as per baggage rules read with State Bank of Pakistan circular.*

6. From perusal of the above findings it reflects that the Tribunal has allowed release of US $ 10,000/- or equivalent amount in Pakistani currency on the prevailing rate on the basis of Circular issued by State Bank of Pakistan and the judgment passed by this Court.

7. As to the argument of the learned Counsel for the Applicant that facts in this matter are different, we may observe that this is not the case. Rather the facts are almost identical. Subsequently, we had summoned the file of said S.C.R.A No.54 of 2010 and it reflects that the issue already stands decided against the Applicant department, whereas, the facts are also same. In that case also it was alleged that the passenger was taking out currency beyond the permissible limit of US Dollar 10,000/- or its equivalent as notified by the State Bank of Pakistan, whereas, he had also pleaded guilty before the Special Judge Customs and Taxation. The adjudicating authority had out rightly confiscated the entire amount of foreign currency which was modified by this Court. These facts are recorded in the order of Tribunal in that case. When the matter came before a bench of this Court, the Special Customs Reference Application was allowed vide order dated 29.10.2010 in the following terms:-

> "This Reference Application has been filed against the order of Tribunal dated 6.1.2010, whereby the appellant was declared to be involved in the act of smuggling of foreign currency from Pakistan and learned member (Judicial)-I directed the Government to refund 3000/- Singaporean Dollars which were declared and confiscated the remaining currency. The following question said to have arisen from the impugned order has been proposed for the opinion of this Court:-
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> > "The impugned order is unable to appreciate the legal point that according to clause (1) of Notification No.F.E.2/98 SB dated 21.7.1998 notified by the State Bank of Pakistan FE-2/98-SB dated 21.7.1998 in terms of Section 8(2) of the Foreign Exchange Regulations Act 1947 "Any person to take out of Pakistan US 10,000/- or equivalent thereof in other foreign currency".
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> However the question has not been framed in a proper manner and therefore with consent of both the learned counsel we reframe the question, which reads as under:-
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> > "Whether the confiscation of the foreign currency is to be made over and above the permissible limit of US $ 10,000/-?".

> We have gone through the impugned order and relevant law. Smuggling has been defined under Clause S of Section (2) of the Customs Act, which reads as under:-
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> > "(S) "Smuggle" means to bring into or to take out of Pakistan, in breach of any Prohibition or restriction or the time being in force, or evading payment of customs duties or taxes leviable thereon:-".
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> Currency has been included in Sub-clause (i) of this clause. Froma the perusal of the definition of `smuggle` it means to bring into or to take out to Pakistan goods in breach of any prohibition or restriction. In accordance with the foreign currency circular of State Bank of Pakistan, citizens of Pakistan are permitted to take out a maximum amount of US$ 10,000/- on a foreign trip, therefore, we are clear in our mind that the smuggled currency will not include currency upto US $ 10,000/-.
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> We, therefore, answer the referred question in affirmative and modify the judgment of the Tribunal to the extent that the currency in excess of US $ 10,000/- be confiscated and the respondents should return US $ 10,000/- to the Applicant in Pakistani currency at the rate which will be prevailing on the day when respondent returns the above amount to the Applicant.
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> This reference application is disposed off in the above manner.

8. Thereafter another Bench of this Court by following the aforesaid order had also allowed SCRA No.153/2012 in the same terms. From perusal of the above order it reflects that the question of law already stands answered against the Applicant department inasmuch as it has been held that in accordance with the circular of State Bank of Pakistan citizens are permitted to take out a maximum amount of US dollar 10,000/= on a foreign trip, and therefore, the smuggled currency will not include currency up to US Dollar 10,000/-. There is only one question which arises out of the impugned order and that is *"Whether the confiscation of the foreign currency is to be made over and above the permissible limit of US $ 10,000/-?",* and the same is answered in the affirmative; against the Applicant and in favor of the respondents. Accordingly, all listed Reference applications being misconceived are hereby dismissed. The order of the Tribunal is upheld.

Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

J U D G E

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Arshad/