

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 5430 of 2020 : Imad Samad vs. Federation of Pakistan & Others

CP D 5536 of 2020 : Syed Ahsan Hussain Rizvi vs. Federation of Pakistan & Others

CP D 1196 of 2021 : Waqar ul Hasan Alvi vs. Federation of Pakistan & Others

CP D 1434 of 2021 : Muhammad Ali v Federation of Pakistan

For the Petitioners : Qazi Umair Ali, Afnan Saeed-uz-Zaman, Mehmood-ul-Hasan & Aijaz Ali Siyal Advocates

For the Respondent : Mr. Shahab Imam and Ms. Naima, Advocates

Mr. Muhammad Naeem Tariq
Deputy Director, Ministry of Commerce.

Mr. Kafeel Ahmed Abbasi
Deputy Attorney General

Date of hearing : 15.12.2020, 22.12.2020, 03.03.2021, 17.03.2021 and 31.03.2021

Date of judgment : 31.03.2021

JUDGMENT

Muhammad Junaid Ghaffar, J. The petitioners seek a direction against Respondents to release vintage cars¹ imported by them by following the law settled in the case of *Moin Jamal Abbas*².

2. It has been contended by the petitioners' counsel³ that the vintage cars imported by the Petitioners are withheld on the pretext that the same are not importable; that this issue is now settled by this Court; that respondents are bound by the dicta laid down by this Court in the referred judgment, whereas, they do not have any lawful authority not to implement the said judgment on the pretext that it has been impugned before the Hon'ble Supreme Court; that

¹ manufactured prior to January 01, 1968 as provided in SRO 833(I)/2018 dated 3.7.2018

² 2020 PTD 660

³ Led by Mr. Qazi Umair Ali

even otherwise the objections now raised by the departments Counsel and by the Ministry of Commerce have already been attended to in the said judgment; hence, they be directed to immediately release the vintage cars imported by the Petitioners as there is no issue regarding the exemption and payment of duties and taxes pursuant to SRO⁴ in question.

3. On the other hand, learned Counsel for the department besides arguing that the said judgment has been impugned before the Hon'ble Supreme Court; submits that it is *per-incuriam* as it has failed to consider the provisions of the Import & Export Control Act, 1950; that used cars are otherwise banned and can only be imported in terms of the provisions of the Import Policy Order, which does not permit import of cars older than three years; that the said facility is further restricted and is only available under the Transfer of Residence or Personal baggage scheme; hence, the petitioners are not entitled for release of the vintage cars until some specific permission is granted by the Ministry of Commerce; that upon representation of the petitioners and others, a fresh summary moved before the ECC also stands regretted, therefore, the petitions are liable to be dismissed.

4. Learned DAG was directed to seek instruction as to the issue presently pending before the Ministry of Commerce on 15.12.2020 and Mr. Muhammad Tariq Deputy Director had assisted us on the last date of hearing as well as today and submits that as per Ministry of Commerce though SRO 833 FBR cannot permit import of old and used cars which is banned and is only permissible under Appendix E of the Import Policy Order, under Personal Baggage, Transfer of Residence and Gift Scheme, and that too for Vehicles which are not more than five years old; that all imports are governed by s.3 of the Import and Export Control Act, and it is the mandate of Ministry of Commerce to regulate all imports including vintage or old and used cars, whereas, twice summary has been moved to the Federal Government and till date no approval has been granted; hence, the petitioners are not entitled for release of these cars until and unless special exemption or permission is granted, which presently is not available with the petitioners.

5. We have heard the respective learned Counsel as well as learned DAG and the representative of the Ministry of Commerce and perused the record. It appears that earlier in similar and identical fashion vintage cars were imported by a person claiming benefit of SRO 833 and the Customs department refused

⁴ 833(I)/2018 dated 3.7.2018

to allow release of the same. The dispute was in respect only of importability and not of levy of duty and taxes. The department had refused release of the said vehicle on the ground that no permission was granted by the Ministry of Commerce; nor had any SRO been issued in terms of s.3 of the Import and Export Control Act, 1950. The matter came before this Court and a learned Division Bench in the case of *Moin Jamal Abbas*⁵ was pleased to hold as under;

5. Perusal of hereinabove provision of Section 19 of the Customs Act, 1969, shows that the Federal Government has been authorized to exempt from payment of customs duty notwithstanding any provision either contained under Customs Act, 1969 or under any other law for the time being in force including Income Tax Ordinance, 2001 and Sates Tax Act, 1990 etc. From perusal of provision of Import Policy Order, 2016, it can be seen that certain restrictions and prohibitions have been imposed in terms of Para. 5 of the Import Policy Order, 2016, therefore, regulating the import and export of the goods into or outside Pakistan, however, subject to prohibitions and restrictions. Whereas, in terms of Para. 20 of the Import Policy Order, 2016, the Federal Government is empowered to allow imports in relaxation of any prohibition or restriction under this Order. It is pertinent to note that Para. 20 of the Import Policy Order, 2016 allows the Federal Government to relax any prohibition or restriction relating to import, and there seems no restriction upon the Federal Government to even to allow complete exemption from payment of custom duty and taxes or to reduce the amount of customs duty in appropriate cases as per policy, SRO (I)/2018 dated 03.07.2018 has been admittedly issued by the Federal Government through Ministry of Finance, Economic Affairs, Statistics and Revenue, (Revenue Division), Government of Pakistan, whereby the Federal Government has been pleased to exempt the vintage or classic cars, jeeps meant for transport of persons on the import, from payment of customs duty, regulatory duty, additional customs duty, federal excise duty, sales tax and withholding tax as are in excess of cumulative amount of US Dollars Five Thousand (US \$ 5000) per unit, and has also been pleased to define the "vintage or classic cars and jeeps as "old and used automotive vehicles" falling under PCT Code 87.03 of the First Schedule to the Customs Act, 1969 and manufactured prior to January 01, 1968, whereas, there has been no reference to any other restriction or prohibition as may be attracted in terms of Import Policy Order, 2016 in respect of other imported vehicles, which shows the clear intention of the Federal Government, not only to exempt a vintage or classic cars from payment of duty and taxes in excess of cumulative amount of US\$ 5000/- per unit, but also to relax other prohibitions or restriction, if any, in respect of other vehicles as per Import Policy Order, 2016.

6. In view of above facts and circumstances of the case, we are of the opinion that there seems no ambiguity regarding import of vintage or classic cars and jeeps on payment of US \$ 5000/- falling under PCT Code 87.03 of the First Schedule to the Customs Act, 1969, provided it is manufactured prior to January, 01, 1968. Accordingly, respondents, under the facts and circumstances of instant case, and in the light of SRO 833(I)/2018 dated 03.07.2018, issued by the Federal Government, are required under law to release the vehicle of the petitioner on payment of US \$ 5000. Moreover, custom authorities are under legal obligations to abide by all such notifications and SROs, issued by Federal Government under section 223 of the Customs Act, 1969.

Accordingly, instant petition is allowed along with listed application, with the directions to the respondents to release the vehicle of the petitioner within seven days on payment of US \$ 5000 in terms of SRO 833(I)/2018 dated 03.07.2018. The request of the petitioner for issuance of Delay and Detention Certificate shall also be decided in accordance with Law.

Petition stands allowed along with listed application in the above terms.

6. Perusal of the aforesaid observation reflects that the learned Division Bench came to the conclusion that since SRO 833 has been issued by the Federal Government; that in terms of Para 20 of the Import Policy Order, 2016, (now Para 21 of the Import Policy Order, 2020) the Federal Government is empowered to allow imports in relaxation of any prohibition or restriction under this Order, and can relax any prohibition or restriction relating to import; that SRO 833 has been issued by the Federal Government and has exempted vintage cars etc. from payment of customs duty and taxes as are in excess of cumulative amount of US \$ 5000 per unit; *that while issuing*

⁵ 2020 PTD 660

such SRO there has been no reference to any other restriction or prohibition as may be attracted in terms of Import Policy Order, 2016; that this shows the clear intention of the Federal Government, not only to exempt vintage cars from payment of duty and taxes; but also to relax other prohibitions or restriction, if any, in respect of other vehicles as per Import Policy Order, 2016.

7. Insofar as the first part of the above observation with respect to exemption and or reducing the rate of duty and taxes is concerned, there appears to be no dispute and it has been so conceded; however, as to the finding that an exemption notification issued in terms of section 19 of the Customs Act, 1969 by the Federal Government, through Ministry of Finance, Economic Affairs, Statistics and Revenue, (Revenue Division), Government of Pakistan shall also be deemed to be a Notification of the Federal Government in terms of Para 20 of the Import Policy Order, 2016 is objected to, and with utmost respect to the learned Division Bench and all the humility at our command, we have also not been able to persuade ourselves to agree with it. Section 19 of the Customs Act, 1969, does not govern importability; nor the Federal Government while exercising powers in terms thereof can regulate the import and export of any goods. Though the said power undoubtedly vests with the Federal Government but for that it has to exercise such powers under section 3⁶ of The Import and Export Control Act, 1950. This aspect of the issue has not been brought before the learned Bench, whereas, in our view the use of the words “Federal Government” in SRO 833 would only be in respect of exercise of powers under the Customs Act, 1969, and it cannot be so construed to have also issued a notification in terms of the Import and Control Act, 1950, notwithstanding that it is the very same “Federal Government”. Before us the Ministry of Commerce which is the concerned Ministry as of today is still saying that no notification has been issued to permit import of vintage cars, despite a request moved by FBR to issue the same pursuant to issuance of SRO 833, whereby, taxes have been reduced on such vintage cars. And the reason assigned is that the Federal Government, (Cabinet and ECC)

⁶ 3. POWERS TO PROHIBIT OR RESTRICT IMPORTS AND EXPORTS (1) The Federal Govt. may, by an order published in the Official Gazette and subject to such conditions and exceptions as may be made by or under the order, prohibit, restrict or otherwise control the import and export of goods of any specified description, or regulate generally all practices (including trade practices) and procedure connected to the import or export of such goods and such order may provide for applications for licenses under this Act, the evidence to be attached with such applications, the grant, use, transfer, sale or cancellation of such licenses, and the term and manner in which and the periods within which appeals and applications for review or revision may be preferred and disposed of, and the charging of fees in respect of any such matter as may be provided in such order.

(2) No goods of the specified description shall be imported or exported except in accordance with the conditions of a license to be issued by the Chief Controller or any other officer authorized in this behalf by the Federal Government

(3) All goods to which any order under subsection (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 16 of the Customs Act, 1969(IV of 1969), and all the provisions of that Act shall have effect accordingly

(4)

has refused to do so. In fact once again an exercise is going on to consider this aspect of the matter. Nonetheless, as of today the very Federal Government has refused to exercise its powers in terms of the Import and Control Act, 1950; or for that matter under the Import Policy Order. Therefore, it is our considered view that till such time it is done, merely a notification issued in terms of s.19 of the Customs Act, 1969 would not suffice. As to non-issuance of necessary orders and or notification in terms of the Import and Export Control Act, 1950, we may observe that it is purely an executive function and is a matter of policy; which we cannot look into and interfere as no such case is made out.

8. We may also observe that the Hon'ble Supreme Court in the case of ***Aryan Petrochemical***⁷ has already settled this aspect of the matter as well, that whether CBR can regulate import or export of goods in terms of the Customs Act, 1969, and it has been held CBR has no such powers. It was a case wherein the then CBR in terms of s.219 of the Customs Act, 1969, had made an attempt to ban or restrict export of certain goods via land route which was challenged before the Peshawar High Court and the learned Court allowed the petitions by striking down such rules as being ultra vires. The Hon'ble Supreme Court upheld that judgment by dismissing the Appeals of CBR and was pleased to hold that CBR has no business to regulate the export of any goods, as it rests with the Federal Government in terms of the Import and Export Control Act, 1950. The relevant finding reads as under;

9. The plain reading of the above provisions would show that the aim of giving the rule making power to CBR is to carry out the purpose of the above statutes through the subordinate legislation. The Federal Government in exercise of powers under section 3 of Imports and Exports (Control) Act, 1950 (Act XXXIX of 1950), may by an order published in the official Gazette prohibit, restrict or otherwise control the import or export of goods of any specified description and regulate the same through licence system and subsection (3) of section 3 of ibid Act, provides that section 16 of the Customs Act, 1969 shall be given effect in respect of goods, the import and export of which has been prohibited or restricted. Thus the Federal Government has the sole authority to regulate import and export of goods and impose conditions for grant of import and export licence, issue orders for carrying out the purpose of Imports and Exports (Control) Act, 1950 and make laws for the import and export of goods across the border whereas the function of the CBR is to give effect to Customs Act, 1969, Sales Tax Act, 1990 and the Central Excise Act, 1944 in the light of the policy of the Federal Government as contemplated by the Imports and Exports (Control) Act 1950. *There is clear distinction between the powers of the Federal Government under Imports and Exports (Control) Act, 1950 and the powers of the C.B.R. under Customs Act, 1969, Sales Tax Act, 1990 and Central Excise Act, 1944.* The framing of the policy relating to the import and export of goods with or without any restriction is the exclusive function of the Federal Government and the Central Board of Revenue, subservient to the policies of Federal Government, may frame rules under the above referred statutes

⁷ **Pakistan v Aryan Petrochemical Industries Ltd (2003 SCMR 370)**

subject to the provisions of section 16 of Customs Act under which it is the prerogative of the Federal Government to prohibit or restrict the bringing into or taking out of Pakistan any goods by any route including the goods enumerated in 3rd Schedule to the Customs Act 1969. Under section 9 of the Customs Act, 1969 the C.B.R. can declare the places as customs ports, customs airport and land customs station for clearance of the goods to be imported or exported but is not empowered under said section or any other provision of law to restrict or prohibit the export or import of the goods through land route..”

9. Therefore, FBR or for that matter the Federal Government acting through Ministry of Finance has no business to regulate import or export of any goods, which was and still is the domain of the Ministry of Commerce under s.3 of The Import and Export Control Act, 1950. Neither FBR has any powers under the said Act; nor the same has been so exercised in SRO 833. It is only a notification in terms of section 19 of the Customs Act, 1969, read with other provisions of Sales Tax Act, 1990, Federal Excise Act, 2005 and the Income Tax Ordinance, 2001 for providing exemption and or reduction from duties and taxes. It cannot restrict or allow the import or export of any goods including vintage cars which admittedly fall under old and used vehicles which are not importable in terms of Appendix C of the Import Policy Order, except as provided in terms of Appendix E of the said Order. It has nowhere been provided in s.19 of the Customs Act, 1969, to authorize the Federal Government to allow or restrict import or export of goods. It only allows exempting or reducing the customs duties. It has to act in terms of the Import and Export Control Act, 1950, with a specific order for allowing the import of vintage cars which otherwise is not permissible. This is notwithstanding the fact that in both the Acts⁸ it is the Federal Government⁹ which is authorized to act; but such exercise of powers has to be done under both the Acts separately, if so desired. One ministry or wing of the Federal Government is not authorized or permitted to exercise powers of the other; as they act under different Acts and spheres. It has been submitted before us that insofar as Ministry of Commerce is concerned, they have not permitted any such import of vintage cars which according to them are still banned and cannot be imported in terms of the current Import Policy Order, 2020 or for that matter even under the Import Policy Order, 2016; both issued in terms of section 3 of the Import and Export Control Act, 1950. Hence, we are unable to agree with the dicta laid down by an earlier Division Bench in the case of *Moin Jamal Abbasi (Supra)*.

⁸ Customs Act 1969 and Import and Export Control Act, 1950

⁹ As explained in *Mustafa Impex v Government of Pakistan (PLD 2016 SC 808)*

10. It is settled law that an earlier judgment of a Division Bench is binding on a subsequent Division Bench, and in case if any contrary view is being taken, then the matter has to be referred to the Hon'ble Chief Justice for constitution of a larger Bench to resolve the controversy as laid down by the Hon'ble Supreme Court in the case of *Multiline Associates*¹⁰ reiterated in the case of *Amir Khan*¹¹.

11. In view of hereinabove facts and circumstances of the case with utmost respect and humility at our command we beg to disagree with the dicta laid down by an earlier Division Bench in the case of *Moin Jamal Abbasi (supra)*; hence, in view of *Multiline Associates*, we direct the office to place all these matters before the Hon'ble Chief Justice for constitution of a Larger Bench inter alia to consider that whether SRO 833 issued in terms of section 19 of the Customs Act, 1969, can also be treated as an SRO issued by the Ministry of Commerce in terms of section 3 of the Import and Export Control Act, 1950, permitting import of vintage cars which are otherwise not importable as being old and used in terms of the Import Policy Order.

12. Since the vehicles are detained at port, therefore, office to act on urgent basis, whereas, if so requested the respective Collectorates shall immediately allow shifting of the vehicles of the petitioners to CPF Warehouse at the cost of the Petitioners to avoid delay, detention and storage charges accruing on a recurring basis at port.

JUDGE

JUDGE

Khuhro/PA

¹⁰ *Multiline Associates v Ardeshir Cowasjee* (1995 SCMR 362 / PLD 1995 SC 423) & *Province of East Pakistan v Dr. Aziz ul Islam* (PLD 1963 SC 296)

¹¹ *Muhammad Amir Khan v Govt. of KPK* (2019 SCMR 1021)