IN THE HIGH COURT OF SINDH AT KARACHI

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

SCRA 468 of 2011	:	The Collector of Customs vs. M/s. Great Eastern Trading Co.
SCRA 469 of 2011	:	The Collector of Customs vs. M/s. Yasir Enterprises
SCRA 470 of 2011	:	The Collector of Customs vs. M/s. Yasir Enterprises
SCRA 471 of 2011	:	The Collector of Customs vs. M/s. Kamran Lubricants (Pvt) Ltd.
SCRA 472 of 2011	:	The Collector of Customs vs. M/s. Kamran Lubricants (Pvt.) Ltd.
SCRA 473 of 2011	:	The Collector of Customs vs. M/s. Kamran Lubricants (Pvt.) Ltd.
SCRA 474 of 2011	:	The Collector of Customs vs. M/s. Kamran Lubricants (Pvt.) Ltd.
For the Applicant	:	Mr. Iqbal Khurram, Advocate
For the Respondent	:	Mian Abdul Salam, Advocate
Date of hearing	:	13.04.2021
Date of announcement	:	13.04.2021

JUDGMENT

Muhammad Junaid Ghafar, **J**. Through these Reference Applications the Applicant has impugned order dated 11.12.2010, passed by the Customs Appellate Tribunal, Karachi Bench-III in Customs Appeal No.K-779 of 2010, and in all connected matters, proposing the following questions of law:

> "1. Whether in the facts and circumstances of the case the Appellate Tribunal has erred in law by not taking into consideration that in terms of Section 2(kka) of the Act, the bill of lading (B/L) and manifest (IGM)/cargo declaration issue by the master of vessel/ shipping company are the legal documents to be considered as an evidence/statement in a "matter of customs" within the meaning of Section 79(1) read with Section 32(1) and 32A (1) (e) of the act?
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> 2. Whether the Appellate Tribunal erred in law by not considering the fact that as per trade practice and the procedure as adopted by the importer/shipping

company that Bill of Lading (B/L) is the essential and mandatory document to determine the ownership of the imported cargo?

3. Whether in the facts and circumstances of the case the Appellate Tribunal erred in law to allow the appeal of the respondent without giving any findings on the charges established on the respondent importer for violation of Section 2 & 16 of the Customs Act, 1969 read with Import Policy Order which restricts the importation of Diesel?

4. Whether the Appellate Tribunal has exceeded the jurisdiction vested in it, by whimsically and fancifully introducing a new concept for the purposes of declaration & untrue statement, which is not only not recognized by the Statute but, as a matter of fact, is completely alien to the provision of Section 32 & 32A of the Customs Act, 1969?

5. Whether in the facts and circumstances of the case the Appellate Tribunal erred in law to hold that the case made out on the basis of Bill of Lading is a presumption?

6. Whether the findings of the Tribunal are not perverse for non-reading and /or mis-reading the record available before the Tribunal?

2. Learned Counsel for the Applicant has read out the order of the Tribunal as well as the Show Cause Notice and the Order-in-Original and submits that respondents had made an attempt to import Diesel Oil under the garb of “Residue of Petroleum” and according to him this was their continuous practice earlier as well. Hence, the impugned order is liable to be set-aside and the order of the original authority be restored.

3. On the other hand, learned Counsel for the respondents submits that it is a matter of record that the respondents have never claimed ownership of the goods, as noted in the Order-in-Original, whereas, in earlier proceedings to which reference has been made, the FIR was quashed under Section 265-K Cr.P.C.

4. We have heard both the learned Counsel and perused the record. It appears that the precise case as set-up on behalf of the Applicant is that a Contravention Report was generated by the Principal Appraiser, Model Customs Collectorate of PaCCS, Karachi, through which it was reported that consignment has been imported with such mis-declaration and based on this contravention report a Show Cause Notice was issued and was then adjudicated. The goods were out rightly confiscated and penalty was also imposed upon the respondents. However, it is a matter of fact which has not been denied that respondents have never claimed ownership nor

had filed any Goods Declaration of the Goods in-question. The operative part of the Order-in-Original reads as follows:-

> 10. I have gone through the facts and record of the case and the submissions made by both sides. The respondents have denied the ownership of goods. However, the import documents such as Import General Manifest, Arrival Notices, the previous import record and the data of Computerized System regarding the role of the respondent No.2, clearly establish that the offending goods i.e. Diesel Oil have been imported by both the respondents. Moreover, the previous record shows that both the respondents have been importing goods with identical declared description in the past. Therefore, it is established that they are the actual importers of the offending goods. Thus, they have violated the restrictions as imported under item 2 of Part II of Appendix-B, read with para 16(B) (i) of the Import Policy Order 2008 (now para 5(B) (i) of Import Policy Order 2009) read with section 16 of the Customs Act,1969, and are also found guilty of offence of smuggling as defined under section 2(s) of the Customs Act, 1969, read with notification SRO 566(1)/2005 dated 06.06.2005. In view of findings above, the imported goods, namely diesel oil imported in all 19 containers referred to above under Bill of Lading No.JED000002934 are confiscated ourtright under clause 8 of section 156(1) of the Customs Act, 1969, and the option of redeem the goods is NOT allowed. Moreover, a penalty of Rs.22,261,887/- equal to the value of offending goods , is imposed on each of the two respondents under the aforesaid clause 8.
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> 11. The aforesaid order also applies, mutatis mutandis, to the six other cases of identical nature, as per details given in the table below. The respondent in the cases at Sr.Nos. 1 & 2 of the table below is M/s. Yaser Enterprises, who is also the respondent No.1 in the case NO.MCC/SCN-1/RESIDUE OIL/CONT/R&D/PACCS/2010 as discussed above, and replies similar to the one reproduced in para 6 above were received in these two cases. In the cases as S.Nos.3 to 6 of the table, the respondent is Mina Abdul Rasheed of M/s. Kamran Lubricants Pvt. Ltd. In each of these four cases two replies were received similar to those as reproduced in paras 6 and 7 above. The findings in all these six cases are same and it is also found that Mian Abdul Rasheed of M/s. Kamran Lubricants Pvt Ltd has also imported and cleared several consignments declared as “residue of Petroleum”, including consignments bearing 1-HC-783828-290908, 1-HC-501826-040108, 1-HC-497424-311207, 1-HC-487077-151207, 1-HC-485716-141207. 1-HC-478581-071207, 1-HC-478575-071207, 1-HC-470223-301107, 1-HC-454027-151107 and 1-HC-439327-021107. Accordingly, these six cases mentioned below are decided in similar terms with the imposition of penalty as mentioned against each:-

5. The said order was then impugned by the respondents before the Tribunal and through the impugned order Appeal has been allowed in the following terms:-

> 13. The ratio decidendi of these judgments is all the more applicable in the subject case where no Goods Declaration was filed or any statement or documents delivered to the Customs Authorities by the appellants and no attempt as such was made to cause any financial loss to the Government. The case of the Department is simply based on Import General Manifest, Cargo Declaration and Bill of Lading not signed or delivered by the appellants to the Customs Authorities. The claim of the appellants that dispatch of the consignments and the appearance of their names in the Import General Manifest delivered by the Master of Vessel, the Cargo Declaration delivered by the Cargo Agent and the Bill of Lading issued by the Shipping lines were not in their knowledge is apparent from the case record since the appellants never filed any Goods Declaration nor made any statements to the Customs Authorities. No evidence to controvert these claims of the appellants was produced by the respondent before this forum.
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> 14. Even the Hon’ble High Court of Sindh has observed in their above referred to judgment PTCL 2005 CL 93 that “after the statutory change in Section 32(1) through Federal Laws Ordinance, 1981, Section 32(1) expressly required that to attract the penal provision a person’s knowledge or belief that such documents or

> statements are false in any material particulars is imperative. It means that even if a document with untrue declaration is submitted before the Customs Authorities without the knowledge of that person to its being false in any material particulars then, too, provisions of Section 32(1) are not attracted in respect of misdeclaration.
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> 15. In this case when there is no document filed or statement made before the Customs Authorities by the appellants there is no question of invoking the penal application of Section 32 of the Customs Act, 1969 against the appellants.
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> 16. In view of the above narration, the charge of misdeclaration and imposition of penalty in terms of Section 32 of the Customs Act 1969 upon the appellants are totally misconceived particularly when the appellant did not make or sign or declare or cause to be declared before Customs Authorities in the form of any declaration, notice, certificate or any document or made statement before the Customs Authorities. The allegation of misdeclaration is presumptuous being based upon documents which have not been singed or delivered by the appellant to the Customs Authorities. The principle of law laid down by the superior judicial for a discussed supra supports these findings. As such the orders passed by the forums below have no legal substance and are hereby set-aside. The penalty imposed upon the appellants is remitted and the subject appeals are accordingly allowed.

6. Perusal of the aforesaid findings as well as the record placed before us reflects that admittedly no Goods Declarations was ever filed by the respondents, and the entire case as set up in the show cause notice / Contravention Report is on the examination of the goods as well as the information available by way of Import General Manifest and the purported Bill of Ladings available with the Applicant. The precise case of the Applicant appears to be that in terms of section 2 (kka) of the Customs Act 1969, a bill of lading has been defined, and theretofore it is a customs document pursuant to which proceedings under Section 32 ibid can be initiated. However, it needs to be appreciated that though a Bill of Lading is a customs document as defined under Section 2 (kka) ibid; but it only matters and is relevant when the same has been annexed or filed along with a Goods Declaration required to be filed under Section 79 of the Act. It will only then become a Customs document of the importer in terms of s.2 (kka) ibid; and if there is any discrepancy in the said document including a Bill of Lading viz-a-viz with the actual goods so imported; only then it would be treated as a document and a case of an alleged mis-declaration under Section 32 of the Act can be made out. Insofar as instant matter is concerned, the said Bill of Lading has never been owned by the respondents; nor based on it, any Goods Declaration has been filed; nor

has even ownership of the goods in question been claimed. In that case merely by conducting examination of goods and getting them tested through laboratory, no case can be initiated or made out against the present respondents for imposition of penalty who have never come up as to the claim of the goods in-question. Moreover, adjudicating authority was also completely mis-directed by placing reliance on clearance of some earlier consignments allegedly done in the same manner. The said goods were not part of the show cause notice in hand; hence, to that extent the Order-in-Original could not even be maintained. The learned Tribunal has correctly appreciated the law as well as facts and the order of the Tribunal, whereby, the penalty imposed has been remitted, does not require any interference by us. In fact in the given circumstances there appears to be no substantial question of law which could arise from the order of the Tribunal; hence need not require any adjudication by us. Accordingly, all these Reference Applications being misconceived are hereby dismissed.

7. Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office to place copy of this order in connected Reference applications as above.

JUDGE

JUDGE

Amjad/PA