

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan Iqbal Chaudhry

C.P. Nos.D-5430 & 5536 of 2020 and
C.P. Nos.D-1196, 1434 & 3911 of 2021

Imad Samad (CP No.D-5430/2020)
Syed Ahsan Hussain Rizvi (CP No.D-5536/2020)
Waqar-ul-Hassan Alvi (CP No.D-1196/2021)
Muhammad Ali (CP No.D-1434/2021)
Salman Talibuddin (CP No.D-3911/2021)

Versus

Federation of Pakistan & others

Date of Hearing: 30.08.2021

Date of announcement: 10.09.2021

Petitioners in CP D-5430 Through Qazi Umair Ali Advocate
of 2020:

Petitioners in CP No.D- Through Mr. Mehmood ul Hassan and Mr.
1196 of 2021: Muhammad Khalid Advocates.

Petitioners in CP No.D- Mr. Salman Talibuddin in person.
3911 of 2021:

In CP No.D-5536 of 2020 None present.
and D-1434 of 2021:

Respondents No.1 & 2/ Through Mr. Kafeel Ahmed Abbasi, Deputy
Federation of Pakistan: Attorney General and M. Hussain Vohra,
Assistant Attorney General along with Mr.
Muhammad Naeem Tariq, Deputy Director/
Staff Officer, Ministry of Commerce.

Respondents No.3 & 4/ Through Mr. Shahab Imam Advocate.
Customs Department:

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Petitioners have imported vintage
cars of the following description:-

Sr. No.	CP No.	Description of vehicle	Bill of lading date
1	D-5430/2020	Rolls Royce Silver Cloud (1960)	04.10.2020
2	D-5536/2020	Bentley S1 (1956) Vin No.B122AN	20.02.2019

3	D-1196/2021	Two Bentley Cars (1967 & 1947) Vin No.SBH 3054 & B219AJ respectively	26.12.2020
4	D-1434/2021	1965 Ford Mustang Vin No.5F07T632895	26.12.2020
5	D-3911/2021	Vehicle (Classic) Chevrolet Corvair (1965) Vin No.105375W189647	11.05.2021

2. Brief facts are that all these petitioners imported aforesaid vintage cars on the strength of SRO No.833(I)/2018 dated 03.07.2018 followed by a decision in the case of Moin Jamal Abbasi in CP No.D-4124 of 2019 reported as 2020 PTD 660. The question for release of the vehicles came before another Bench which did not concur with the ratio - decidendi of the judgment delivered in Moin Jamal's case and request for a Larger Bench was made to Hon'ble Chief Justice. Accordingly this Full Bench was constituted to consider the question arising out of litigation:-

“Whether the subject SRO No.833(I)/2018 issued in terms of Section 19 of Customs Act, 1969 can also be treated as SRO issued by the Ministry of Commerce in terms of Section 3 of the Import & 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 of both 2016 and 2020?”

3. We have heard the learned counsel, Qazi Umair and Mr. Salman Talibuddin who appeared in person and primarily adopted the arguments of Qazi Umair Ali Advocate. Counsel substantially relied upon the judgment delivered in Moin Jamal Abbasi's case which then was followed in Meena Munawer¹ and Bilal Akbar's² case. He submitted that in SRO 833(I)/2018 issued under section 19 of Customs Act, 1969, Federal Government was pleased to exempt vintage or classic cars and jeeps from such customs duty, regulatory duty, additional customs duty, federal excise duty, sales tax and withholding tax as are in excess to cumulative amount of US \$.5000. Thus, this notification, per counsel, be

¹ Writ Petition No.4020/2019 (Islamabad) order dated: 17.8.2020

² Writ Petition No.68810/2019 (Lahore) order dated: 16.12.2020

deemed to be a permission of Ministry of Commerce on the strength of it being issued by Federal Government³. They (petitioners) claims equal treatment as given to petitioner of CP No.D-4124 of 2019 (Moin Jamal Abbasi v. Federation of Pakistan) and others referred above.

4. The dispute primarily is of import of vintage cars/vehicles/jeeps in terms of SRO 833(I)/2018 dated 03.07.2018 issued under section 19 of Customs Act, 1969, which is claimed to have carried assent and/or yielded and paved way to the requirement of the Ministry of Commerce in terms of Section 3 of Import & Export Control Act, 1950 and thus be read as permission to import vintage cars which otherwise are not importable under Import Policies 2016-20 being old and used vehicles.

5. In Moin Jamal's case the ratio decidendi was that since Section 19 of the Customs Act enabled the federal government to exempt payment of customs duties etc. notwithstanding anything contained in any other law for the time being in force including Income Tax Ordinance 2001, Sales Tax Act, 1990 etc. it should be read as import permission. The Bench while relying on Para 20 of the Import Policy 2016 (which is now *pari materia* to Para 21 of Import Policy 2020), held that the federal government since was empowered to allow import in relaxation of any prohibition or restriction under this order (Import Policy) the SRO 833(I)/2018, be read as such, having been issued by federal government.

6. Perhaps on the strength of the language used in SRO 833(I)/2018, it created an impression in the mind of the Bench as if the federal government was also pleased to permit the import and/or relax restrictions and/or prohibition of the Import Policy either of 2016 or 2020. This being a crucial aspect of the case, I am inclined to take advantage of relevant Rules of Business of 1973.

³ Mustafa Impex v. Government of Pakistan (PLD 2016 SC 808)

7. These Rules of Business are framed under Article 90 and 99 of the Constitution of Islamic Republic of Pakistan, 1973 for the allocation and transaction of federal businesses. The executive authority of federal government is required to be exercised in the name of President and the federal government which then consists of prime minister, federal ministers, acting through prime minister as being chief executive of the federation, and while discharging their functions, the prime minister act either directly or through ministers, if the businesses are allocated⁴. The respective businesses to minister and divisions forming federal secretariat, are allocated under Rule 3 of Rules of Business, 1973. Prime minister though is under the obligation to constitute ministries having divisions and the businesses are distributed amongst the divisions as these rules are structured. The distribution of businesses is on the basis of divisions in terms of Schedule II. It is the prime minister who apportions the ministries to ministers by assigning the survival divisions disclosed in Schedule-I, which is under the charge of said minister. In the absence of such assignment, prime minister is deemed to have the charge of it.

8. Ministry of Commerce having commerce division whereas ministry of finance, revenue and planning and development assigned the finance division. The Schedule II of Rules of Business 1973 caters distribution of business amongst the divisions. Commerce division, amongst many other businesses, is also allocated import and export across customs frontier whereas the allocation of work to finance division is totally different and separate. Schedule II of Rules of Business 1973 thus deals with their respective businesses structured in the rules itself. So it cannot be by desire that the business could be allocated as it is already structured by Rules of Business of 1973.

⁴ Article 90 of Constitution of Islamic Republic of Pakistan, 1973

9. At times the business and the allocation of work of one division may require some consultation and discussion from another division which is catered by Part-B of the Rules of Business 1973 in terms of Para 8. It further provides that when the subject of a case concerns with more than one division, the division in charge shall be responsible for consulting the other division concerned and further process is dependent on such consultation, unless there is an urgency requiring approval of prime minister in terms of proviso to Para 8.

10. This misconception is thus clear that business that deals with another division could be assigned to another unless the rules are structured as such. The two businesses of two distinct and separate divisions having separate ministers, incharge cannot overlap each other as it would be a trespass to another's jurisdiction.

11. SRO 833(I)/2018 is issued by the minister of Finance, Economic Affairs, Statics & Revenue (Revenue Division) and the federal government gave exemption on custom duties vide Section 19 of the Customs Act, and the pari materia provision of Federal Excise Act 2005, Sales Tax Act, 1990 and Income Tax Ordinance 2001. This SRO 833(I)/2018 thus could be read to the extent of levy of such duties/taxes etc.

12. This alone will not have an overriding effect to the business independently allocated under the Rules of Business to the Ministry of Commerce (Commerce Division) which, under a policy has prohibited and restricted the import of vehicles (used/old) vide earlier SRO 345(I)/2016 dated 18.04.2016 and SRO 901(I)/2020 dated 25.09.2020, in exercise of powers conferred by subsection (1) of Section 3 of Import & Export Control Act, 1950. Reference of SRO 345(I)/2016 issued under Section 3 of Act 1950 is given as there could be a case of goods' arrival prior to the effect of later SRO 901(I)/2020. In terms of Section 3 of the ibid Act,

it is the exclusive jurisdiction of federal government acting through the ministry of commerce to prohibit, restrict and/or to control the import and export of goods of any specified description or regulate generally all practices and procedure in relation thereto.

13. The importability of vehicles in Pakistan is catered by the Import Policy by way of SRO 902/(I)/2020 (earlier 345(I)/2016 and it provides that the goods specified in Appendix-C (Sr. No.10 Vehicles of 87.037) are banned for import in secondhand and used condition except those for which exemption is provided therein. This ban of secondhand and used vehicles is relaxed in case of import of vehicles under personal baggage, transfer of residents and gift schemes. The procedure of which is specified in Appendix-C having age restriction of 3 to 5 years (Sedan/SUV). The details and specifications of such relaxation of vehicles and procedure involved thereto may not be relevant for the purpose of these proceedings as the importability of vintage car (on account of their age) itself is a question as raised by the respondents before us and unless the referred SRO 833(I) is read as an SRO permitting the import, such consequential details after import, are not essential in this case.

14. Section 19 of the Customs Act, 1969 primarily deals with a situation for immediate action for the purpose of national security, natural disaster, national food security in an emergency. Subject to such conditions, limitations or restrictions, as it thinks fit to impose, by notification in the official gazette, exempt any of the goods, imported into or exported from Pakistan or into or from any specific port or station or area therein, from whole or any part of the customs duties chargeable thereon and may remit fine, penalty, charge or any other amount recoverable under this Act. This provision of Customs Act or any notification/SRO issued thereunder could not withstand the requirement

or restriction of importability. Importability is a business which originates from commerce division/Ministry of Commerce. It even could not be conceived as lack of coordination between two divisions or precisely by commerce division under Rule 8 of Rules of Business 1973 as it could have been an initiative of Commerce Ministry, had it so desire, as far as importability is concerned, which then only could have ended up in consultation with Finance Ministry. It could not have been an issue of finance division unless the importability is finalized and thus a cart is invented first before birth of a horse. If the Ministry of Commerce/Commerce Division has not carved out policy of importability or if the summary of importability of such vehicles is declined by Cabinet/ECC, then SRO 833(I)/2018 is a wasted effort. The legitimacy of import and export of vehicles is required to be steered in terms of Section 3 of Act 1950.

15. Customs officials thus have lawfully objected to the importability of vehicles on the touchstone that SRO 833(I)/2018 could only be read to the extent of levy of duties and taxes including customs duties, excise and sales tax etc. but cannot be construed as a notification under Section 3 of ibid Act 1950 relaxing the prohibition and restrictions.

16. The ministry of commerce i.e. respondent No.3 and so also Collector of Customs i.e. respondent No.4 have filed their respective comments through Advocate Shahab Imam who has seriously opposed the importability of such vehicles under the referred SRO and under restrictions and prohibitions provided in the Import Policy 2016 and 2020

17. Para 21 of the Import Policy 2020 deals with the relaxation of prohibition and restrictions which is *pari materia* to Para 20 of Import Policy 2016. Appendix-A of Import Policy is list of ban items which is categorized as negative list. The commodities specified in the table are not permissible. Appendix B and all parts attached and Annexures B1/B2

are not related to the subject in hand. Appendix-C is the one precisely for the subject items as the goods/vehicles have been imported as/in secondhand/used conditions. This list shows that the items are not importable in used and secondhand condition and at Sr. No.10 the vehicles in used and secondhand conditions are shown as not importable except those which have been separately categorized therein. Subject vehicles do not form part of those exceptions.

18. In exercise of powers under section 19 of the Customs Act, 1969, undoubtedly the federal government may levy or relax the duties and taxes on import and export of goods but while dealing with permission of import and export, Section 19 of the ibid Act is irrelevant as such prohibition and restrictions flows from Section 3 of Import & Export Control Act, 1950 hence if at all federal government is required to exercise its powers for the business of import and export then it is required to be exercised under above referred Section 3 of Act 1950⁵.

19. Surprisingly this aspect of the matter was not brought to the attention of the earlier Bench which laid down the law/precedent in Moin Jamal Abbasi's case. Even today the position is that the federal government (Cabinet & ECC)⁶ has refused the request of the Federal Board of Revenue. These are not the petitions where relaxation is claimed in terms of Para 21 of Import Policy Order 2020 or Para 20 of Import Policy Order 2016 as they (petitioners) seek enforcement of SRO 833(I)/2018 for release of the vehicles, therefore, I cannot extend the claim of the petition further for consideration to such an extent as we have been informed by petitioners' counsel that not even an application in this regard is moved to the concerned Ministry for one time relaxation by any of the petitioners.

20. In accepting the contentions of the petitioners to treat SRO 833(I)/2018 as one under section 3 of Import and Export Control Act, 1950,

⁵ 2003 SCMR 370 Aryan Petro.

⁶ PLD 2016 SC 808 Mustafa Impex v. The Government of Pakistan

should we not be permitting litigants to understand law as they perceive and desire. For a rule of law it is not important how and in what manner “interested persons” conceive a law but intention of legislature matters. Court cannot give a premium to the litigants who are amiss in law and that too for a monetary gain. Knowingly that the matter on such defence of Ministry of Commerce is pending before Hon’ble Supreme Court, (as informed) and final conclusion is yet to be drawn on the basis of disputed SRO (which they conceive it for import), yet they attempted to import vehicles and now claim mercy. Court cannot be a tool to resurrect or reinvent doctrine of necessity.

21. The conclusion of the above analyses is that in the case of Moin Jamal Abbasi the earlier Bench was not assisted properly by the counsel appearing on behalf of respondents and consequently the Bench reached to a conclusion which is contrary to the requirements of Section 3 of Import & Export Control Act, 1950 and an incorrect law/precedent was laid down which judgment was followed by the Benches of two other jurisdictions.

22. I am of the view that since constraints and restrictions of Section 3 of Import & Export Control Act, 1950 were not taken into consideration, judgment in the case of Moin Jamal Abbasi reported as 2020 PTD 660 is per-incuriam. I, therefore, in view of above facts and circumstances and analyses reached, am of the view that the petitioners cannot seek release of their respective vehicles by enforcing SRO 833(I)/2018 as long as restrictions and prohibitions of Ministry of Commerce in terms of SRO 345(I)/2016 dated 18.04.2016 and SRO 901(I)/2020 dated 25.09.2020 forming Import Policy Order, 2016/2020 are not relaxed. All petitions are as such dismissed along with pending applications.

Judge

We have given separate decision attached here in.

Judge

Judge

Adnan Iqbal Chaudhry J. with Muhammad Iqbal Kalhoro J. - We concur with our esteemed learned brother Mr. Justice Muhammad Shafi Siddiqui that SRO 833(I)/2018 cannot be treated as an SRO under section 3(1) of the Imports and Exports (Control) Act, 1950 permitting the 'import' of vintage cars. However, as to its consequence, we are of a some-what different view.

2. SRO 833(I)/2018 reads as follows:

"GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS, STATISTIC &
REVENUE
(REVENUE DIVISION)

Islamabad, the 3rd July, 2018

NOTIFICATION
(Customs, Federal Excise, Sales Tax and Income Tax)

S.R.O. 833 (I)/2018.- *In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), section 16 of the Federal Excise Act, 2005, clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990 and sections 148 and 53 read with Second Schedule to the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to exempt vintage or classic cars and jeeps meant for transport of persons on the import thereof from so much of the customs-duty, regulatory duty, additional customs duty, Federal excise duty, sales tax and withholding tax as are in excess of the cumulative amount of U.S. dollars five thousand per unit.*

Explanation.- *For the purpose of this Notification vintage or classic cars and jeeps mean old and used automotive vehicles, falling under PCT Code 87.03 of the First Schedule to the Customs Act, 1969 (IV of 1969), manufactured prior to the 1st January, 1968.*

(sd/-)
Additional Secretary"

3. It is not the case that SRO 833(I)/2018 was issued by the Revenue Division without lawful authority or that it was issued with any *malafides*. It is accepted both by the learned Assistant Attorney General and learned counsel for the Customs that SRO 833 was to follow in consequence of a SRO under section 3(1) of the Imports and Exports (Control) Act, 1950, also by the Federal Government *albeit* through the Commerce Division, which was to be issued prior to or at least simultaneously with SRO 833 to expressly permit the import of vintage cars, but that was not so done, nor was

SRO 833 recalled. The comments on behalf of the Federal Government concede that *“This anomaly in the policies lead to confusion and litigation”*. We are therefore of the view that in issuing the consequent SRO 833 to fix duty and taxes on import of vintage cars, the Federal Government held out and represented to citizens that the requisite SRO permitting the import of vintage cars had also been issued, or at least that import of vintage cars is not forbidden any more. After all, otherwise, there was no point in fixing duty and taxes on the import of vintage cars if the import remained prohibited. Therefore, the Petitioners acted, to their detriment, on an act / representation made by the Federal Government. The argument of the Customs amounts to saying that before acting upon SRO 833 to import a vintage car, a citizen should have first verified whether the representation in SRO 833 that a vintage car was importable, was in fact correct or not. That argument if accepted would be catastrophic to the presumption of correctness attached to official acts.⁷ Conversely, it is not difficult to imagine the chaos that would ensue if executive orders requiring action are not implemented on unwarranted excuses of verifying the underlying competency. There is another aspect of the matter. It is apparent that SRO 833 was issued for lack of coordination between the Revenue Division and the Commerce Division of the Federal Government resulting from a failure to adhere to the ‘Inter-Division Procedure’ set-out in Rule 8 of the Rules of Business, 1973. The consequence of such failure cannot be permitted to turn prejudicial to the case of the Petitioners.

4. Adverting now to the relief sought by the Petitioners; in our view, thus far, no writ can be issued to the Customs to release the vintage cars when SRO 902(I)/2020 i.e. the Import Policy Order issued under section 3(1) of the Imports and Exports (Control) Act, 1950, does not expressly permit the import of such vehicles. However, clause 21 of that very Import Policy Order provides:

⁷ See illustration (e) to Article 129 of the Qanoon-e-Shahadat Order, 1984.

“21. Relaxation of prohibitions and restrictions.--(1) In terms of section 21 of the General Clauses Act, 1897, the Federal Government may, for reasons to be recorded, allow import in relaxation of any prohibition or restriction under the Order.

(2) The Federal Government may relax the requirement of re-export on goods imported on temporary on such conditions as it may deem fit.

(3) The Federal Government may issue import authorization in respect of any item for which relaxation is made under subparagraph (1) or for which import authorization is required under this Order.

(4) The Federal Government shall issue the aforesaid condonation or authorization on its letter-head, consecutively number and duly embossed.”

5. Thus, the Import Policy Order vests a certain discretion in the Federal Government to allow an import in relaxation of a prohibition therein. Mr. Shahab Imam, learned counsel for the Customs had also disclosed during the course of arguments that the Federal Government had in the past exercised such discretion to issue a one-time import permit for a vintage car. Regardless of that, in our view, clause 21 of the Import Policy Order does cater to an import made *bonafide* with unintended consequences, as is the case of these Petitioners. Therefore, we dispose of these petitions with a direction to the Federal Government to consider the case of these Petitioners for a one-time relaxation / permit of import under clause 21 of the Import Policy Order, 2020 in respect of vintage cars falling under SRO 833(I)/2018 already imported by them, and to decide the same within 10 days keeping in mind the observations above. For said purposes, a copy of these petitions shall be forwarded by the learned Assistant Attorney General to the Commerce Division of the Federal Government, which shall be treated as applications under clause 21 of the Import Policy Order.

JUDGE

JUDGE

Karachi

Dated: 10 -09-2021