

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No. D – 5593 of 2019

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI.
MR. JUSTICE MAHMOOD A. KHAN.

M/s. Farid Asif Limited and another

Vs.

Federation of Pakistan & others

Petitioners through Mr. Omair Nisar, Advocate

Respondents through Mr. Khalid Mehmood Rajpar,
Advocate along with Ms. Zeba Azher,
Director (TT), Rahmatullah Vistro, Addl.
Director and Shahid Hassan Rizvi, Assistant
Director.

Federation: through Mr. Muhammad Ameenullah
Siddiqui, Assistant Attorney General a/w. S.
Muzammil Hussain, Entomologist,
Department of Plant Protection.

Date of Hearing: 06.12.2019.

Date of Order: 06.12.2019.

ORDER

Aqeel Ahmed Abbasi, J.: Through instant petition, the petitioners have expressed their grievance against the action of the Customs Authorities, whereby, consignment(s) of 262 containers containing sugar imported from India to be transported to Afghanistan under “**Afghanistan Pakistan Transit Trade Agreement 2010 (APTTA 2010)**” have been detained by the Customs Authorities, whereas, following relief(s) has been sought:-

- 1) *Declare that the Petitioners are entitled to delivery of the subject cargo comprising of 262 containers of sugar declared through GDs (detailed in Para 11 above) imported by it for transit to Afghanistan.*
- 2) *Declare that the actions of confiscation/detention of the subject consignments of 262 containers is absolutely illegal, unlawful, coram non-judice and untenable in the eyes of law.*
- 3) *Declare the Show Cause Notices issued under the Customs Act, 1969 for detention of the petitioner's cargoes of sugar comprising of 262 containers to be illegal, unlawful, null and void.*
- 4) *Direct the Respondents to immediately release the subject consignments comprising of 262 containers detailed in GDs mentioned in Para 11 above. The Respondents may also be directed to withdraw the subject notices issued by them.*
- 5) *Direct retesting of the subject consignments from at-least 03 prominent laboratories (for example HEJ, Inter-tek, SGS and PNRA) through the Nazir of this Honourable Court.*
- 6) *Issue Delay and Detention Certificates.*
- 7) *Restrain the Respondents from taking any action against the petitioners and/or their subject cargoes in light of the Show Cause Notices issued inter alia under the Customs Act, 1969.*
- 8) *Any other relief which this Hon'ble Court deems fit may also kindly be granted.*

2. Learned counsel for the petitioners has argued that petitioners through a contract, imported a consignments of sugar from India under APTTA 2010, which according to learned counsel, are fully compliant to the Afghanistan Pakistan Transit Trade Agreement 2010, and there has been no allegation of either misuse or violation of the APTTA 2010, or any allegation of pilferage by the petitioners in respect of such consignments. However, such consignments, comprising of 262 containers, have been intercepted and detained by the Customs Authorities without issuing any Show Cause or providing any material to justify such detention, on the allegation that sugar imported by the petitioners is not white crystal sugar, hence not fit for human consumption. It has been contended by the learned counsel for the petitioners that Customs Authorities have no jurisdiction in respect of subject consignments, which are admittedly covered under APTTA, 2010 and meant for Afghan Transit, whereas, petitioners have not filed any GD for home consumption or into bond, therefore, provisions of Customs Act, 1969 are not

attracted to the case of petitioners. Per learned counsel, there is no allegation in the Show Cause Notice to the effect that subject consignments were either de-routed or there has been any pilferage or there has been any attempt to unload, store or sell such sugar within the territorial limits of Pakistan. Learned counsel for the petitioners further submits that in order to justify illegal detention of the consignments of the petitioners, Customs Authorities have issued a Show Cause Notice, which besides having been issued without lawful jurisdiction, contains baseless allegations of misdeclaration, as according to learned counsel, there has been no misdeclaration of description, quantity or value, on the contrary, on the basis of some purported credible information, the entire consignments of petitioners have been detained. Per learned counsel, without prejudice to hereinabove legal defects, the Customs Authorities did not send the representative samples out of 262 containers, for the purposes of testing and verification of description and fitness for human consumption of the imported sugar, therefore, it was prayed by learned counsel that respondents may be directed to send the samples of sugar to some reputable Laboratories viz. HEJ, SGS or PCSIR for the purposes of testing and verification of the description its fitness for human consumption under the supervision of Nazir of this Court, as the petitioners are ready to deposit the Nazir fee as well as the sample testing charges. On 13.08.2019, while issuing notice of instant petition to the respondents as well as to the DAG, directions were issued to the respondents that request of the petitioners for sending the samples of imported sugar to some recognized reputable laboratories, including above said laboratories, shall be processed in accordance with law under the supervision of Nazir of this Court. Nazir fee was fixed tentatively @ Rs.100,000/- to be paid by the petitioners in advance along with cost of testing to be paid to the laboratory. On 10.10.2019, Nazir furnished reports from various laboratories, which were in sealed form, therefore, office was directed to de-seal the same and supply copy to the petitioners and respondents, which were duly supplied to both the parties, whereafter, objections were filed by Additional Director, Directorate General of Transit Trade with regard to methodology adopted while drawing samples. However, such objections were duly responded by the Nazir in detail, whereas, it was explained that 40 representative samples from

various containers plus one combined samples were drawn in the presence of all the parties, including Customs Authorities, who did not raised any objection and put their signatures on all the sealed samples accordingly. However, after perusal of the Nazir report and the test reports of SGS, HEJ and PCSIR Laboratories, it transpired that there was no specific finding given by the Laboratories except PCSIR, which was vague and not conclusive, relating to the fitness or otherwise of the sugar for human consumption, therefore, Nazir was directed to ask the concerned Laboratory to submit detailed report with regard to suitability of subject sugar for human consumption within seven days and to supply the advance copy of such report to learned counsel for the parties. At this juncture of proceedings, learned counsel for the petitioners vehemently argued that unnecessary delay is being caused by the Customs Authorities, which is causing financial losses to the petitioners at one hand, and there is likelihood that the shelve-life of the sugar will expire in the month of February, 2020. It was further argued by learned counsel for the petitioners that Customs Authorities have no jurisdiction or authority whatsoever to detain such consignments of the petitioners or to examine the quality of imported sugar, as it is duly covered under APTTA, 2010 and not be imported or used in Pakistan. Reliance in this regard was placed by the learned counsel for the petitioners in the case of *Federation of Pakistan through Secretary Ministry of Foreign Affairs and five others v. Jamaluddin and others (1996 SCMR 727)*. Learned counsel for the respondents were directed to come prepared and to assist the Court on the legal point raised by the petitioner relating to jurisdiction of Customs Authorities, on the next date of hearing. Thereafter, pursuant to Court's directions, Nazir has furnished reports of the aforesaid Laboratories, copies of which were supplied to the learned counsel for the parties. Perusal of the reports obtained from two Laboratories HEJ & SGS reflected that the samples drawn under the supervision of Nazir of this Court in the presence of the petitioners and the Customs Authorities are found to be **fit for human consumption**, therefore, the allegation of the Customs Authorities in this regard stood falsified, whereas, detention of sugar under the circumstances of this case was also found to be unjustified and without any factual and legal basis. Learned counsel for the petitioners vehemently argued that without prejudice to

the legal objection with regard to jurisdiction of the Customs Authorities in respect of consignments, which are meant to be transported to the Afghanistan under APTTA, 2010, petitioners in good faith, themselves have offered subject consignments to be sent to the Laboratory for testing purposes by incurring huge charges as the matter related to human health, whereas, all the reports are in favour of the claim of petitioners to the effect that there is no violation of Customs Act, Rules, APTTA, 2010 or the APTTA Rules, therefore, all actions, including detention, confiscation of the consignments of the petitioners by the Customs Authorities, may be declared to be without lawful jurisdiction and illegal, and the respondents may be directed to allow the subject consignments to be transported to Afghanistan under their supervision in accordance with law and relevant Rules under APTTA 2010.

3. While confronted with hereinabove factual and legal position and the submissions of the learned counsel for the petitioners, learned counsel for the respondents duly assisted by the officials of the Customs Department, including Director (TT), Additional Director and Assistant Director, Transit Trade, requested for further time to assist the Court on the subject controversy. Further opportunity was given to the learned counsel for the respondents and the officials present in Court and the matter was heard in three different occasions at their request, however, learned counsel for the respondents and the officials of the Customs Department could not satisfactorily submit any justification of detention and the confiscation of subject consignments nor could justify the issuance of Show Cause Notice to the petitioner alleging mis-declaration. However, reference to Article 22 of the APTTA 2010, sub-rule (5) & (6) of Rule 473, Sub-Chapter 2 of Importation of Afghan Transit Goods, 601, 604 of the Customs Rules, 2001. During the course of further arguments, Director (T.T), present in Court along with their counsel submitted that since sugar imported by the petitioners is a food item, therefore, it requires a Phytosanitary Certificate from the country of origin, whereas, in case of misdeclaration by the importers in the Goods Declaration or in the other import documents, then consignment can be sent for testing purpose as per Phytosanitary requirement to the Department of Plant Protection, Government of Pakistan. According to Director (T.T), since Pakistan and Afghanistan are signatories of

WHO and International Convention, therefore, in terms of Article 22 of APTTA 2010, contracting parties are bound by multilateral agreements signed under the umbrella of WHO, Food and Agricultural Organization and World Organization of Animal Health etc. to make inspection of goods crossing the borders and to ask for production Phytosanitary Certificate and Veterinary inspection by relevant department. Accordingly, learned Assistant Attorney General was directed to call some responsible officer from the Plant & Protection Department, Government of Pakistan, in order to assist the Court as to whether in respect of sugar imported by the petitioners, which is meant for Afghanistan under APTTA 2010, requirement of Phytosanitary Certificate is mandatory or not. Pursuant to Court's direction, Syed Muzammil Hussain, Entomologist, Department of Plant Protection, Government of Pakistan, has shown appearance, who was confronted with the submissions of both the learned counsel for the parties on the subject controversy and was asked to assist the Court as to whether as per Pakistani Law, the importer is required to obtain any Phytosanitary Certificate from the Department of Plant Protection, Government of Pakistan in respect of sugar, in response to which, the officer present in Court has candidly stated that under the Pakistani Law there is no requirement of obtaining any Phytosanitary Certificate from Plant Protection Department, Government of Pakistan, in respect processed goods, which includes the sugar imported by the petitioners to be transported to Afghanistan. It has been however, contended that some of the countries require Phytosanitary Certificate from the country of origin in respect of various food items, whereas, different countries determine their own standard for such purpose as there are no common standards settled to be applied in each contracting countries. It has however been contended by the officer present from the Department of Plant Protection that their Department does not issue any Phytosanitary Certificate relating to Aflatoxin level in respect of processed food items.

4. We have heard the learned counsel for the parties, perused the record with their assistance and have also gone through the relevant Provisions of Customs Act, 1969; Customs Rules, 2001; APTTA, 2010; and APTTA Rule as amended by SRO by the learned counsel for the parties during course of arguments. It is admitted position that the subject consignments containing 262 containers of sugar

are meant to be transported to Afghanistan under APTTA, 2010, whereas, no G.D. for home consumption or for into-bond has been filed by the petitioner in respect of any of the subject consignments. There has been no allegation to the effect that petitioners have attempted to either de-route, unload, store or sell the subject consignments containing sugar, within Pakistani territory, whereas, the only allegation as reflected from the Show Cause Notice issued by the Customs Authorities against the petitioners is that petitioners have made misdeclaration on the grounds that instead of white crystal sugar, petitioners have imported the sugar, which is distinct brown color and pungent order, therefore, there is reasonable doubt about the fitness of such sugar for human consumption. As per contents of Show Cause Notice, Customs Authorities sent the samples to the Customs Laboratory for the purposes of testing and to examine as to whether the imported sugar is suitable and fit for human consumption or not. Whereas, the Customs Laboratory opined that the samples of imported sugar are found to be dull white crystalline grey sugar, with unpleasant odor and soluble in water, hence unfit for human consumption. However, instead of giving conclusive opinion, Customs Laboratory also advised to seek further technical assistance from some other Laboratory as well. On the first date of hearing, learned counsel for the petitioner while challenging the jurisdiction of the Customs Authorities to intercept petitioner's cargo, which was meant to be transported to Afghanistan under Afghanistan Pakistan Transit Trade Agreement, 2010 (APTTA, 2010) contended that inspite of repeated requests by petitioners, the Customs Authorities are not sending the samples out of 262 containers to some reputable laboratory for the purposes of testing and verification of the description and its fitness for human consumption, therefore, request was made on behalf of the petitioners to send the samples to some reputable laboratory i.e. SGS, HEG or PCSIR under the supervision of Nazir of this Court as the petitioner are ready to deposit Nazir's fee as well as the testing charges. Accordingly, while issuing Notices to the respondents and to the learned DAG, respondents were directed to process the request of the petitioner for sending the representative samples of the imported sugar to some recognized reputable Laboratory, including aforesaid laboratories, under the supervision of Nazir of this Court. Pursuant to Court's directions,

representative samples were drawn in the presence of the Nominee of the petitioner and the Customs Authorities under the supervision of Nazir of this Court, which were sent to the aforesaid three laboratories, which submitted their reports in Court, however, except PCSIR no specific finding was given by the laboratories about the fitness of the subject consignment of sugar for human consumption, therefore, vide order dated 29.10.2019, Nazir was directed to ask the concerned laboratories to give specific report with regard to suitability and fitness of subject sugar for human consumption within seven days. Accordingly, SGS Laboratory vide letter dated 04.10.2019, opined that the submitted sample is considered as fit for human consumption, whereas, HEJ Laboratory vide letter dated 01.11.2019 also opined that the sugar sample sent for testing purposes is edible and fit for human consumption, it will be advantageous to reproduce the contents of both the report from the aforesaid Laboratories, which read as follows:-

“SGS

Sample # AGO-9323

Date: 4th October, 2019

To,

The Nazir
High court of Sindh

This is in response to the letter received with reference C.P.D-5593 of 2019.

With reference to report no 105180 reference AGO-9323. As requested further explanation/comments as follows:

In accordance with **Pakistan Standard Specifications [PS: 1822-2007 (3rd Rev)]** Submitted samples was found not in-conformance with the specification mentioned in table 1 requirement for refined sugar and white sugar, due to high results in SOLUTION COLOUR ICUMSA UNIT & CONDUCTIVITY ASH. There is no criteria advised in Pakistan Standard Specifications [PS: 1822-2007 (3rd Rev)] for fit for human consumption.

In accordance with **Apendix “A” to IFIA Agricultural Committee Bulletin 11-01 Rev 4 (September 2017) MINIMUM TESTING REQUIREMENTS FOR “FIT FOR HIMAN CONSUMPTION” STATEMENTS**, The submitted sample tested for sulphurdioxide and heavy metals as per the limits mentioned in PS:1822-2007 (3rd Rev) as IFIA does not recommend the limits. Results for sulphur dioxide, Arsenic, copper & lead found within the mentioned limits. **Therefore, the submitted sample is considered as fit for human consumption.**

Thanks and Best Regards
Agriculture, Food and Life
SGS Pakistan (Private) Limited
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“INDUSTRIAL ANALYTICAL CENTRE

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Located at the Campus of
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Dr. Shakil Ahmed,
Ph.D

Senior Research Officer
Technical Manager.

Ref : IAC/TR/L/12503

Date: 01.11.2019

Honorable The Nazir
High Court of Sindh
at Karachi.

Subject: **C.P.D-5593 OF 2019**

This is with reference to your letter regarding above mentioned subject, the given sample was analyzed by following the International Commission for Uniform Methods of Sugar Analysis (ISUMSA) methods and results were compared with Pakistan Standard Specification for refined sugar and white sugar (3rd Rev.) (PS:1822-2007), the polarization, invert sugar and color of the analyzed sample is not compliance with the Pakistan Standard Specification of white & refined sugar, therefore the given sample is not compliance with white and refined sugar. However, according to International Federation of Inspection Agencies (IFIA), the sugar is considered as fit for human consumption with respect to the

results of heavy metals contaminants (Pb, Cd, Hg, As, Cu, Fe and Zn) and Sulphur dioxide, when results lies within the specified limits of standards. **Therefore, in accordance to IFIA the sugar sample tested by HEJ is edible and fit for human consumption. We hope that the above clarification will help you to proceed further.**

Best Regards,

Sd/-

Dr. Shakil Ahmed”

While having received the aforesaid reports, Customs Authorities raised an objection with regard to methodology of taking samples and submitted that sample from each bag out of 260 containers, should have been taken, instead of sending representative samples, however, such objection was duly responded by the Nazir of this Court, who has stated in his report that forty (40) representative samples were drawn from different containers marked for such purpose in presence of the Customs Authorities and the representative of the petitioners, which were duly sealed and signed by the Customs officials, whereas, in addition to forty (40) samples, a composite sample was also drawn, which were all sent for testing purpose to the aforesaid three laboratories, whereas, no objection whatsoever was raised by the Customs Authorities at the time of drawing, sealing and sending such samples to the Laboratories as per directions of the Court. It is pertinent to mention that on various dates of hearing, particularly, after having received the above reports from recognized Laboratories with regard to fitness of the sugar for human consumption, learned counsel for the respondents were confronted to assist as to whether, under the Customs Act, 1969, Customs Rules, 2001, or under Afghanistan Pakistan Transit Trade Agreement, 2010, read with Afghanistan Pakistan Transit Trade Rules as per SRO 601(i)/2011 dated 13.06.2011, is there any provision, which authorizes the Customs Authorities to intercept such consignment under Afghan Transit Scheme, unless there is any violation of APTTA, 2010 and Afghanistan Pakistan Transit Trade Rules as amended through SRO 601(I)/2011 dated 13.06.2011, however, learned counsel for the respondent could not submit any satisfactorily response, and requested for further time to call

the concerned Director Transit Trade to provide further assistance in this regard. Accordingly, in order to provide complete opportunity to the respondents, the Director Transit Trade was also heard at length, however, could not point out any relevant provision of the Customs Act, 1969, Customs Rules 2001, APTTA 2010 or Afghanistan Pakistan Transit Trade Rules as per SRO 601(i)/2011 dated 13.06.2011, which could authorize the Customs Authorities to intercept any consignment meant to be transported to Afghanistan under APTTA 2010, unless, there is any violation of Afghan Transit Scheme or an attempt by the importer to either de-route, unload, store or sold such consignment within Pakistani territory. However, it has been argued that since Pakistan is the signatory of International Conventions, WTO, SPS and TBT Agreement etc., which according to her, explains the application and requirement of sanitary and phytosanitary measures to be adopted by all the members states, whereas, as per Article 22 of the APTTA 2010, there is a requirement of phytosanitary and veterinary inspection, therefore, such examination and inspection was made by the Customs Authorities to ensure compliance of Article 22 of the APTTA 2010. Such contention of the concerned Director was vehemently disputed by the learned counsel for the petitioners, who submitted that requirement of Phytosanitary Certificate is only attracted in the case of plant related products and unprocessed items only, whereas, according to learned counsel, there is no requirement of such certificate in respect of duly processed sugar imported by the petitioner for Afghanistan. In order to examine this objection on behalf of the Customs Authorities, learned Assistant Attorney General vide order dated 27.11.2019 was directed to call some responsible officer from the Department of Plant and Protection, Government of Pakistan, to assist the Court as to whether in respect of sugar imported by the petitioner, which is meant for transit to Afghanistan, requirement of Phytosanitary Certificate is mandatory or not.

5. Pursuant to Court's Notice, one Syed Muzammil Hussain, Entomologist, Department of Plant Protection, Government of Pakistan, appeared in Court, who was confronted in detail with the subject controversy and was required to assist the Court relating to requirement Phytosanitary Certificate in respect of processed sugar. The officer present in Court, has candidly submitted that there is no

requirement of Phytosanitary Certificate in respect of processed items, which included the subject consignment of sugar imported by the petitioner. It has been further contended by the officer that even in the case of such consignment if imported into Pakistan, there is no requirement of obtaining Phytosanitary Certificate from the department of Plant Protection, Government of Pakistan.

6. From detailed scrutiny of hereinabove facts and after examination of the relevant provisions of Customs Act, 1969, Customs Rules, 2001, Afghanistan Pakistan Transit Trade Agreement, 2010 (APTTA 2010) and Afghanistan Pakistan Transit Trade Rules as per SRO 601(I)/2011 dated 13.06.2011, it has emerged that the sugar imported by the petitioner under APTTA 2010, which is meant to be transported to Afghanistan is a processed edible item, which does not require a Phytosanitary Certificate under the Plant Protection Act 2000, which fact has been duly confirmed by the concerned official i.e. Syed Muzammil Hussain, Entomologist, Department of Plant Protection, Government of Pakistan. Therefore, reference to Article 22 of APTTA 2010, by the Customs Authorities to this effect is otherwise misconceived and not relevant to the facts of instant case. Similarly, the allegation of misdeclaration in the Show Cause Notice issued by the Customs Authorities to the petitioners on the basis of some purported credible information to the effect that the goods in the subject consignments are contrary to the declaration, and the examination by Customs Authorities observing that the sugar imported by the petitioners is not the white crystal sugar and the same is brownish crystal sugar, therefore, not fit for human consumption, besides being unwarranted under the Customs Act, 1969, Customs Rules, 2001, APTTA 2010 and Afghanistan Pakistan Transit Trade Rules, otherwise stands falsified in view of the Laboratory reports received from two independent Laboratories in the instant case, according to which, subject sugar is edible and fit for human consumption. It is pertinent to note that Customs Authorities have failed to point out any violation of the Customs Act, 1969, Customs Rules 2001, APTTA 2010 and Afghanistan Pakistan Transit Trade Rules, nor there has been any allegation that there has been an attempt by the petitioners to either de-route, unload, store or sell the sugar within the Pakistani territory. Nothing has been placed on record relating to the

purported credible information of mis-declaration in the description of goods, nor due care has been exercised by the Customs Authorities while intercepting the subject consignment meant to be transported to Afghanistan in terms of Rule 607 of Afghanistan Pakistan Transit Trade Rules, which provides **“that the Customs authorities shall refrain from routine physical examination of the transport unit and transit goods while on the way from port of entry to port of exit unless an irregularity is suspected in view of explicit tampering of seals or locks of the transport unit or some reliable specific intelligence information.”**

It is equally important to refer to Rule 604 of Afghanistan Pakistan Transit Trade Rules relating to examination of goods, which provides that the examination of the transit goods can be made to ascertain its nature, origin, condition, quantity and value with reference to the declarations made in this regard in the transit documents filed with the Customs, however, it does not authorize an officer of the Customs to make scrutiny of the quality of the goods as well in a routine manner, in the absence of any specific violation of Customs Act, 1969, Customs Rules, 2001, APTTA 2010, as it is the propogative of the importing country i.e. Customs Authorities of Afghanistan at Afghanistan in the instant case. The Hon'ble Supreme Court of Pakistan in the case of ***Federation of Pakistan through Secretary, Ministry of Foreign Affairs, Government of Pakistan, Islamabad and 5 others V. Jamaluddin and others (1996 SCMR 727)***, while examining the scope and jurisdiction of the Customs Authorities in respect of consignment covered under the Afghanistan Pakistan Transit Trade Agreement, has been pleased to hold as under:-

“9. From the afore-noted resume of the factual background and the respective contentions raised by the learned Deputy Attorney-General and the learned counsel appearing for the respondent-importer, the question which arises for consideration is whether the C.B.R. and/or the Collector of Customs could lawfully ban/disallow import of tyres by Afghan nationals under the Afghan Transit Trade Agreement and refuse the facility of transit through the territory of Pakistan in respect of such tyres during the subsistence of the said Agreement: This question when examined on a purely legal and jurisdictional plan, its answer is bound to be in the negative. We quite agree with the view taken by the learned Judges of the High Court that keeping in view the background of the Transit Agreement and the fact that Afghanistan is a land-locked country,

the goods imported by Afghan nationals from other countries for use and consumption in Afghanistan could not be said to- have been imported into Pakistan merely because they crossed the Custom barrier and entered into Pakistan, through to be transited to their destination viz Afghanistan. Such goods, in fact, are goods in transit to be dealt with and transhipped to Afghanistan in accordance with the Transit Agreement and the Protocol appended thereto Customs law relating to the importation would not, therefore, be applicable to them. Assuming, however, for the sake of argument that such goods could be construed to have been imported into Pakistan under the Customs Act and that section 16 of the said Act could be invoked which gives power to prohibit or restrict the importation and exportation of goods (though in the earlier round of litigation, both the parties had conceded in this Court that section 16 of the Customs Act was not applicable to the present case and the cases of goods in transit were governed by section 129 of the said Act), still the impugned orders/letters could not be clothed with lawful authority for two reasons. Firstly, the power under section 16 was conferred on the Federal Government which could not be exercised by subordinate authorities like Collector of Customs who in the instant case had issued the impugned public notice purporting to impose the ban on the import of tyres and secondly the power was to be exercised by a Notification in the official Gazette which requirement was not complied with in the present case.

10. *Looked at from yet. another angle, the Customs Authorities had no jurisdiction in the matter at all. They could neither ban the import of the goods in question nor refuse to allow them to be transited to their destination. Under the Rules of Business, 1973 made in exercise of the powers conferred by the Constitution, business regarding the import and export across Customs frontiers including treaties, agreements, protocols and conventions with other countries and international agencies bearing on trade and commerce and the Transit Trade has been allocated to the Ministry of Commerce, which has exclusive jurisdiction in such matters. The goods in question were undoubtedly goods in Transit and, therefore, to deal with them was the exclusive function of the Commerce Ministry. It is significant that the Afghan Transit Trade Agreement was concluded by the Government of Pakistan through this Ministry and it was signed by the then Minister of Commerce on behalf of the Government of Pakistan. That being so, only the Ministry of Commerce, Government of Pakistan could take appropriate action and that, too, in terms of the Transit Agreement to prevent the alleged smuggling back of the tyres into Pakistan. Needless to observe that the import of goods covered by the Transit Agreement cannot possibly be prohibited unilaterally even by the Government of Pakistan by passing an order under section 3 (1) of the Imports and Exports (Control)*

Act XXXIX of 1950 which empowers the Federal Government to prohibit; restrict or otherwise control the import and export of goods. In fact, as rightly pointed out by the learned counsel for the respondent/importer, the Notification, dated 29th June, 1988 issued by the Ministry of Commerce (Import Trade Control) under section 3 (1) of the said Act, prohibiting the import of certain goods specified in Schedule II thereof made an exception for the goods in transshipment to a country outside Pakistan/the goods in transit to Afghanistan. The impugned letters dated 14-1-1989 and 19-12-1989 and the subsequent public notice dated 23-7-1990 are ex facie repugnant to the aforementioned Notification, dated 29th June, 1988.

11.

We are not persuaded to accept this contention because the words used in Article X of the Transit Agreement are "for the security of its own territory" which can by no stretch of reasoning or logic be construed as economic security of the country. Territorial security/integrity has a definite connotation which could not be said to have been jeopardized/threatened by the alleged smuggling of tyres into Pakistan. The problem of smuggling could well be solved by adopting and enforcing strict and effective anti-smuggling measures. The learned Judges of the High Court were right in repelling the contention of the appellants with the observation, "If the grievance of the respondents was, as it seems to have been, that the tyres and tubes after entering into Afghanistan illegally re-entered into Pakistan and are mixed up with mass of other tyres and tubes, then other remedies might be open to the respondents". In our considered view, the alleged smuggling of the tyres into Pakistan could not furnish any valid justification to the appellants to unilaterally take away the facility of transit or to impose any restriction on the duty-free import itself which was guaranteed by the Transit Agreement. Customs Authorities should have proceeded under Article VIII of the Transit Agreement or recourse should have been taken to the machinery provided under Article XII of the Agreement which provides for negotiation and in the event of failure of negotiations, to refer the matter to an arbitrator acceptable to both the parties whose decision would be binding on them. Failing to find any solution through this mechanism, the Government of Pakistan could terminate the Transit Agreement which is terminable at the instance of either party at any time after giving six months' notice of termination and re-negotiate fresh terms of the Transit Agreement. In fact, during the course of hearing, we were informed that the meetings between the parties were already being held and the parleys were in progress for re-negotiating/re-drafting the Transit Agreement. This appears to be the only

lawful and reasonable course in the facts and circumstances of the case. Needless to observe that so long as the Afghan Transit Trade Agreement of the year 1965 is subsisting, the appellants had no option but to allow the goods in transit to be transited to Afghanistan in accordance with the terms of the said Agreement and the procedure laid down in the Protocol and the Annex appended therewith. Section 129 of the Customs Act also requires the Customs Authorities to allow the goods in transit to be transmitted to the country of their destination without payment of any duties which are otherwise chargeable thereon. We have not been shown any provision in the Customs Export Transit Rules to show that the Customs Authorities had any jurisdiction to impose ban on the import of goods intended to be transited to another country across the territory of Pakistan or to refuse to allow the transit of such goods to that country.”

7. In view of hereinabove facts and circumstances of the case, vide our short order dated 06.12.2019, instant petition was allowed in the following terms:-

“ For the reasons to be recorded later on, instant petition is allowed. Respondents are directed to ensure safe transit of the subject consignment(s) of the petitioners to Afghanistan Border in accordance with law, whereas, request of the petitioner for issuance of delay detention certificate shall be considered in accordance with law. It is expected that such exercise will be completed within a period of fifteen days from the date of this order.”

8. Above are the reasons for such short order as referred to hereinabove.

9. Before parting with the order, we may observe that Customs Authorities may share the information or the material so gathered in respect of subject consignment of sugar with Customs Authorities at Afghanistan to ensure compliance of multilateral agreements or the Conventions, to discharge their obligation, if any, in this regard. However, it shall be ensured that subject consignment of sugar shall be transported to Afghanistan under their supervision as per APTTA, 2010 and the relevant rules, and shall not be permitted to be smuggled into Pakistan.

JUDGE

Dated: .12.2019

JUDGE