

IN THE HIGH COURT OF SINDH, KARACHI
C.P. No.D-7112 of 2016

Date	Order with signature of Judge
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Priority.

1. For orders on Misc. No.8688 /2019.
2. For hearing of Misc. No.33976/2016.
3. For hearing of Main Case.

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Arshad Hussain Khan

26-03-2019

Mr. Muhammad Adnan Moton, advocate for the petitioner
a/w Obaydullah Mirza, advocate.
Ms. Masooda Siraj, advocate for respondents No.3 & 4.
Sardar Muhammad Ishaque, advocate for respondent No.2.
Ms. Lubna Pervaiz, DAG.

O R D E R

Through instant petition, the petitioner has impugned the attachment of petitioner's moveable property (three vehicles) as well as bank account(s) vide Notices dated 14.11.2016 and 21.11.2016 respectively, for the recovery of an amount of Rs.74,95,594/- for being illegal and without lawful authority, as according to learned counsel, neither any reference to the Order-in-Original pursuant to which, the impugned demand was created, nor petitioner has been provided any opportunity of being heard before issuance of such Notices. It has been contended by the learned counsel for the petitioner that an Order-in-Original No.95/2012 dated 07.05.2012 has been passed by the Additional Collector Adjudication, MCC (PaCCS), Custom House, Karachi, against which order, the petitioner filed an appeal before the Collector of Customs (Appeals) on 22.05.2012 along with all the relevant documents, including the paid challan, and thereafter, an urgent application along with stay application against recovery of the impugned demand was also filed before the Collector of Customs (Appeals) on 21.11.2016. However, neither appeal of the petitioner has been heard or decided, nor the application for stay has been decided so far, therefore, the impugned demand, which is subject matter of appeal, could not otherwise be recovered by

adopting coercive measure i.e. attachment of property and bank accounts of the petitioner.

2. Notice of instant petition was issued to the respondents, who have filed their parawise comments, whereas, comments have also been filed on behalf of Collector of Customs (Appeals), wherein, it has been acknowledged that petitioner filed an appeal against the aforesaid Order-in-Original on 22.05.2012, however, according to learned counsel for the respondents, such appeal was returned to the petitioner vide letter dated 28.06.2012, as during scrutiny, it was found that fee challan of Rs.1000/- was not accompanied along with memo of appeal by the petitioner before the Collector of Customs (Appeals). In support of her contention, learned counsel for the respondents has referred to Dispatch Register of the Collector of Customs (Appeals) and copy of outward register at Sr. No.1486. Such factual position has been seriously disputed by petitioner who has filed Affidavit-in-Rejoinder to this effect, whereas, it has been stated that the petitioner was never served with aforesaid letter nor there has been any acknowledgement of service of such letter. It has been contended by the learned counsel for the petitioner that if the appeal of the petitioner was not accompanied with requisite documents, including fee challan of Rs.1000/-, the appeal would not have been received, whereas, deficiency, if any, would have been pointed out on the same date of presentation of appeal, whereas, the appeal of the petitioner was duly received in the office of Collector of Customs (Appeals), Karachi, without any objection or pointing out any deficiency therein. Learned counsel for the petitioner has referred to the index of appeal, which includes as Annexures, memo of appeal, copy of impugned Order-in-Original No.95/2012 dated 17.05.2012, copy of Show Cause Notices, copy of contravention report dated 16.07.2011, Vakalatnama and original paid challan, and submits that appeal has been duly received in the office of Collector Customs (Appeals) under acknowledgement stamp and signatures of the concerned officer, which fact has not been disputed by respondents. Learned counsel further submits that

without prejudice to hereinabove factual position, the respondents could not otherwise, simply return the memo of appeal to the petitioner on the ground of some deficiency in documents, and instead, an opportunity should have been provided to the petitioner to rectify the deficiency, if any, which has not been done in the instant case, on the contrary, to justify illegal recovery a letter of return of appeal, which is not even signed by the concerned officer and is merely an office copy. It has been prayed that recovery against petitioner through attachment notices may be declared to be illegal. In support of his contention, learned counsel for the petitioner has placed reliance in the case of **Abdul Ghaffar v. Customs Appellate Tribunals and 2 others (2017 PTD 446)**.

3. We have heard the learned counsel for the parties, perused the record with their assistance and have also gone through the judgment relied by the learned counsel for the petitioner. It will be advantageous to reproduce the relevant findings as recorded in paragraph 5 of the aforesaid judgment:-

“5. We have heard the learned counsel for the parties, perused the impugned order passed by the Customs Appellate Tribunal and examined the case record, which reflects that the appeal filed by the applicant before the Customs Appellate Tribunal was deficient to the extent that the applicant could not file the certified copy of Order-in-Original along with memo of appeal, however, record shows that no objection was raised by the Registrar while accepting such memo of appeal nor it appears that any opportunity was given to the applicant by the Customs Appellate Tribunal at the time of hearing the appeal to make out such deficiency, whereas, the appeal filed by the applicant has been dismissed on this account alone. It will be relevant to refer to provision of clause (d) of sub-rule (3) of Rule 5 of Customs, Excise and Sales Tax Appellate Tribunal (Procedure) Rules, 2006, which reads as follows:--

‘5(3)

(d) to point out defects in such appeals and applications to the appellants or applicants requiring them to rectify the mistakes by affording them a week’s time and, if the defects are not rectified within the given time, to obtain the order of the Bench for the return of the appeals or applications, as the case may be to the appellants or applicants.’

Above rules clearly requires the Registrar Appellate Tribunal to point the defects and allow the appellant to rectify the same, however, in the instant case, no such exercise has been undertaken by the office of Registrar. It will be equally relevant to refer to provisions of Rule 12(3) which reads as follows:-

***'12(3)** The Tribunal may keeping in view the circumstances of the appeal, accept a memorandum of appeal, which is not accompanied by all, or any of the documents referred to in these rules.'*

Above rules clearly provides that Appellate Tribunal has the authority to accept the memorandum of appeal, which is not accompanied by all or any of the documents referred to in these rules, however, it appears that the Customs Appellate Tribunal by ignoring such authority vested in it in terms of above rule, has dismissed the appeal in a cursory manner without assigning any reason as to why such discretion could not be exercised in favour of the applicant. More particularly, when the appeal was filed in time and was also accompanied with all the relevant documents, except the certified copy of Order-in-Original. It further appears that the applicant has not been given an opportunity to explain his position and to make out such deficiency, on the contrary appeal has been dismissed on this account alone, instead of being disposed of on merits. In view of hereinabove facts and circumstances of the case, the impugned order is hereby set-aside and the matter is remanded back to the Customs Appellate Tribunal to decide the appeal of the applicant on merits, after providing opportunity of being heard. It may be clarified that the aforesaid appeal shall stand restored, and shall be decided, preferably, within a period of two months from the date of receipt of this order."

4. Keeping in view the ratio of above cited judgment, and while examining the facts and circumstances of the instant case, it appears that petitioner has discharged the burden of proof to show that an appeal was filed on 22.05.2012 under acknowledgment before the Collector of Customs (Appeals) against the Order-in-Original, along with its annexures, as shown in the index. Whereas, no objection was raised from the office of Collector (Appeals) regarding any deficiency or short document. Respondents have not been able to show that such appeal was returned to the petitioner vide letter dated 28.06.2012, as nothing has been produced by respondents to show that such letter was ever served upon the

petitioner. The office copy of letter dated 28.06.2012 filed alongwith comments does not contain any acknowledgement of receipt by the petitioner or his counsel nor there is any endorsement on the dispatch register to this effect, which could support the version of respondents relating to return of the appeal to the petitioner. Moreover, we are of the considered opinion that in case of any deficiency of documents relating to appeal filed before the Collector of Customs (Appeals), the same could have been pointed out on the same date, when such appeal was being presented in the office of Collector of Customs (Appeals), or could have been pointed out at a subsequent stage, within a reasonable time, however, before expiry of such period as may be available to the appellant, so that such deficiency, if any, could be removed within the stipulated period, instead of returning the appeal to the petitioner. In the afore cited case, this Court has examined this aspect of the matter, and has decided that an opportunity should have been provided to make out the deficiency, if any, and the appeal should have been decided on merits. Accordingly, we hold that under the above facts and circumstances of the instant case, the appeal of the petitioner is still pending before the Collector of Customs (Appeals), whereas, attachment proceedings initiated by the Customs Authorities, without providing opportunity of being heard to the petitioner or without deciding the appeal of the petitioner on merits, are without lawful authority, therefore, the attachment Notices issued to the petitioner are hereby set-aside.

5. Collector of Customs (Appeals), Karachi, is directed to decide the appeal of the petitioner on merits after providing opportunity of being heard to the petitioner, preferably, within a period of two months from the date of receipt of this order, which shall be communicated by the petitioner to the Collector of Customs (Appeals) within seven days'. However, if the record of appeal is not available in the office of Collector of Customs (Appeals), Karachi, petitioner is directed to supply the requisite memo of appeal along with annexures, to the Collector of Customs (Appeals), Karachi, within seven days, whereafter, appeal of the

petitioner shall be decided on merits, however, after providing opportunity of being heard to both the parties. However, till decision either on the stay application or on the main appeal, whichever is earlier, respondents shall not enforce recovery of impugned demand subject matter of appeal before Collector of Customs (Appeals).

Petition stands disposed of in the above terms along with listed applications.

JUDGE

JUDGE

NADEEM HUSSAIN