

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.213 of 2022

Muhammad Hasan Nadeem & three others.....Applicants

Vs.

Collector of Customs (Adjudication-II) and two othersRespondents.

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Zulfiqar Ahmad Khan

Dates of hearing : 19.10.2022, 03.11.2022, 24.11.2022,
19.12.2022, 21.12.2022, 06.03.2023 and
13.03.2023.

For the applicants : Khawaja Shams-ul-Islam, Advocate.

For the respondents No.1&2 : Mr. Saad Fayyaz Memon, Advocate.

Respondent No.3 : A proforma party.
Customs Appellate Tribunal Bench-1

J U D G M E N T

IRFAN SAADAT KHAN, J. The instant Special Customs Reference Application (SCRA) has been filed against the order passed by the Customs Appellate Tribunal (CAT) in Customs Appeal No.K-7484/2021 dated 22.03.2022. Though a number of questions were raised in the instant SCRA, however, vide order dated 20.05.2022, only the following questions of law were admitted for consideration:

- i) *Whether on the facts and circumstances of the case the applicants have truly discharged their burden under Section 187 of the Customs Act, 1969 by placing all the record i.e. paid challan, GDs, sales tax invoices which fact was neither denied by the official respondents in the reply before the learned Division Bench nor even subject matter of*

the show cause notice inasmuch as the Hon'ble Division bench of this Hon'ble Court has already held that the applicants have discharged their onus in terms of Section 187 of the Customs Act, 1969? [Question No.ii of the SCRA]

- ii) Whether the show cause notice dated 4.12.2020 is time barred as the search and seizure was conducted on 1st /2nd October 2020 and show cause notice has been issued after lapse of two months? [Question No.v of the SCRA]*
- iii) Whether the impugned Order-in-Original No.07/2020-2021 dated 13.7.2021 passed by respondent No.1 is illegal, void ab initio, in violation of the mandatory provisions of time limit contained in Section 179(3) of Customs Act, 1969 and violative of the Hon'ble Supreme Court of Pakistan reported in 2019 SCMR 1735 as well as 2017 SCMR 1427? [Question No.vi of the SCRA]*
- iv) Whether the learned Tribunal has failed to appreciate that the learned Division Bench of this Hon'ble Court has already declared that the official respondent No.2 has no territorial jurisdiction to conduct raid at the factory premises of the applicants as no any notification in terms of Sections 9 and 10 of the Customs Act, 1969 has been issued till today exceeding territorial jurisdiction? [Question No.vii of the SCRA]*

2. Briefly stated, the facts of the case are that the applicants are engaged in dealing with unstitched cloth imported from abroad and purchased from different parts of the country. The said goods are stored in the godown of the applicants situated at Plot No.31/1, Sector 12-D, Township North Industrial Area, opposite Ghazi Food Centre, Karachi. That the respondent received spy information that unpaid custom duty cloth has been stored at the above referred godown. A team of customs officials then conducted a raid in the night of 1st and 2nd October 2020 at the godown and took away the goods lying there to their warehouse at Kemari. As per the customs officials since nobody was present at the time of raid at the said godown hence the goods were taken away and the godown was sealed. The customs officials then prepared mushirnamas of the goods at the spot. As per the respondents the seized goods were smuggled and were liable for

confiscation under the various provisions of Customs Act, 1969 (**the Act**). On 2nd October the officials of the customs once again visited the godown and took away the left over goods lying at the warehouse; however on 4th October the said godown was de-sealed. The respondents then lodged FIR bearing No.ASO-448/2020(HQ) on 05.10.2020. The applicants obtained bail in respect of the FIR. In the meantime the applicants filed Constitutional Petition bearing No.D-4965 of 2020 claiming that the action of the respondents was illegal. Notices were issued in the said petition and thereafter vide order dated 22.10.2020 the matter was disposed of by observing that the seizure conducted by the customs officials was dissonant with the law and was violative of the customs laws and directed the respondents to return the goods within seven days' time, however directed the applicants to face criminal cases in accordance with law. The customs authorities then issued Show Cause Notice (**SCN**) to the applicants which was duly responded. The Collector Adjudication then passed Order-in-Original (**ONO**) No.07/2020-21, dated 13.07.2021. An appeal thereafter was filed before the CAT, which appeal was dismissed and it is against this order that the present SCRA has been filed.

3. Khawaja Shams-ul-Islam Advocate has appeared on behalf of the applicants and stated that the action of the customs authorities in raiding the godown and seizing the goods is wholly illegal and uncalled for, as the imported goods lying at the godown were duty paid and proper sales tax has been paid on the goods imported from upcountry. He stated that complete record of the same has been

furnished to the Collector Adjudication but the same was not considered and even the CAT has not considered the various documents available on the record in this regard. The learned counsel stated that the goods were imported through proper GDs and their descriptions were duly given to the Collector Adjudication as well as to the CAT and all these goods were out of charge, as proper customs duty and taxes were paid by the applicants at the import stage which was duly assessed by the customs authorities in accordance with law. He stated that no notice, as required under the law, was issued by the customs authorities before conducting the raid. He stated that though it has been averred by the customs authorities that nobody was present at the godown at the time of raid but in fact the Chowkidars of the godown were there who were kept under habeas corpus. He next stated that a comprehensive reply was given in response to the SCN issued by the customs authorities but the department has simply brushed aside the same and has passed a totally illegal ONO, which without proper application of mind incorrectly and illegally was affirmed by the CAT. He stated that the allegation of the department that the goods were smuggled and the provisions of Section 2(s) of the Act were applicable is uncalled for as, according to him, the goods were properly duty paid out of charge goods and so far as locally purchased goods are concerned proper sales tax was paid on these as well. He, therefore, finally prayed that since the ONO and the order of the CAT are wholly illegal and uncalled for, the same therefore may be set aside by answering the questions raised in the instant SCRA in favour of the applicants and against the respondents. The learned

counsel in support of his above contentions has relied upon the following judgments:

- i) *Messrs Mujahid Soap and Chemical Industries (Pvt.) Ltd. Vs. Customs Appellate Tribunal, Bench-I, Islamabad and others (2019 SCMR 1735)*
- ii) *Abbasi Enterprises Unilever Distributor, Haripur and another Vs. Collector of Sales Tax and Federal Excise, Peshawar and others (2019 SCMR 1989)*
- iii) *The Collector of Sales Tax, Gujranwala and others Vs. Messrs Super Asia Mohammad Din and Sons and others (2017 SCMR 1427)*
- iv) *The Collector Central Excise and Land Customs and others Vs. Rahim Din (1987 SCMR 1840)*
- v) *Messrs A.J. Traders through Proprietor Vs. Collector of Customs (Adjudication) Islamabad and others (PLD 2022 Supreme Court 817)*
- vi) *Federation of Pakistan through Secretary Finance, Islamabad and another Vs. E-Movers (Pvt.) Limited and another (2022 SCMR 1021)*
- vii) *Rasheed Ahmad Vs. Federation of Pakistan through Secretary, Ministry of Information, Broadcasting and National Heritage, Government of Pakistan, Islamabad and others (PLD 2017 Supreme Court 121)*
- viii) *Nestle Pakistan Limited & others Vs. Federal Board of Revenue & others (SBLR 2023 Sindh 211)*
- ix) *The Collector of Customs and others Vs. Zeeshan and others (2022 PTD 1330)*
- x) *Messrs Zakwan Steel and others Vs. The Federation of Pakistan through Secretary (Revenue/Chairman) and others (2023 PTD 9)*
- xi) *The Collector of Customs (Enforcement) Customs House, Karachi and others Vs. Hassan Trading Company and others (2023 PTD 51)*
- xii) *Messrs Sun Diplomatic Bonded Warehouse (Pvt.) Ltd. Vs. Customs Appellate Tribunal, Bench I, Islamabad and 2 others (2023 PTD 206)*
- xiii) *Collector of Customs Vs. M/s. Al-Karam Trading in SCRA No.218 6/2015 & others (PTCL 2021 CL. 400)*
- xiv) *Khan Trading Company, Gujranwala Vs. Collector of Customs, Excise & Sales Tax (Adjudication), Lahore (PTCL 2001 CL. 615)*
- xv) *M/s. Power Links Vs. Directorate General of Intelligence and Investigation, F.B.R. and another (PTCL 2014 CL. 480)*

- xvi) *Collector of Customs through Additional Collector of Customs through Additional Collector of Customs Vs. Ms. Shazia Aman (2022 PTD 674)*
- xvii) *Messrs Popular Juice Industries (Pvt.) Ltd. through Authorized Officer and 6 others Vs. Federation of Pakistan through Chairman Federal Board of Revenue and 3 others (2021 PTD 1329)*
- xviii) *Collector of Customs (Preventive) and 2 others Vs. Muhammad Mahfooz (PLD 1991 Supreme Court 630)*
- xix) *M/s. Micro Innovations and Technologies (Pvt.) Ltd., Vs. Federation of Pakistan and others (decision of this Court in CP No.D-2890 of 2020)*

4. Mr. Saad Fayyaz Memon Advocate has appeared on behalf of the respondents and has vehemently refuted the arguments of Khawaja Shams-ul-Islam and stated that no question of law is arising out of the order of the CAT, as it has passed the order on the basis of facts obtaining in the matter. He stated that the raid was conducted on the basis of concrete information and all the ingredients, parameters and legal formalities prior to the said raid were complied with and fulfilled. He stated that since there was nobody at the time of raid, mushirnama of recovery, mushirnama of shifting along with mushirnama of examination were prepared at the spot and after fulfilling all the legal and codal formalities the goods were shifted to the customs warehouse. He stated that since there was nobody to receive the notice, under Section 165 of the Act, the same was displayed at the notice board and pasted at the gate of the warehouse. The learned counsel admitted that the High Court vide judgment dated 22.12.2020 has issued certain directions to the customs authorities and that proper SCN was given in the adjudication proceedings and after receiving the reply and reproducing it ONO was passed wherein detailed discussion with regard to the confiscation of the goods and

imposition of penalties are given. He stated that the CAT, which is the last fact finding authority, after hearing the case at length, did not find any force in the submissions of the learned counsel for the applicants and has quite rightly affirmed the ONO.

5. The learned counsel stated that the allegation of Mr. Shams that the SCN was time barred is incorrect as according to him as per Section 168 of the Act the said limitation does not apply to smuggled goods. He also relied upon SRO 499(1)/2009 in support of his claim. He next stated that since the said SCN was not time barred, therefore, the assertion of the learned counsel for the applicants is misplaced and the decisions relied upon by him in this regard do not support his contention. The learned counsel further submitted that even if for arguments' sake if it is assumed that the SCN was time barred, it may be noted that the time prescribed for passing an order for issuing SCN is only directory in nature and not mandatory. He stated that the case of the applicants falls under Section 179(3) of the Act, hence in the present matter the stance taken with regard to limitation does not apply since this is a case of smuggled goods. He stated that reading one provision of law should not be made in such a way that it would either oust or make redundant other provisions of the law. He stated that the provision of Section 168(2) of the Act has to be read with Section 173 of the Act. The learned counsel next stated that the applicants have failed to discharge the burden of proof, as required under Section 187 of the Act, as upon physical verification of the goods they were found to be smuggled and different from the goods declared in the GDs, which were duly noted by the CAT. He next

stated that the applicants have miserably failed to substantiate their claim with regard to payment of sales tax with proper sales tax returns, statement of accounts etc. He stated that complete discussion on this aspect is available in the ONO, which according to him had remained unrebutted. The learned counsel next stated that the customs authorities have the jurisdiction to conduct raid on the places falling under their jurisdiction, if they come across that some un-duty paid items are being stored at a designated place. He in this regard placed reliance on SRO 581 of 2013, SRO 13 of 2019 and SRO 1562 of 2019. He stated that the raiding staff has the jurisdiction in respect of the place where they have raided and have successfully found un-duty paid items in huge quantity. The learned counsel in the end stated that the concurrent findings are in his favour therefore this SCRA may be dismissed by answering the questions in favour of the respondent /department. In support of his above contentions, the learned counsel has relied upon the following decisions:

- i) *A & B Food Industries Limited Vs. Commissioner of Income-Tax/Sales, Karachi (1992 SCMR 663)*
- ii) *Muhammad Siddique Vs. The Commissioner of Income-Tax, Zone-A, Lahore (2001 PTD 1998)*
- iii) *Messrs Pakistan Television Corporation Limited Vs. Commissioner Inland Revenue (Legal), LTU, Islamabad and others (2017 SCMR 1136)*
- iv) *Messrs Sikandar and Brothers Vs. Government of Pakistan through Member (Judicial), Central Board of Revenue and another (PLD 1986 Karachi 373)*
- v) *Joint Secretary, Central Board of Revenue (Customs) and others Vs. Raja Nazar Hussain and another (1991 SCMR 647)*
- vi) *Collector of Customs, Karachi Vs. Mazhar-ul-Islam (2011 PTD 2577)*

- vii) *Khurram Jamal Vs. Collector of Customs (Appraisement) [PTCL 2007 CL. 489]*
- viii) *Assistant Collector of Central Excise and Land Customs Vs. Mst. Siddiqan Afzal and others (PTCL 2008 CL. 32)*
- ix) *Abbasi Enterprises Unilever Distributor, Haripur and another Vs. Collector of Sales Tax and Federal Excise, Peshawar and others (2019 SCMR 1989)*
- x) *Commissioner Inland Revenue, Zone-II, Regional Tax Officer (RTO), Mayo Road, Rawalpindi and another Vs. Messrs Sarwar Traders, 216/1-A, Adamjee Road, Rawalpindi and another (2022 SCMR 1333)*
- xi) *Mst. Nawab Bibi and 3 others Vs. Ch. Allah Ditta and others (1998 SCMR 2381)*
- xii) *Messrs MFMY Industries Ltd. and others Vs. Federation of Pakistan through Ministry of Commerce and others (2015 SCMR 1550)*
- xiii) *Messrs AH Textiles Vs. The Director, Directorate of Intelligence and Investigation FBR and 4 others (2019 PTD 1088)*
- xiv) *Collector of Customs, Model Customs Collectorate, Peshawar Vs. Muhammad Mashhood and others (2020 PTD 1943)*
- xv) *The Collector Central Excise and Land Customs and others Vs. Rahm Din (1987 SCMR 1840)*
- xvi) *M/s. Power Links Vs. Directorate General of Intelligence and Investigation, F.B.R. and another (PTCL 2014 CL. 480)*
- xvii) *The Collector of Customs and others Vs. Zeeshan and others (2022 PTD 1330)*
- xviii) *Collector of Customs E & S.T. and Sales Tax Vs. Pakistan State Oil Company Ltd. (2005 SCMR 1636)*
- xix) *Messrs JFK International through Proprietor Vs. Commissioner Inland Revenue, Zone-I and 2 others (2017 PTD 941)*
- xx) *Commissioner Inland Revenue, Zone-II Regional Tax Office-II Vs. Messrs Sony Traders Wine Shop (2015 PTD 2287)*
- xxi) *Messrs Popular Juice Industries (Pvt.) Ltd. through Authorized Officer and 6 others Vs. Federation of Pakistan through Chairman Federal Board of Revenue and 3 others (2021 PTD 1329)*
- xxii) *Collector of Customs (Preventive) and 2 others Vs. Muhammad Mahfooz (PLD 1991 Supreme Court 630)*
- xxiii) *Commissioner Inland Revenue, Lahore Vs. Coca Cola Pakistan Limited, Lahore (2022 PTD 1400)*

xxiv) Commissioner Inland Revenue Vs. Messrs Pak Arab Pipe Line Company Ltd. (2014 PTD 982)

xxv) Commissioner Inland Revenue-II, Karachi Vs. Royal International Exchange Company (Pvt.) Ltd., Karachi (2013 PTD 1614)

6. We have heard both the learned counsel at considerable length and have also perused the record and the decisions relied upon by them.

7. Since the averments made in questions No.ii and iii (questions No.v and vi of the SCRA) are somewhat similar, the same are taken up prior to questions No.i and iv (questions No.ii and vii of the SCRA). The main contention of Mr. Khawaja Shams-ul-Islam in respect of this matter being that the customs authorities were legally required under Section 179(3) of the Act to pass ONO within a period of 90 days from the date of issuance of the SCN or within such extended period by the Collector for which reasons have to be recorded but that extended period should also not extend the period of 60 days, meaning thereby that in all an ONO could be passed within a maximum period of 150 days from the date of SCN, whereas admittedly the ONO has been passed after a period of more than 220 days from the date of issuance of SCN. For the sake of brevity, the relevant portion of Section 179(3) of the Act is reproduced herein below:

179 Power of adjudication.—(1).. .. .

(2)

(3) *The cases shall be decided within ninety days of the issuance of show cause notice or within such period extended by the Collector for which reasons shall be recorded in writing, but such extended period shall in no case exceed sixty days:*

Provided that in cases, wherein the provisions of clause (s) of section 2 have been invoked, such cases shall be decided within a period of thirty days of the issuance of show cause notice:

Provided further that any period during which the proceedings are adjourned on account of a stay order or alternative dispute resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days, shall be excluded for the computation of aforesaid periods:

Provided further that in cases where in goods are lying at sea-port, airport or dryport, these shall be decided within thirty days of the issuance of show cause notice which can be extended by another fifteen days by Collector of Customs, if required so.

8. It is noted that in the appeal filed before the CAT this aspect was duly raised by the applicants, which is quite evident from the grounds taken before the CAT. Even in the summary of arguments this issue was raised, however interestingly the order of the CAT is totally silent on this aspect. Though the CAT, which is the last fact finding authority, has given its detailed judgment with regard to the declaration of goods in the GDs and the goods found during the raid but this legal issue going to the roots of the case has neither been dealt with nor dilated upon by the CAT. Though the learned counsel appearing for the respondents has tried to substantiate that the parameters of Section 179(3) of the Act are not applicable to the instant matter while submitting that the provisions of the said Section are not applicable to the smuggled goods and that the period of limitation given in the Section is only directory and not mandatory but has simply failed to draw our attention towards the facts that when this matter was being agitated and was taken in the grounds and in the

written arguments as to why this aspect was not discussed and dilated upon by the CAT. The CAT no doubt is the final authority on the facts but it does not mean that it will not dilate upon the legal aspects raised before it when those legal aspects were going to the roots of the case and the whole edifice of the case of the applicants was built on that legal issue. In our opinion, the order of the CAT lacks on this aspect, as when this issue was taken in the grounds and in the summary of arguments and was main prayer of the applicants, this aspect ought to have been discussed and dilated upon by the CAT which on the face of it appears to be lacking, as the learned counsel for the respondents also has failed to demonstrate from the order of the CAT that the said issue was discussed and dilated upon by the CAT. We, therefore, are of the view that since this primary aspect has skipped the attention of the CAT as the same has neither been dilated upon nor discussed, it would be in the interest of justice and fitness of things if we remand the matter to the CAT to decide the matter on this preliminary issue first, after granting opportunity of hearing to the parties.

9. Apropos the other question with regard to discharging of burden under Section 187 of the Act is concerned, here again the learned counsel for the applicants has explained that the same was not part of the SCN and hence the applicants could not furnish a plausible reply in respect of the issue with regard to burden of proof relating to origin of the goods. Though the CAT has discussed the aspect in detail with regard to the GDs declared by the applicants but we could not find from the order of the CAT that whether after detecting that the confiscated goods were of Thai origin rather than Chinese origin, as

declared by the applicants, SCN in this respect was given or not which in our view was mandatory. The learned counsel for the respondents has not pointed out from the SCN or any other correspondence made with the applicants that this aspect with regard to the origin of the goods was ever communicated, as in the SCN the only thing which is mentioned being that the confiscated goods were of non-duty paid foreign origin hence, in our view, when the CAT would rehear the matter on the legality or otherwise of the SCN it would also consider and dilate on this issue in accordance with law after granting opportunity of hearing to both the parties.

10. So far as the last question pertaining to territorial jurisdiction is concerned, in our view since there are several SROs governing the authority of the customs authorities with respect to territorial jurisdiction, which have been pointed out by the learned counsel appearing for the respondents, but interestingly this aspect too has neither been dilated upon nor discussed by the CAT in its order hence this aspect too, in our view, may be agitated and decided by the CAT, keeping in view the various SROs issued by the Federal Board of Revenue from time to time, after providing opportunity of hearing to the applicants.

11. The upshot of the above discussion is that since we are remanding this matter to the CAT for de-novo decision, we refrain ourselves from giving answer to the proposed questions either in affirmative or negative, as, in our view, these questions would only arise after detailed discussion on the above legal issues addressed by

the CAT, after granting opportunity of hearing to the parties, in accordance with law. Both the learned counsel are directed to place the relevant decisions relied upon by them, agitated in this SCRA, before the CAT which would augment their stance in respect of the legal issue raised by them. With these directions, the instant SCRA stands disposed of along with all the listed /pending application(s), if any.

JUDGE

JUDGE

Karachi:

Dated: .04.2023.

Tahseen/PA