

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application ("SCRA") No. 829 of 2015

Date Order with signature of Judge

*Present: Mr. Justice Muhammad Junaid Ghaffar
Justice Ms. Sana Akram Minhas,*

Applicant: The Director, Directorate General of
Intelligence & Investigation-FBR,
Regional Office, Karachi,
Through Ms. Masooda Siraj, Advocate
along with Mr. Saud Hassan Khan,
Assistant Director Customs
Intelligence.

Respondent No.2: M/s. Sun Shine Company Airport
Road, Gawadar.Through Ms. Dil
Khurram Shaheen, Advocate.

Date of hearing: **06.09.2023.**
Date of Judgment: **06.09.2023.**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant (department) has impugned order dated 15.12.2014, passed in Customs Appeal No.K-857 of 2014 by the Customs Appellate Tribunal Bench-II, Karachi, proposing following questions of law;

- i. Whether the tanker can be released unconditionally despite the fact the same has been seized in the process of transporting a huge quantity (35000 liters) of smuggled HSD and despite the fact that the provisions of law contained in sub-section (2) of Section 157 of the Act read with clause (b) notification SRO 499(I)/2009 dated 13.06.2009 ordain out rightly confiscation of the vehicles/conveyances found wholly used for transportation of smuggled goods?
- ii. Whether the Tanker has been exclusively and wholly used in transportation of the smuggled and confiscated HSD oil?"

2. Heard learned counsel for the parties and perused the record. It appears that pursuant to a show cause notice dated 14.2.2014, an Order in Original dated 7.7.2014 was passed, whereby, 35,000 liters of Iran Origin High Speed Diesel (HSD) Oil along with Hino Oil Tanker were out rightly confiscated. Respondent No.2 being aggrieved preferred appeal before the Tribunal which has been allowed through the impugned order; however, only to the extent of release of the Oil Tanker unconditionally. The said order of the Tribunal was divergent inasmuch as, the Member

Technical was unable to agree with the findings of the Member Judicial, who had ordered that the vehicle in question i.e. Tanker carrying smuggled HSD oil, be released to the respondent unconditionally. While doing so, learned Member Technical had proposed five points of difference for the Referee Member, which was to be nominated by the Chairman of the Tribunal. These points of difference were as under;

- "i) Whether, on the basis of the evidence on record, it is established that the confiscated HSD oil has been smuggled into the country?
- ii) Whether the provisions of section 177 of the Act read with notification SRO 118(I)/1983 dated 12.02.1983 place any restriction on Customs authorities to seize an smuggled goods, liable to confiscation under section 168 of the Act, which are found in possession of any person inside the municipal limits which are liable to confiscation?
- iii) Whether the provisions of law contained in sections 162 and 163 of the Act are attracted in this case despite existence of evidence to the effect that the confiscated HSD oil was intercepted near Mouach Goth, Hub River Road, Baldia Town, Karachi while the same was under transportation to some unspecified destination?
- iv) Whether the tanker has been exclusively and wholly used in transportation of the smuggled, and confiscated, HSD oil?
- v) Whether the tanker can be released unconditionally despite the fact that the same has been seized in the process of transporting a huge quantity (35000 liters) of smuggled HSD and despite the fact that the provisions of law contained in sub-section (2) of section 157 of the Act read with clause (b) of notification SRO 499(I)/2009 dated 13.06.2009 ordain outright confiscation of the vehicles/conveyances found wholly used for transportation of smuggled goods?"

3. Learned Referee Member (Judicial) in his order has agreed with the findings of the Member (Technical), in respect of the first three points of difference; however, in respect of points No.(iv) and (v), the Referee Member observed as follows;

"2. I am inclined to agree with the judgment passed by the Hon'ble Member (Technical) Bench-II, Karachi, with reference to the points mentioned at serial No.(i) to (iii). However, with regard to the points mentioned at serial No.4 and 5, I am of the following opinion:-

Sub-section (2) of section 157 of the Customs Act, 1969 means that the term "shall also be liable to confiscation" does not mean liable to confiscation automatically. The discretion given to the authority to confiscate the goods or vehicle must be exercised on sound judicial principles. If the words 'liable to confiscation' give a discretion to the confiscating authority to deprive a person of his property, then it follows that this discretion must be exercised upon the principles of natural justice; that is to say, the persons sought to be deprived of the property must be given notice to show cause, they must be furnished with adequate opportunity of putting forward their point of view and the same must receive due consideration. In the instant matter no show cause notice was issued to the owner of the vehicle and he was not given any opportunity to explain his point of view. Therefore, as per the dictum of law no one should be condemned unheard.

Furthermore, according to one of principles now well accepted, no person should be deprived of his property by way of penalty unless it is clear that he is in some measure responsible for assisting or furthering the commission of the offence committed and no innocent person should be unjustly punished or deprived of his property. Indeed, there was no indication even that the owner of the vehicle was also involved. If that be so, then it is difficult to appreciate on what basis even a reasonable suspicion could arise as to the complicity of the appellant. There is nothing on record which shows any collusion between the owner of the vehicle and the owner of the smuggled goods. In the absence of any proof on the record, it is not in accordance with law to hold such vehicle as part of the act which is prohibited by the law. Therefore, it is established that the said vehicle is not deliberately part of the act which is forbidden by law.

3. In the light of the above, the Oil Tanker bearing Registration No.TKF-206 is released to its lawful owner unconditionally, after proper verification of his ownership.”

On perusal of the aforesaid findings of the Referee Member, it appears that while agreeing with the Member (Technical) regarding his observations in respect of points No.(i) to (iii), he has ordered for the release of the vehicle in question unconditionally. However, this does not seem to be a correct legal approach inasmuch as once he came to the conclusion that the vehicle in question was carrying smuggled HSD oil¹, and so also it was intercepted lawfully by the applicant², then perhaps the contrary findings in respect of points No.(iv) & (v) could not have been arrived at in favour of respondent No.2. If the oil tanker in question was carrying smuggled HSD Oil, then as a corollary it was involved in exclusive transportation of smuggled goods. The Referee Members divergent findings in respect of point No. (i) & (iv) cannot be sustained.

4. In terms of SRO 499(I)/2009 dated 13.06.2009 issued in exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969), it has been directed that no option shall be given to pay fine in lieu of confiscation in respect of (a) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969); and (b) lawfully registered conveyance including packages and containers found carrying smuggled goods in false cavities or *being used exclusively or wholly for transportation of offending goods under clause (s) of Section 2 of the Customs Act, 1969*. Once it is not denied that the Vehicle in question was carrying smuggled HSD Oil, then it was liable to be confiscated out rightly. It could not, even be released against payment of any redemption fine, whereas, the learned Referee Member has failed to take this

¹ See point No.(i) as above

² See point No.(ii) as above

provision of law into consideration while concurring with the other Member (Judicial) ordering release of the Vehicle unconditionally. In our considered view, the findings of Referee Member do not support the case of respondent and after his concurrence with Member (Technical) in respect of point Nos.(i) to (iii), no further case for indulgence was made out; rather, the appeal of Respondent No.2 ought to have been dismissed.

5. The provisions of Section 181 of the Act and its proviso along with SRO 566(I)/2005 dated 6.6.2005 and SRO 574(I)/ dated 6.6.2005 (the earlier SRO's under section 181 *ibid*) and the powers of FBR to prescribe conditions in respect of outright confiscation and redemption fine came for scrutiny before the Hon'ble Supreme Court in the case of **Collector of Customs, Peshawar**³, and it was held that the requirement to give option to pay fine in lieu of confiscation in respect of confiscated goods is not absolute and is subject to the Notification issued by FBR under Section 181, and the order of the Tribunal for imposition of redemption fine in lieu of outright confiscation of smuggled goods was held to be unlawful and in violation of section 181 *ibid*. In an unreported case of *Haji Tooti*⁴, a challenge to the provisions of Section 181; its provisos, and the erstwhile SRO 574(I)/2005 being *ultra vires* to Section 223 of the Customs Act, 1969, has been dismissed, and it has been held that FBR is competent to exercise its powers under Section 181 of the Act, and can issue notification to fix minimum redemption fine direct outright confiscation of goods. Reliance on may also be placed on the cases of *Muhammad Tasleem*⁵, *Collector of Customs*⁶ & *Maqbool Ahmed*⁷.

6. In view of the above, the question No.1 is answered in negative in favour of the applicant and against respondent No.2 and as a consequence thereof, question No.2 need not to be answered. This Special Customs Reference Application is allowed and the order of the Customs Appellate Tribunal stands set-aside. Let copy of this order be sent to the Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of the Customs Act, 1969.

JUDGE

JUDGE

³ Collector of Customs v Wali Khan (2017 SCMR 585)

⁴ Haji Tooti v Federal Board of Revenue (Civil Appeal No.24-Q of 2014 vide order dated 26.5.2021)

⁵ Collector of Customs v. Muhammad Tasleem (2002 MLD 296);

⁶ Collector Customs v. Salman Khan (2015 PTD 1733)

⁷ Maqbool Ahmed v. Customs Appellate Tribunal (2009 SCMR) 226

*Faizan/PA**