IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Justice Adnan Iqbal Chaudhry
Mr. Justice Abdul Mobeen Lakho

S.C.R.A. No 213 of 2024
[Director, Directorate General I&I (Customs) v. Muhammad Sabir & another]

Applicant	:	Director, Directorate General, Intelligence & Investigation (Customs) through Mr. Zulfiqar Ali Arain, Advocate.
Date of hearing	:	28-10-2024
Date of decision	:	05-11-2024

J U D G M E N T

Adnan Iqbal Chaudhry J. - This Reference under section 196 of the Customs Act, 1969 (prior to its amendment by the Finance Act, 2024) by the Director, Directorate General Intelligence & Investigation (Customs) **[Applicant],** is from judgment dated 20.12.2023 passed by the Customs Appellate Tribunal **[Tribunal]**, allowing Customs Appeal No. H-1161/2023 filed by the Respondent No.1 against Order-in-Original No. 39/2023 **[OnO]** dated 26.05.2023 passed by the Collector of Customs (Adjudication). The Tribunal has set-aside the order of confiscation to the extent of the goods claimed by the Respondent No.1 and ordered release after holding that there was sufficient evidence to show that such goods were not smuggled.

2. Learned counsel for the Applicant has filed a statement dated 23-10-2024 to propose revised questions of law for our consideration which read as follows:

> *"1. Whether in the facts and circumstances of the case, the Appellate Tribunal has not erred in law to appreciate that the 1st Respondent (herein) has presented bogus and sketchy local purchase invoices to discharge burden of proof of lawful possession in respect of the impugned foreign origin smuggled goods ?*
>
> *2. Whether in the facts and circumstances of the case, the act of presentation of additional invoices by the 1st Respondent (herein) other than the invoices produced before Collector (Adjudication) is not hit with*

the principle of estoppel and the Appellate Tribunal was justified to pass impugned judgment ignoring the said principle and without dilating upon admissibility of invoices as evidence ?

3. Whether in the facts and circumstances of the case the 1st Respondent (herein) on the basis of bogus and sketchy local purchase invoices has not failed to discharge burden of proof of lawful possession as required under clause (89) of sub-section (1) of Section 156 and Section 187 of the Customs, 1969, in relation to impugned smuggled goods ?

4. Whether the Appellate Tribunal has not erred in law to ignore that the 1st Respondent had produced a total number of nine bogus and sketchy local purchase invoices before Original Authority and thereafter in deviation has attached fifteen local purchase invoices in the memo of Customs of Appeal as an afterthought to legalize smuggled goods ?

5. Whether in the facts and circumstances of the case the Appellate Tribunal while concluding impugned judgment has not indulged into mis/non-reading of evidence and has not arrived at an erroneous conclusion liable to be set aside ?"

3. In our view, apart from question No.3, the questions posed by the Applicant are questions of fact which essentially seek to determine whether the documentary evidence relied upon by the Respondent No.1 before the Tribunal was false and fabricated. It is settled law that a question involving an inquiry into facts is not a question of law and cannot be considered by the High Court in a Reference under section 196 of the Customs Act.[1] The general rule is that findings of fact rest with the decision of the Tribunal[2] with the exception where such findings are perverse or contrary to the material on the record.[3]

Question No.3 however is a mixed question of law and fact, and even before sub-section (1) of section 196 of the Customs Act was amended by the Finance Act, 2024, it was held by the Supreme Court that a mixed question of law and fact can be answered by the High Court in Reference jurisdiction.[4] For purposes of clarity, we rephrase question No.3 as follows:

> Whether the Respondent No.1 as possessor of goods alleged to be smuggled, had discharged the burden of proof on him under clause 89(i) of section 156(1) and section 187 of the

---

[1] *Pakistan State Oil Company Ltd. v. Collector of Custom, E&ST (Adjudication-II),* (2006 SCMR 425).
[2] *Commissioner Inland Revenue v. Sargodha Spinning Mills* (2022 SCMR 1082).
[3] *National Logistics Cell v. Collector of Customs* (2023 SCMR 1325).
[4] *Fancy Foundation v. Commissioner of Income Tax* (2017 SCMR 1395).

Customs Act, 1969 to avoid confiscation of goods under clauses 8 and 89(i) of section 156(1) of the Customs Act ?

4. Since the Tribunal had ordered release of goods, learned counsel for the Applicant sought an order of stay until the Reference could be finally decided. However, since we were not convinced to pass such an order, we called upon learned counsel to make his submissions on the Reference. Heard learned counsel and perused the record.

5. On 19.02.2023, the Applicant intercepted a trailer at Sukkur on its way to Gujranwala from Karachi said to be carrying zinc ingots, aluminum sheets in rolls, copper scrap and brass scrap. Not being satisfied with the bilties (transportation receipts) produced by the driver, the goods were seized on suspicion of foreign-origin scrap brought into the country through an unauthorized route. Show-cause notice under section 180 of the Customs Act was issued to the driver and the transport company to satisfy why the goods should not be confiscated under clauses 8 and 89 of section 156(1) of the Customs Act, 1969. On receiving information the Respondent No.1 joined the proceedings and filed a reply to the show-cause notice claiming to be owner of some of the goods aboard the trailer, specifically goods under bilties No. 562 and 565 as under, hereinafter **'the subject goods'**:

(a)	*Copper Armechar (scrap)*	*3173.30 kg*
(b)	*Brass (scrap)*	*1080.00 kg*
(c)	*Silver Net*	*326.70 kg*
(d)	*Silver scrap*	*110.00 kg*
(e)	*Nickel metal*	*435.10 kg*
(f)	*Lead metal (kasi dhaat)*	*152.80 kg*
(g)	*Silver scrap*	*146.00 kg*
	Total	*5,323.9 kg*

6. The Respondent No.1 submitted that he was a scrap dealer and had purchased the subject goods from various scrap vendors at Karachi. In support thereof he produced purchase receipts issued by such scrap vendors. By the OnO, the Collector (Adjudication) held that such receipts were not sufficient evidence to dislodge the

presumption that the subject goods were smuggled. However, in passing the impugned judgment the Tribunal was satisfied with those receipts as against the bald allegation made by the Applicant that the goods were smuggled.

7. It was not alleged by the Applicant that the subject goods were banned from import into Pakistan under the Imports and Exports (Control) Act, 1950. Rather the case was that since the Respondent No.1 could not produce documents to show lawful import, the presumption was that those were smuggled into Pakistan without paying customs duty and taxes. For drawing such a presumption, the Applicant relied on clause 89(i) of section 156(1) and section 187 of the Customs Act, which read at the relevant time as follows:

> Clause 89(i) of section 156(1) of the Customs Act:
>
> "If any person without lawful excuse, the proof of which shall be on such person, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, retailing, or in any manner dealing with smuggled goods or any goods in respect to which there may be reasonable suspicion that they are smuggled goods;
> such goods shall be liable to confiscation and any person concerned in the offence shall be liable to a penalty not exceeding ten times the value of the goods; and, where the value of such goods exceeds three hundred thousand rupees, he shall further be liable, upon conviction by a Special Judge, to imprisonment for a term not exceeding six years and to a fine not exceeding ten times the value of such goods."
>
> Section 187 of the Customs Act:
>
> "When any person is alleged to have committed an offence under this Act and any question arises whether he did any act or was in possession of anything with lawful authority or under a permit, license or other document prescribed by or under any law for the time being in force, the burden of proving that he had such authority, permit, license or other document shall lie on him :
> Provided that any person, alleged to have committed an offence under this Act, shall bear the burden of proof that any property owned by him in his name or someone else name was not acquired from the proceeds of such crime:
> Provided further that the procedure for forfeiture of such property shall be prescribed by the Board under the rules."
>
> (Underlining supplied for emphasis)

8. The feature common in both the above provisions is that they lay the burden to prove lawful possession on the possessor. Under clause 89(i) of section 156(1) such burden is specifically in connection with goods smuggled or suspected to be smuggled. Under section 187 such burden is generally with regards to anything alleged to be held by committing an offence under the Customs Act. Here, it is important to keep in mind that in cases where the possessor does not claim to be the importer, the question whether the possessor commited the offence alleged is separate from the question whether the goods were lawfully imported, for even if the possessor was *bonafide* purchaser, the goods would still be liable to confiscation if those were found to be smuggled.

9. The phrase "burden of proof" has two meanings. One, the burden of proof as a matter of law in pleadings, and the other, the burden of establishing a case. The former is fixed as a question of law on the basis of pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour.[5] The latter *i.e.* the shifting burden is usually distinguished as the 'onus of proof'. It is this onus that is first upon the possessor under clause 89(i) of section 156(1) and section 187 of the Customs Act. Once he brings some evidence that *prima facie* indicates lawful possession, the onus shifts to the prosecution. In other words, those provisions do not mean that the ultimate burden of disproving the alleged offence remains on the possessor and never shifts to the prosecution. A similar view was expressed by a learned Division Bench of this Court in *Kamran Industries v. The Collector of Customs (Exports)* (PLD 1996 Kar 68) as under:

> "24. …… However, on a closer scrutiny of the provisions of section 187 and the case-law settled by our Courts on the subject it appears that in such a situation it is only the evidential and tactical burden of proof which is cast upon the accused while the legal burden to bring home the allegations remains with the prosecution. ……

[5] Law of Evidence by M. Monir. 17th Edition. Page 1643.

> 25. …… Before parting with the discussion on section 187 of the Customs Act we are of the view that in case the interpretation on the lines invited by the learned Standing Counsel were to be adopted i.e. that for every offence for which the accused is charged under the Customs Act he shall have to disprove the allegations of the Customs Authorities in entirety without any obligation upon the Customs Department to adduce evidence, it would amount to affording unfettered, naked and arbitrary discretion to the authorities who may at their sweet will make out false cases against importers without the need of proving the sanctity of their actions. Such cannot be the intention of Parliament while the Courts are under an obligation to place such construction on statutes which would be beneficial to the widest extent and which would make the legislation operate fairly, justly and equitably and not unreasonably (see Mst. Zainab v. Kamal Khan (PLD 1990 SC 1051)."

10. Specifically with regards to clause 89(i) of section 156(1), for that to attract there must at least be a "reasonable suspicion" that the goods are smuggled. A similar condition of 'reasonable belief' had existed in section 177-A of the erstwhile Sea Customs Act, 1878 with regards to an act to defraud the Government of duty, which was interpreted by the Supreme Court as follows in *(1) Pakistan and (2) The Assistant Collector, Central Excise and Land Customs, Kohat v. Qazi Ziauddin* (PLD 1962 SC 440):

> "A study of section 177-A will reveal that this section is care-fully worded. A presumption with respect to the existence of certain facts can under this section, arise only if circumstances exist justifying a reasonable belief in the existence of those facts so that the practical effect of the section is only this that if there is *prima facie* evidence of certain facts then those facts are to be presumed to exist. Cases decided by the High Court of West Pakistan show that there is a general apprehension as to the applicability of the first part of section 177-A to every case of purchase or possession of foreign goods. This apprehension it appears to us is not well-founded. The section requires reasonable belief on the part of the person seizing the goods that an act to defraud the Government of duty has been committed. If a person purchases goods in an ordinary market then in the absence of any suspicious circumstances or some definite facts leading to that inference the Customs Officer is not entitled to a reasonable belief that the Government has been defrauded of the duty payable on the goods. The ordinary method of the import of goods from outside into Pakistan is that they come through the Customs Barrier and the duty payable is in fact paid. The presumption, therefore, with respect to any goods which may be sold in the open market in the absence of an indication to the contrary would be that duty has been paid on them."

Again, in *Sikandar A. Karim v. The State* (1995 SCMR 387) *albeit* a matter of bail, the Supreme Court observed:

> "If the items alleged to be smuggled by the prosecution were available freely in the open market and imports of such goods were not banned in the country, a presumption may arise that these goods were lawfully brought in the country unless contrary is shown."

11. Thus, it is settled law that where the goods in question are not banned from import under any statute and are available in the local market, the presumption is that those were imported after paying customs duty and taxes, and therefore the allegation that the goods were in fact smuggled must be premised on a 'reasonable suspicion'.

12. Admittedly, the subject goods were scrap items of such goods that were importable into Pakistan, and therefore it was presumable that the scrap of imported goods being traded in the local market was duty-paid. In such circumstances, the allegation that such goods were smuggled simply because those were of foreign origin, was hardly based on any reasonable suspicion within the meaning of clause 89(i) of section 156(1) of the Customs Act.

13. Nevertheless, the Respondent No.1 had produced purchase receipts issued by local scrap vendors to submit that he had purchased the subject goods in local scrap markets. With the aforesaid presumption in importable goods available in the market, the onus of proof had then shifted to the Applicant. However, the Applicant did absolutely nothing before either forum below to discharge that onus. The sole submission of learned counsel for the Applicant was that by virtue of section 187 of the Customs Act the Applicant was not required to prove the allegation of smuggling and it was for the Respondent No.1 to disprove it. However, as discussed above, such an interpretation of section 187 is entirely misconceived.

14. In view of the foregoing, the question of law rephrased in para 3 above is answered in the affirmative in favor of the Respondent No.1 and against the Applicant *viz.* that the Respondent No.1 had

discharged the burden of proof on him under clause 89(i) of section 156(1) and section 187 of the Customs Act, 1969 to avoid confiscation of the subject goods. A copy of this judgment shall be sent under seal of this Court to the Customs Appellate Tribunal.

JUDGE

JUDGE

Karachi
Dated: 05-11-2024