

IN THE HIGH COURT OF SINDH, KARACHI

Special Custom Reference Application (“SCRA”) No. 97 of 2024

(Director, Directorate General, Intelligence & Investigation
(Customs) Versus Shahid Hussain and another)

Date	Order with signature of Judge
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PRESENT:

Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman

Hearing of Case

- 1.For hearing of CMA No.376/2024
- 2.For Regular hearing

09.12.2024

Mr. Khalid Mehmood Rajpar, Advocate for the Applicant
Mr. Amjad Hayat Advocate for the Respondent

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ORDER

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant has impugned order dated 20.11.2023, passed by the Customs Appellate Tribunal, Bench-II, Karachi, in Customs Appeal No.K-1493/2023, by proposing the following questions of law:-

- “(1) *Whether on consideration of the facts and circumstances of the case, the 1st Respondent has not failed to successfully discharge burden of proof of lawful possession in respect of the impugned cloth as envisaged under clause (89) of subsection (1) of Section 156 of the Customs Act, 1969?*
- (2) *Whether the Appellate Tribunal while concluding impugned judgment has not indulged into non/mis-reading of evidence and consequently has arrived at an erroneous conclusion in holding that “the invoices were reported in January 2023 and the seizure was effected in April 2023”, which has caused serious mis-carriage of justice?*
- (3) *Whether under the facts and circumstances of the case impugned non-duty paid/ smuggled cloth is not liable to outright confiscation in terms of clauses (8) & (89) of subsection (1) read with subsection (2) of Section 156 of the Customs Act, 1969 and SRO 499(1)/2009 dated 13.06.2009?*
- (4) *Whether on consideration of the facts and circumstances of the case the impugned judgment passed by the Appellate Tribunal is not perverse, arbitrary, unjust and thus liable to be set aside?”*

2. Heard learned counsel for the parties and perused the record. It appears that a show cause notice was issued to the Respondent

alleging that the goods in question were smuggled goods under Section 2 (s) of the Customs Act, 1969. Such show cause notice was responded by the Respondent and the Adjudicating Authority was pleased to order outright confiscation of the goods in question and the relevant findings of the Adjudicating Authority are as under:-

“8. I have examined the case record brought before me and have perused written as well as verbal submissions of the respondent and the department. In this case, the seizing/reporting agency has seized foreign origin assorted sofa/curtain cloth weighing 3,910 kgs for being smuggled and non-duty paid from a godown situated at Manzoor Colony, Karachi after obtaining search warrant from the concerned judicial magistrate, while the possession holder, Shehzad Ahmed, failed to produce any document in support of lawful import/possession of the recovered foreign origin sofa/curtain cloth. In response to the notice issued under Section 26 of the Customs Act, 1969, an advocate submitted reply on behalf of owner of Godown, Shahid Hussain, vide letter dated 07-04-2023 along with photocopies of four invoices bearing Nos. 01 dated 01-12-2022, 02 dated 03-12-2022, 04 dated 07-12-2022 and 10 dated 19-12-2022. issued by M/s Royal Textiles, Karachi in favor of Mr. Shahid Hussain, Shop No. 28, Sector-1, Choudhry Rehmat Ali Road, Manzoor Colony, Karachi, against sale of polyester pile furnishing fabric, total weighing 4,528 kgs during the month of December, 2022, whereas no relevant import document was enclosed with the said invoices. However, upon further direction from the seizing agency to submit relevant import document of the detained sofa/curtain cloth. the advocate again submitted photocopies of aforesaid four invoices along with three GDs bearing Machine Nos. KAPW-HC-98992, dated 23-12-2022. KAPW-HC-88212, dated 10-01-2023. and KAPW-HC-107056, dated 21-02-2023, showing description of goods as polyester woven furnishing fabrics, polyester knitted short dense pile fabric, PU coated artificial leather, polyester embroidered lining material for curtains, polyester woven furnishing embroidered fabrics for sofa/curtain and catalogue of samples, etc, which were not relevant to the detained assorted sofa/curtain cloth recovered from the godown. Moreover, the aforesaid assorted foreign origin fabrics were imported by M/s Royal Textiles, Karachi under the aforesaid three GDs on 23-12-2022, 10-01-2023 and 21-02-2023, while the said invoices were issued on 01- 12-2022, 03-12-2022, 07-12-2022 and 19-12-2022. It shows that invoices were issued before the goods were imported. Goods were not in possession of the seller, but still aforesaid invoices were issued before occurrence of imports. Upon scrutiny of the invoices submitted during the initial enquiry, it was observed that the places of stamps and signatures were different and signatures also did not match with each other because of slight differences. The said invoices seemed to be fake and fabricated and quantity of the fabrics as indicated in the said four invoices and the seized quantity was also different. Moreover, the address shown in the aforesaid invoices is also so different from the address of godown from where the foreign origin curtain/sofa fabric was recovered. Total 4,528 kgs of polyester pile furnishing fabric were purchased during the

period 01-12-2022 to 19-12-2022 (within 19 days) as per invoice whereas during search of godown total 3,910 kgs of assorted sofa and curtain cloth was found/recovered. Therefore, it became evident that the aforesaid import documents had no relevance with the detained foreign origin fabric. The owner of godown had tried to give legal cover to the smuggled foreign origin fabric recovered from the godown to save himself from penal action as per law. The revised contention of the second Advocate of the respondent that the respondent entered into a contract with M/s Royal Texte for supply of polyester pile furnishing fabrics (sofa/curtain fabrics) on DA basis appears to be an afterthought. According to the revised version, as the imported goods were on the way (board on ship), it was mutually decided by the importer and the respondent that after clearance of the imported goods from Customs, the respondent shall get fabrics of his own choice and the importer/supplier issued 4 Sales Tax invoices before arrival of the imported goods at port. According to the respondent's new counsel, the importer/supplier got clearance of the goods from Customs vide Goods Declaration No. KAPE-HC-90992 dated 23 12 2023, and after clearance, the respondent got delivery of fabric of his own.

9. This revised version to the extent of entering into a contract with M/s Royal Textile appears to be a concocted story, as not a single concrete evidence is available on record in support of his stance. This stance is also in contrast to the initial reply submitted by Advocate, Obaidullah Mirza, vide letter dated 07-04-2023, wherein he had furnished only sales tax invoices and no contract between importer and the respondent was mentioned. I tend to agree with the seizing agency that the contention of consultant pertaining to a contract between an importer and the respondent is incorrect, baseless and seemed to be an afterthought intended to cover up the anomalies in dates of invoices which were issued before importation of goods. I fully agree with the seizing agency that this purported act of issuance of invoices by importers before the importation of goods and without actual sale of goods is not a normal business activity and is against normal business norms. It was observed that initially the respondent had submitted three GDs bearing Machine Nos. KAPW-HC-98992 dated 23-12-2022, KAPW-HC- 88212 dated 10-01-2023 and KAPW-HC-107056 dated 21-02-2023 in support of four submitted invoices which were issued by M/s Royal Textiles, while subsequently, the new consultant of the respondent changed the contention altogether and submitted only one GD bearing Machine Nos. KAPW-HC-98992 dated 23-12-2022 in support of aforesaid four invoices. However, it was observed that even these documents and invoices submitted by the respondent had no relevance with the seized goods. Therefore, it became evident that the seized assorted sofa/curtain cloth weighing 3910 kgs has no relation with the submitted invoices, as neither the description of cloth matched with the seized cloth nor the weight tallied with the invoices. It appears that the subject sales tax invoices may relate to another consignment: of fabric which had been purchased from M/s Royal Textile. Karachi. By revising earlier version. the respondent attempted to give legal cover to the smuggled foreign origin sofa/curtain cloth recovered from the said godown.

Moreover, the seizing/reporting agency has rightly pointed out that the impugned assorted foreign origin sofa/curtain cloth has been notified item vide SRO 566(1)/2005 dated 16th June, 2005 at Serial No. 27 and its possession without lawful excuse and in absence of discharge of burden of proof for lawful possession of notified item amounts to possession of smuggled goods warranting action in terms of Section 2(s) read with sub-section (89) of Section 156(1) (89) of the Customs Act, 1969 read with Section 156(2) and 187 of the Customs Act, 1969. Hence, the plea of the counsel of the respondent that they had purchased impugned goods from an importer before actual import of goods is not maintainable in the absence of any valid and relevant proof of import of the subject goods. The sales tax invoices have been found to be irrelevant and contradictory and do not serve the purpose hence liable to be rejected as valid proof/evidence.

10. The seizing agency aptly and rightly cited the judgement of the Honorable Supreme Court of Pakistan in Civil Appeal No. 1050/2009 titled M/s Collector of Customs Peshawar vs Wali Khan etc wherein it was held that "the confiscated goods were admittedly of foreign origin and there was no proof that they were lawfully imported into Pakistan, the burden of which according to clause 89 as mentioned above, was on the respondent. When confronted, learned counsel for the respondent failed to provide any concrete evidence except contending that these to prove that the confiscated goods were not smuggled goods. Therefore goods are easily available in the market and can be purchased from anywhere. Thus, the respondent has failed the forums below have erred in holding that the confiscated goods were not notified and thus do not fall within the purview of section 2(s) of the Customs Act". The seizing agency has correctly responded to the objection of the respondent regarding interception of goods within the city. Fact of the matter is that in terms of Section 177 of the Customs Act, 1969 and SRO 118(I)/1983 dated 12.03.1983, there are some restrictions/prohibitions on the persons, living within the vicinity of the borders of Iran, Afghanistan and India to the effect that they should not keep possession of any such goods or class of goods in excess of such quantity or value as may from time to time be notified by the Federal Government or the Provincial Government in the official Gazette. The provisions of Section 177 of the Customs Act, 1969 and notification SRO 118(1)/1983 dated 12.03.1983 do not act as a bar on the interception of smuggled/non- duty paid goods for violation of the provisions of Section 2(s) and 16 of the Customs Act, 1969, outside the areas mentioned in the referred section. It was observed that the judgments cited by the respondent's counsel were distinguishable and were not relevant to the facts of the instant case."

3. Perusal of the above finding in the Order-in-Original reflects that the stance of the Respondent, taken from time, has been examined and a detailed reasoning has been assigned while rejecting the same. It has been observed that since the Goods Declarations so relied upon were dated later than the Sales Tax Invoices placed before the Adjudicating Authority, they have no

relevance and cannot be considered as valid for the purposes of discharging the burden as required under Section 187 of the Customs Act, 1969. It has been further observed that to overcome this discrepancy the argument that a contract was entered into by the supplier for purchase of the goods in question in advance, therefore, the GD's are relevant and must be taken into considerations has been correctly discarded by the Adjudicating Authority for the simple reason that once reliance had been placed on some Sales Tax Invoices, then there was no occasion to seek shelter in any GD's. In fact, this was a case of blowing hot and cold at the same time by the Respondent.

4. The Tribunal in its impugned order has set-aside the finding so recorded in the Order-in-Original; however, the same does not appear to be correct as the Tribunal has completely ignored the above aspect of the matter highlighted in the Order-in-Original. The Tribunal's finding is as under;

"8. We have perused the case record, heard both parties to the dispute and given due deliberations to the subject matter. The counsel for the appellant has submitted details of purchases made from M/s. Royal textile (NTN: 9831993). The claimant of goods has provided four sales tax invoices issued in his favor by the supplier. The details of invoices are as under:-

Name of supplier	Invoice No. and dated	Name of Buyer
ROYAL TEXTILE (NTN-9831993)	Invoice No.1 dated 01.12.2022	Shahid Hussain (NTN-12844608)
-do-	Invoice No.2 dated 03.12.2022	-do-
-do-	Invoice No.4 dated 07.12.2022	-do-
-do-	Invoice No.10 dated 19.12.2022	-do-

9. The supplier has submitted summary statement (submitted alongwith monthly sales tax return for December, 2022) wherein these invoices have been reflected. The respondents have alleged that the imports were affected subsequent to issuance of sales tax invoices. The invoices were reported in January, 2023 and the seizure was effected in April, 2023.

10. A person buying imported goods from a local supplier can satisfy himself through receipt of sales tax invoice(s) and can not necessarily press for import documents from the supplier. If a buyer were to press for import document (in addition to receipt of sales tax invoices) then it is feared that businesses will face additional hurdles. We are of the opinion that the claimant has reasonably discharged burden of proof as mandated under section 187 of the Customs Act, 1969 and are constrained to hold that the charge leveled in the show cause notice do not withstand judicial scrutiny. Hence, the Order-in-Original is set aside and the goods made be handed over to the rightful owner unconditionally."

5. From perusal of the aforesaid finding of the Tribunal, it reflects that the Tribunal has miserably failed to respond to the objection as raised in the Order-in-Original and the fact that the Respondent had submitted two different versions before the adjudicating authority. Initially, the Respondent's case was that the goods in question were locally purchased and reliance was placed on four sales tax invoices issued by the supplier. However, at the same time another version was also submitted by the Respondent before the adjudicating authority and then reliance was placed on certain goods declaration dated 10-01-2023 and 21-02-2023 which were in fact dated much later after the issuance of sales tax invoices. The Tribunal has failed to appreciate this stance of the Respondent and has not reconciled the same before setting aside the Order-in-Original. Once it has come on record that the GD's were dated much after the sales tax invoices, hence, there could not have been any nexus between the two inasmuch as a sales tax invoice can only be issued after the GD has been filed and duties and taxes including sales tax has been paid. This admittedly is not the case of the Respondent and when confronted, it has been contended that a contract was entered into with the supplier and initially sales tax invoices were issued whereafter copies of GD's. We are afraid this does not help the case of the Respondent in discharging the initial burden under Section 187 of the Customs Act, 1969 and the Tribunal has failed to appreciate this legal as well as factual question.

6. In view of hereinabove facts and circumstances of this case, proposed Question No.1 is answered in favour of the Applicant and against the Respondent, whereas the remaining three questions need not to be answered. Accordingly, the impugned judgment of the Tribunal stands **set-aside** and this Reference Application stands **allowed**. Let a copy of this order be issued to the Tribunal as required under Section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE