

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar and Agha Faisal, JJ.**

CP D 3353 of 2018	:	Ikramullah and Others vs. Federation of Pakistan & Others
CP D 3354 of 2018	:	Khitab Khan & Others vs. Federation of Pakistan & Others
CP D 3355 of 2018	:	Jehanzeb & Others vs. Federation of Pakistan & Others
For the Petitioners	:	Mr. Kashif Nazeer, Advocate.
For the Respondent No. 1	:	Mr. Ishrat Zahid Alvi Assistant Attorney General
For the Respondent Nos. 2 & 3	:	Mr. Kafeel Ahmed Abbasi Advocate
Dates of Hearing	:	11.12.2018, 15.02.2019 & 26.02.2019
Date of Announcement	:	13.03.2019

JUDGMENT

Agha Faisal, J.: These connected petitions pertain to facts and circumstances common *inter se*, hence, shall be decided through this common judgment.

2. The facts relevant to CP D-3353 of 2018 ("**Lead Petition**") are representative of the facts pertaining to the remaining petitions, listed *supra*, and, therefore, it may suffice to confine the factual discussion to the controversy encapsulated in the Lead Petition. The germane facts are that the petitioners have imported used vehicles and sought

to have them cleared as per prevailing law, practice and usage. The vehicles imported were stated to conform to the category *Van* in respect whereof the Import Policy Order ("**IPO**"), currently in vogue, places a restriction that at the time of importation they must not be older than five (05) years. The age restrictions in respect of the category *Cars* is three (03) years and it is alleged that at the time that the petitioners sought clearance of their vehicles, the customs authorities inexplicably decided to misinterpret the applicable provisions of the law and treat the vehicles imported as *Cars* and not *Vans*, hence, applying the age restrictions of three (03) years and not five (05) years, which was the entitlement claimed by the petitioners. The present petitions were preferred to *inter alia* seek the release of the consignment of vehicles.

3. Mr. Kashif Nazeer, advocated the case for the petitioners and submitted that the petitioners had imported used vehicles, of the nomenclature Toyota Probox ("**Probox**") and Toyota Succeed ("**Succeed**"). It was argued that in accordance with the IPO the imported vehicles fell squarely within the five (05) year age restrictions and that the relevant goods declarations ("**GDs**") along with the vehicle export certificates and other ancillary documents, designating the said vehicles as *Vans*, were submitted to the customs authorities upon discharge of the said vehicles at Karachi port. It was submitted that the customs authorities examined the imported vehicles and raised no objection with respect to the declared description / specifications of the vehicles and referred the GDs to the assessment group for further action in view of the IPO. It was next

contended that during the physical examination of the vehicles, as prescribed per Section 80 of the Customs Act, 1969 ("**Act**"), the authorities found the vehicles as per declaration and confirmed the specifications of the vehicles as declared, however, instead of allowing the release of the vehicles, the respondent No. 2 withheld the said vehicles on the pretext that the specifications of the vehicles, being classified as a *Van* or otherwise, was required to be verified prior to the release thereof. Per learned counsel, the petitioners supplied the customs authorities with GDs of similar previously cleared vehicles and also brought to their attention a letter dated 10.01.2018 wherein Indus Motor Company Limited ("**IMC**"), being local agent of Toyota, had confirmed to the customs authorities that the types of vehicles imported fell within the category of *Van*. It was demonstrated from the record that while the aforesaid IMC certification was relied upon resulting in the release of the vehicles of earlier importers, however, 15 days hence the vehicles of the present petitioners were detained upon the same pretext. Learned counsel referred to an advice given by the Engineering Development Board ("**EDB**") in which a view point was expressed with respect to the classification of the imported vehicles as *Cars*, and not *Vans*. However, it was submitted that the said advice was a self-serving attempt predicated on mala fides and devoid of any legal or logical sanction. Per learned counsel, the vehicles imported by the petitioners are lying at the port for over a year, incurring demurrage and diminution in value, and it is the imperative that remedial measures be sanctioned by this Court in order to protect the fundamental rights of the petitioners to their property, with respect

whereof they stood deprived otherwise than in accordance with the law.

4. Mr. Kafeel Ahmed Abbasi, Advocated the case for the customs authorities and sought to classify the imported vehicles as *Cars*, and not *Vans*. The basic thrust of his argument was that the classification is required to be predicated upon the usage of a vehicle and if a said vehicle could be used to carry passengers that it was mandatory that the same be classified as a *Car* and not a *Van*. Learned counsel referred to a letter issued by IMC and argued that the content therein was in supersession of the letter referred to by the petitioners and that the subsequent letter reclassified the imported vehicles as *Vans* and not *Cars*. Learned counsel also placed before us the print outs from Wikipedia in an attempt to demonstrate that Succeed and Probox are light commercial vehicles and not *Vans*, as being argued on behalf of the petitioners. In conclusion it was argued that either this Court determine the definitions of *Cars* and *Vans* and then determine whether which category the vehicles imported by the petitioners fall into or the present petitions may be dismissed while maintaining the view taken by the customs authorities with respect to the classification of the imported vehicles.

5. We have heard the respective learned counsel and have also appreciated the documentation arrayed before us. It is pertinent to record at the very outset that it is not the purview of this Court to determine the definitions of the respective classifications. Our scope herein is confined to an adjudication upon whether the detention of

the imported vehicles / refusal to release the same was sanctioned under the codified law for the time in force.

6. In order to initiate the deliberation upon the controversy herein, it may be pertinent to advert to the relevant constituents of the IPO. The definitions section defines "Vehicle" as comprising of passenger car, bus, van, trucks, pick-ups including 4X4 vehicles. It is thus observed that *Cars* and *Vans* are both included in the definition of *Vehicle*. The conditions of import, provided in the IPO, prescribe that vehicles more than five (05) years old shall not be allowed to be imported, subject to certain exceptions stipulated therein. However, the conditions of import further state that *Cars* older than three (03) years shall not be allowed to be imported. The apparent distinction maintained in the IPO is that while the remaining constituents of the defined term "Vehicles" are allowed up to the age of five (05) years, *Cars* may only be imported provided that they are not older than three (03) years. The requirements pertaining to the import of vehicles in Pakistan have been delineated in the Public Notice No. 05/2014 (AW) dated 09.09.2014 ("**Public Notice**"), and it may be pertinent to reproduce the relevant content herein below:

"Subject: Filing of true and complete goods declaration for clearance of New, old and used vehicles through WeBOC System.

Directorate of Reforms and Automation (R&A) has developed and launched a new module for processing and clearance of vehicles under Web Based One Customs (WeBOC) with effect from 01st September, 2014. This is an important and new procedure introduced for processing the import declarations of vehicles under automated system. It entirely revolves around self assessment of duty / taxes or other charges by the importers/clearing agents. Concerted efforts are needed on the part of all stakeholders i.e.

importers/clearing agents, assessing and examining officials for making it a success. For smooth flow of the processes, following is suggested to be done by the importers/clearing agents so that GDS are processed expeditiously and without wastage of time:

- i) A true Goods Declaration (GD) giving therein complete and correct particulars of vehicle should be filed by the Importer or by the authorized Clearing Agent online in WeBOC System through use of allocated user ID.
- ii) Complete description / details of the imported vehicle showing (a) chassis/VTN number (b) Engine capacity in CC (c) Make and (d) Model are to be furnished.
- iii) The importer/clearing agent shall make self assessment of the payable duty/taxes and other charges etc. against the imported vehicle which shall be paid up from accordingly.
- iv) The importer/clearing agent will ensure that no auto parts (in commercial quality or not pertaining to that vehicle like replacement of any damaged part etc, excluding spare tyre, jack or tool kit etc.) are imported along with the vehicle. Operative Trade Policy allows import of vehicle in Complete Built Unit (CBU) form only under Transfer of Residence, Baggage or Gift Scheme.
- v) Following information/documents shall be uploaded in the WeBOC system facilitate quicker GD processing:
 - a) Relevant pages of passport of the passenger showing photo ID of the pass holder, issue and expiry date of passport, date of exit and entry of the passenger as endorsed by the immigration authorities.
 - b) VIN information given by the manufacturer / authenticated chassis number month and year of manufacturer of the vehicle.
 - c) Original Bill of Lading (B/L). In case of B/L has been surrendered then copy along with copy of the delivery order.
 - d) Copy of purchase receipt / invoice.
 - e) An undertaking on the already given format on stamp paper of Rs.50/100.
 - f) Export Certificate issued by the concerned authority of the Exporting country.

(Underline added for emphasis.)

7. A perusal of the Public Notice shows that the relevant identifying document with respect to an imported vehicle is an export

certificate issued by the concerned authority of the exporting country. This certification document delineates entire particulars of the imported vehicle, including without limitation its classification, engine capacity, make and model etc. Learned counsel for the petitioners demonstrated from the record that the export certificates with respect to the imported vehicles denote the said vehicles in the category of *Van*. The original export certificates issued by the concerned authority of the exporting country, Japan, were filed along with its translation in English having been certified by the Consulate General Japan at Karachi. Learned counsel had drawn our attention to the promotional material of Toyota Japan, available at page 327 of the Court file, wherein Probox, Succeed and other vehicles, namely; Hiace, Liteace, Townace, Reguisace were represented as *Vans* under the heading *Light Commercial Vehicles*. Learned counsel also referred to a copy of an online international used car website, available at page 329 of the Court file, wherein Probox and Succeed were also referred to as *Vans*. Per learned counsel the imported used vehicles were earlier registered in Japan in the category of *Vans* and further demonstrated from the record that the relevant GDs in respect thereof duly filed before the customs authorities, as apparent *inter alia* on page 331 of the Court file, also designated the said vehicles as *Vans*. A statement dated 08.11.2018, is on record wherein computer printouts were presented before this Court of international websites denoting the imported vehicles as *Vans*. A list of previously cleared vehicles, available at page 271 of the Court file, was brought to our attention wherein it was apparent that fifty (50) Probox and Succeed vehicles were imported in the recent past in the Pakistan and were duly

cleared by the authorities under the classification of *Vans*. We have noted that the customs authorities had written a letter dated 01.01.2018 to IMC enclosing an export certificate of a Toyota Probox vehicle and sought IMC confirmation whether the said vehicle was to be defined as *Van* or *Car*. The reply of IMC dated 10.01.2018, clearly denoted Probox as *Van* and it may be pertinent to reproduce the relevant confirmation herein below:

“Subject: REPLY TO THE LETTER FOR SUPPLY OF CONFIRMATION TOYOTA PROBOX VAN OR CAR BEARING CHASSIS NO. NCP50-0129640.

Reference to your office letters Ref. No. SI/Misc/14/2017-VII-West, dated: 01.01.2018 on above mentioned subject.

As per our information the subject vehicle Toyota Probox has not been imported by Indus Motor Company.

However, based on the supporting documents that you provided we have identified that the Toyota Probox is Van”.

(Underline added for emphasis.)

8. We have also taken note of another letter, dated 18.01.2018, wherein IMC has certified to the customs authorities once again that Probox is identified as a *Van*. For the sake of expediency second IMC letter is reproduced herein below:

“Subject: REPLY TO THE LETTER FOR SUPPLY OF CONFIRMATION TOYOTA PROBOX VAN OR CAR BEARING CHASSIS NO. NCP50-0131033.

Reference to your office letters Ref. No. SI/Misc/14/2017-VII-West, dated: 11.01.2018 on above mentioned subject.

As per our information the subject vehicle Toyota Probox has not been imported by Indus Motor Company.

However, based on the supporting documents that you provided we have identified that the Toyota Probox is Van".

(Underline added for emphasis.)

9. It is apparent from the foregoing that up and till the period manifest from the documentation referred to *supra* imported Probox and Succeed vehicles were consistently treated and cleared by the customs authorities in the category of *Vans* and not *Cars* and as a consequence thereof such vehicles up to five (05) years old were importable in the Pakistan pursuant to the IPO. The controversy arose when the EDB wrote a letter to the customs authorities dated 06.04.2018, wherein for the first time it presented a view point stating *inter alia* that vehicles including Probox and Succeed fell in to the category of *Cars*. The EDB filed a response in the present petitions and predicated its classification of Probox and Succeed as *Cars* on the basis that they were being imported under PCT Code 8703.2220, hence, stating that the necessary implication thus was that the vehicle is a *Car* and not a *Van*. The remaining content of comments filed by the EDB concentrated on the Auto Development Policy 2016-21 wherein investments in the automobile sector is being encouraged under the Greenfield and Brownfield segments and it is EDB's contention that the continued importation of the used vehicles over three (03) years of age, would impact the profitability of companies manufacturing competitive products in Pakistan. The issue of a PCT heading implying the classification of a vehicle is a novel concept and it appears to have been based upon a third IMC letter, dated 24.05.2018. For the sake of clarity, it may be pertinent to reproduce the content of this letter, addressed to EDB, herein below:

“This is in response to your letter dated May 14, 2018 regarding the subjected matter.

According to custom clearance and historical evidence, Toyota Probox is being imported under the PCT code 8703.2220 implying that it is classified as a car in Pakistan”.

(Underline added for emphasis.)

10. It is apparent that the third letter is at complete variance to IMC’s earlier consistent certification issued to the customs authorities wherein it was unequivocally stated that Probox and Succeed fell within the category of *Vans*. This third letter, far from being direct, merely states that since vehicles are being imported under a particular PCT heading, therefore, the implication could be that the said vehicles would be classified as *Cars* in Pakistan. We have had the benefit of consideration of the Pakistan Customs Tariff, currently in force, and it is observed that PCT heading 8703 denotes motor cars and other motor vehicles. There are numerous sub headings under the said heading which denote all types of vehicles including passenger cars, vans, mini vans, auto-rickshaw, 4X4s etc. The said headings are also further classified in the context of engine size. The pertinent heading / sub heading 8703.2200, as relied upon in the third IMC letter and also by the EDB, denotes *Vehicles* of a cylinder capacity exceeding 1000cc but not exceeding 1300cc. It is *prima facie* apparent that the subject heading uses the term *Vehicles*, not *Cars*, and the definition of the terms *Vehicle* is already provided in the IPO, as referred to *supra*, and the said definition *inter alia* includes *Vans*. It is thus clear that the rationale employed in the third IMC letter seeking to classify by implication does not stand based on the very

basis implied therein as there is no implication in the cited PCT heading to suggest that the imported item is anything but a *Vehicle* of a certain specified engine capacity. The EDB reliance, therefore, upon such correspondence also appears to be uninformed in the list.

11. The question then arises that what is the barometer being employed by the customs authorities to designate the classification of imported vehicles. The answer lies in the Public Notice, wherein the only mandatory requirement prescribed with respect to the particulars of an imported vehicle is export certificate issued by the concerned authority of the exporting country. We have seen from the record arrayed before us that the export certificates with respect to the subject vehicles denote the said vehicles as *Vans*. We have also seen the GDs with respect to the imported vehicles and the consignments have also been declared as *Vans*. The record clearly shows that these GDs were accepted and processed by the customs authorities without any demure in the past and also in the present circumstances and no case of mis-declaration has ever been instituted. We put a direct question to the learned counsel for the customs authorities as to whether any of the GDs referred to herein have ever been deemed to be mis-declarations, either in the past or specifically in the present facts and circumstances, and the learned counsel replied to our query in the negative. It would thus appear that the customs authorities are themselves accepting the relevant GDs, wherein the vehicles are declared as *Vans* and then subsequently treating the same consignments as *Cars*. Learned counsel for the respondents have been unable to address this anomaly.

12. The honorable Supreme Court has deprecated an unsubstantiated departure from a settled departmental practice, especially when rights had been created in reliance upon such practice. Nasim Hasan Shah, J (as he then was) maintained in the case of *Radaka Corporation & Others vs. Collector of Customs & Another* reported as 1989 SCMR 353 as follows:

“Now it is settled law that where the departmental practice has followed a particular course in the implementation of some rule whether right or wrong, it will be extremely unfair to make a departure from it after a lapse of many years and thereby disturb rights that have been settled by a long and consistent course of practice; see *Nazir Ahmad v. Pakistan and others* (PLD 1970 SC 453).”

13. The comments filed by the respondent No. 2 herein clearly allude to a re-examination of the issue thereby admitting the stance of the petitioners that Probox and Succeed have consistently been treated in the past in the manner submitted by the petitioners. The said comments propose a redetermination the criteria for classification of vehicles and suggest that a *Van* may be denoted as one high-roof box-type body for passengers as well as the goods; presence of sliding doors; absence of a hinged bonnets and absence of comfort and safety features in part or whole of passenger area such as floor carpeting, seat belts etc. While it is duly observed that the determinants are a mere proposal hence have no official sanction whatsoever, it is noted that based on the said determination even a Hiace Van would be classified as a *Car* as it contains comfort and safety features and floor carpeting. It is also noted that the Suzuki APV Van, widely proliferated locally, would also not qualify as a *Van*

as, according to the uncontroverted promotional material in respect thereof arrayed before us, it does not have sliding doors, there is a hinged bonnet and the comfort and safety features including seat belts and carpeting are duly present therein.

14. We do not agree with the argument advanced by the learned counsel for the respondents that this Court may decide upon the determinants of the classifications of motor vehicles in order to address the present controversy or accept the position postulated by the respondents. It is apparent before us that there is an existing policy, being the IPO, under which certain rights and privileges have been accorded and furthermore the Public Notice clearly denotes the requirements to be fulfilled in regard to importation of vehicles permitted by the IPO. The respondents have been unable to justify their deviation from the consistently applied previous interpretation of the relevant provisions applicable hereto and the entire basis thereof being the third letter of IMC is entirely unjustifiable. It is also a fact that the proposals of the EDB, for classifications of vehicles, are mere proposals devoid of any statutory sanction. The respondents have been unable to justify as to why the treatment of the said vehicles as *Vans* was deviated from and such conduct is compounded by the fact that there is no record of their being any mis-declaration claimed in respect of the import documentation, which manifestly denotes the imported vehicles as *Vans*.

15. In view of the reasoning and rational contained herein, we are of the considered view that the detention of the imported vehicles, subject matter herein, are not in consonance with the law, hence, it is

directed that the same be released and handed over to the petitioners, subject to payment of all applicable taxes and duties, along with relevant delay detection certificates.

16. These petitions are allowed in terms herein contained.

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*SHABAN ALI/PA**