IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.96 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGE(S)

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

Applicant:	**Director, Directorate General, Intelligence & Investigation (Customs) Through Dr. Shah Nawaz Memon, Advocate.**
Respondent:	**Awais & Others Through Manzar Hussain Memon, Advocate.**
Date of hearing:	**21.01.2021**
Date of Order:	**21.01.2021**

O R D E R

Muhammad Junaid Ghaffar J.- Through this reference application, the Applicant / Department has impugned Judgment dated 23.10.2018, passed by the Customs Appellate Tribunal at Karachi, in Customs Appeals Nos.K-579/2018 (The Director Directorate General of Intelligence & Investigation (Customs) vs. Awais & Another) proposing the following questions of law, which according to the applicant purportedly arise out of the Judgment of the Tribunal:-

i. Whether the learned Appellate Tribunal was justified to hold that mandatory requirements for search without warrant under Section 163 of the Customs Act, 1969, were not met, despite the fact that statement under the said proviso was served upon the occupant, communicating therein the grounds for search to recover the smuggled/non-duty paid goods secreted therein?

ii. Whether the Appellate Tribunal while concluding the impugned judgment has seriously erred in law and failed to understand that in terms of sub Section (2) of Section 156 and Section 187 of the Customs Act, 1969, the claimant of smuggled goods has failed to discharge burden of proof of lawful possession of the impugned smuggled cloth?

iii. Whether the Appellate Tribunal not erred in law by not taking into consideration that the claimant has produced irrelevant import documents in respect of the recovered goods and as such failed to discharge its evidential burden of proof of lawful possession cost upon him under Section 187 of the Customs Act, 1969?

iv. Whether the learned Appellate Tribunal, being the last fact-finding forum in the hierarchy of the Customs Act, 1969, is not required under the law to anxiously scrutinize the documents presented before it by the respective parties? What will be effect if lack of anxious scrutiny is obvious from the face of the record-in-proceedings?

2. Learned Counsel for the Applicant has read out the Judgment and submits that the Appellate Tribunal has erred in dismissing the appeal filed by the applicant as the goods in question are smuggled goods, whereas, the documents produced in support of such goods do not relate to the goods in question. He further submits that search in question was in accordance with law.

3. On the other hand, learned counsel for the respondent has supported the impugned Judgment.

4. We have heard both the learned counsel and perused the record. Though the Appellate Tribunal has decided the issue primarily by placing reliance on Sections 162 and 163 of the Customs Act, 1969 and on the grounds that the search carried out was illegal and was in violation of Section 163 *ibid*. However, on perusal of record, it is surprising to note that this was never a question raised by the respondent before the adjudicating Collectorate, whereas, the appeal was filed by the Applicant and not by the respondent in whose favour the adjudicating authority had passed the order. Therefore, we are of the considered view that this question of law does not arise out of the order of the Appellate Tribunal inasmuch as the Appellate Tribunal has erred in taking up this issue out of nowhere. Even if had been taken up in the cross objections by the Respondent, that would not ipso facto mean that it ought to have been taken up and decided as it was never raised at the first stage i.e. Adjudication.

5. Insofar as the Respondent's case before the adjudicating authority is concerned, on perusal of the record it reflects that the respondent was never issued the show cause notice and in fact he had subsequently entered into the Adjudication proceedings as a claimant. The Respondent's case is that out of 1140 bales of the

foreign origin cloth in question, 457 bales belong to him and in support thereof he has relied upon certain documents including Goods Declarations claiming seized goods to be lawfully imported. However, when the order of the Adjudicating authority dated 27.03.2018 is perused, it appears that when the raid was conducted by the Applicant, the Manager of the warehouse, namely, Muhammad Hashim, was interrogated and he recorded a statement by submitting that the seized goods were owned by three persons, namely, *Faiz Muhammad, Mohib Ullah, & Jamshe*d, and he also relied on certain Goods Declarations to justify that these goods were imported from Iran by M/s. Adnan Textile Mills and Multi Textile Mills and were stored in the warehouse by these three persons. Thereafter, the respondent entered into these proceedings as a claimant and also stated that some affidavit was sworn by Muhammad Hashim by stating that these 457 bales belong to him. It however appears that the adjudicating authority, while deciding the matter in favour of the respondent at para-19(a), has held as under:

> "19. Having considered all documents and written replied as well as verbal arguments of both the sides, I observe as under:-
> a) As far as seizure of (226, 103 = 457 Bales), the documents of its purchase and legal import have been produced. In this regard properly filed GDs of the import of these impugned goods and its subsequent purchase from bonafide importers alongwith Sales Agreement and Sales Tax receipt were also brought on record as also evident in the reply on behalf of the claimant Mr. Awais. The seizing agency in its reply has failed to establish that these 457 Bales out of the seized impugned goods were smuggled. The document produced on behalf of respondent claimant Mr. Awais are enough to prove that the impugned seized 457 Bales were legally imported on the properly filed customs documents including the relevant GGs and also prove its legal ownership by way of the documents. The Seizing Agency has failed to establish that the documents of import of the subject impugned seized goods and its purchase from bonafide importer were fake or forged in any way. Therefore, in my view the case of smuggling in respect of these 457 Bales is not established. Show Cause Notice to the extent of seizure of 457 Bales on the allegation of smuggling is, therefore, vacated and the impugned seized 457 Bales may be released to its lawful claimant henceforth."

6. Perusal of the aforesaid findings of the Adjudicating authority reflects that firstly, it has not dealt with the objections of the Applicant as well as the fact that the respondent entered into the proceedings as claimant and was not a Respondent to the show cause notice, whereas, even otherwise such claim of the present Respondent was in contradiction and against the

statement given by the warehouse keeper. It is not clear that whether the warehouse keeper was examined in any manner or any effort was made by the Adjudicating authority to decide this issue first. This issue was crucial and had to be addressed first, as the other three claimants, as stated and disclosed by the warehouse keeper, also claimed the goods and submitted documents before the Adjudicating authority in support of the lawful import of the goods in question. Surprisingly, their claim was not accepted as legal owners of the goods, whereas, the case of present Respondent was decided in its favor. Secondly, and without prejudice to the above observation, even on merits the Adjudicating authority has not dilated upon the very fact as to whether the Goods Declaration furnished by the Respondent in fact justify the possession of these 457 bales, as the order is silent or sketchy without having any deeper appreciation of this crucial aspect of the matter. In fact, it appears that no effort has been made to reconcile the Goods Declarations with the available goods.

7. In view of hereinabove facts and circumstances of the case, the questions proposed by the Applicant are answered in favour of the applicant and against the respondent. Consequently, the impugned order of the Appellate Tribunal dated 23.10.2018 and of the Adjudicating authority dated 27.03.2018 to the extent of the present Respondent are hereby set-aside and the matter is remanded to the Adjudicating authority to decide the issue afresh, after affording opportunity to the parties and to first determine the locus standi of the claimant, in view of the above observations and the statements of the warehouse keeper as recorded by the seizing agency and so also by a thorough examination of the material / documents being relied upon in respect of the seized goods and as to their lawful import into the country. With these observations the matter stands remanded. Let copy of this order be sent to the Customs Appellate Tribunal in terms of Section 196(5) of the Customs Act, 1969 as well as to Respondent No.2 for compliance.

JUDGE

JUDGE

Khuhro/PA