

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

C.P. No.D-6544 of 2020
M/s Driveline Motors Ltd.
Versus
Federation of Pakistan & others

AND

Special Customs Reference Application No.693 of 2019

The Collector of Customs
Versus
M/s Driveline Motors Ltd.

Date	Order with signature of Judge
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Dated: 05.11.2021

Mr. Adnan Ahmed Zafar along with Aga Zafar Ahmed for petitioner in CP No.D-6544 of 2020 and for respondent in SCRA 693 of 2019.

Mr. Khalid Rajpar for applicant in SCRA No.693/2019.

Mr. Kafeel Ahmed Abbasi, Deputy Attorney General along with Mr. Hussain Bohra, Assistant Attorney General.

Rana Sakhawat holds brief for Mr. Shahab Imam for respondent in CP No.D-6544 of 2020.

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Since subject of both the petition as well as Special Customs Reference Application is the judgment of Appellate Tribunal impugned in these proceedings, the same are being disposed by this common order and in preference for convenience primarily the questions raised in the Reference are being deliberated upon.

Out of ten proposed questions, applicant's counsel has not attempted to argue any of these proposed questions and in fact raised arguments primarily on a question:

Whether the Tribunal was justified in allowing appeal and thereby allowed the respondent to re-export the vehicle without

payment of duties and taxes in terms of Import Policy Order 2016?

On this solitary question (which we consider a point of law rather than question) applicant's counsel Mr. Khalid Rajpar submitted that a Mercedes Benz was imported, which is not permitted under Import Policy Order 2016 and consequently show-cause notice was issued on 03.11.2018 which ended up in passing Order-in-Original dated 29.11.2018, which order was set aside by the Tribunal vide its judgment dated 20.05.2019, which is assailed in the Reference.

I have heard learned counsel and perused record.

The subject matter of this Reference is a vehicle (Mercedes Benz Car) having chassis No.WDD-21209823006604, shipped vide Bill of Lading No.963240103, IGM No.92/2018, which was shipped by the respondent (registered under the law of U.K) as a gift to the Chief Executive of a shipping Company M/s Quality Freight Systems (consignee) having its office at 63/A, Adam Jee Nagar, off Tipu Sultan Road, Karachi. The consignee in whose favour the cargo was booked did not file goods declaration; on the contrary on 17.04.2018 the shipper M/s Driveline Motors Ltd. U.K. informed that the subject vehicle was sent to the Chief Executive Officer of the shipping company Quality Freight Systems as a gift and has requested that the vehicle may be allowed to be IB-shipped to the consigner as the consignee is not willing to clear the subject vehicle. The request was followed by a letter dated 16.05.2018 of the Clearing Agent for re-export/reshipment back to the shipper as a frustrated cargo in terms of section 138 of Customs Act, 1969 read with Customs Rules 86 to 89 laid down in SRO 450(I)/2001.

The request of the shipper was turned down treating the Cargo as not being a frustrated cargo in terms of section 138 of Customs Act, 1969.

The case revolves around Section 138 of Customs Act, 1969 and rules framed thereunder. For convenience the relevant provisions of Customs Act, 1969 and relevant Rules framed thereunder are reproduced:-

Section 138 of Customs Act, 1969

“138. Frustrated cargo how dealt with.- (1) Where any goods are brought into a customs-station by reason of inadvertence, misdirection or untraceability of the consignee, 7 [or where consignee has dishonored his commitments] 6 [an officer of Customs not below the rank of Additional Collector of Customs] may, on application by the person-in-charge of the conveyance which brought such goods or of the consignor of such goods and subject to rules, allow export of such goods without payment of any duties (whether of import or export) chargeable thereon, provided that such goods have remained and are exported under the custody of an officer of customs.

(2) All expenses attending to such custody shall be borne by the applicant.

Rules 86 to 89 of Customs Rules 2001

86. Frustrated cargo will be such goods as are brought into a customs-station by reason of inadvertence or mis-direction or where the consignee is untraceable or has dishonored his commitments and the consignor wishes to have it re-shipped to him.

87. The master of the vessel or his authorized agent or the consignor of the goods himself or through his authorized agent shall apply in writing or electronically where Pakistan Customs Computerized System Customs Computerized System is operational to the Collector of Customs concerned for permission to re-export the frustrated cargo.

88. On receipt of an application, the Collector of Customs shall satisfy himself with reference to the relevant import manifests and other documents that the goods are ‘frustrated cargo’ as provided in section 138 of the Act.

89. If the Collector is so satisfied, he would permit re-export of the frustrated cargo under Customs supervision without payment of duties (whether of import or export) chargeable thereon.”

The substantive provision in Import Policy Order 2016 that deals with the current issue is Clause 19, which, for the sake of convenience, is also reproduced as under:-

19. Contravention of the Act. - Any imports that do not comply with the requirements of this Order, or are made

on the basis of any false or incorrect particulars, shall be deemed to have been made in contravention of the Act:

Provided that the Federal Government may condone such contravention upon payment of surcharge or on such conditions as it may prescribe;

Provided further that all goods of banned list imported in commercial quantity shall not be released in any circumstances. Such goods shall be re-exported at importers or shipping lines costs:

Provided also that goods on restricted list which are of sub-standard quality affecting public health including short shelf life medicines or pharmaceutical raw materials or edible products imported in contravention of this Order shall be destroyed within a period of six months without offering any release.

Provided also that goods rejected or denied import shall be allowed to be re-consigned or returned to the foreign exporters subject to the laws and regulations pertaining to the trade of contraband goods.”

The Fourth proviso *ibid* provides that the goods, import of which is rejected or denied shall be allowed to be re-consigned or returned to the foreign exporter subject to the laws and rules and regulations pertaining to the trade of contraband goods. The Second provision to Clause 19 that deals with the contravention of the Act provides that the goods of banned list imported in commercial quantity shall not be released in any circumstances and such goods shall be re-exported at importers or shipping lines cost.

The subject goods may not be of commercial quantity but it may have commercial aspects, which cannot be ignored. Appendix ‘E’ of Clause 15 of Import Policy Order 2016 provides that the cars older than three years are not allowed to be imported under gift, personal baggage and transfer of residence schemes whereas age of the vehicle is to be determined from 1st. January of the year subsequent to the year of manufacture till the date of shipment as per Bill of Lading.

Section 138 of the Customs Act, 1969 permits re-export on three events i.e. either it is an act of inadvertence, misdirection or untraceability of the consignee. The import of goods having been brought

into customs stations is inevitable for the applicability of any of the above three factors. Thus, Section 138 would make or break the situation for the consigner and consignee. This is an admitted fact that the consignee has not come forward to accept the consignment, the situation of un-traceability of consignee and/or refusal is thus evident and is thus applicable here as despite notice he has not come forward for the clearance of the goods.

Since section 138 deals with the frustrated cargo and Rule 86 has defined what frustrated cargo would be. It is thus one which will be brought into customs station by reason of inadvertence or misdirection or where consignee is untraceable or has dishonoured his commitments and the consignor wishes to have it re-shipped to him. Since the consignee has refused or dishonoured his commitments, the consignor immediately acted upon by moving an application for re-export on 17.04.2018 and that is exercised under Rule 88 of the *ibid* Rules. There was no occasion for the Collector of Customs to have avoided or discarded the application of the consigner for the re-export of the vehicle as it was and is within the definition of frustrated cargo and permission ought to have been followed in terms of Rule 89 on Collector being satisfied which he should under the relevant circumstances of the case as in our view the vehicle came out as a frustrated cargo.

The impugned judgment provides in terms of Para 16 that even the consignee refused to accept the cargo (vehicle) vide its letter dated 09.03.2018 and has requested the customs authorities to re-ship the impugned car to the consignor in terms of Section 138 of Customs Act, 1969 read with the relevant Rules. The reasons perhaps are apparent that the consignor was not aware of the Import Policy Order 2016, which does not permit import of vehicles which is older than three years. Thus, on account of dishonoring the commitments of the

consignee, it became a frustrated cargo and the treatment in terms of Section 138 ought to have been provided by the Tribunal.

We do not see any reason to interfere in the impugned judgment dated 20.05.2019 passed by learned Customs Appellate Tribunal, Karachi, and the only question/point of law on the basis of which this Reference was argued and as framed above is answered in affirmative. Resultantly, the Special Customs Reference Application is dismissed and in consequence thereof petition, which is filed for implementation of the impugned judgment, is allowed to the above extent.

A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to learned Customs Appellate Tribunal Bench-II, Karachi, as required by section 196(5) of Customs Act, 1969.

Judge

Judge