

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Mahmood A. Khan

C.P. No.D-8568 of 2019

Falak Jan
Versus
Federation of Pakistan & others

ALONG WITH

Special Customs Reference Application No.850 of 2019

The Collector of Customs
Versus
Falak Jan & another

Date of Hearing:	25.11.2021
Petitioner in CP & respondent No.1 in SCRA:	Through Mr. Zakir Hussain Khaskheli Advocate
Applicant in SCRA and Respondent No.2 in petition:	Through Mr. Shahid Ali Qureshi Advocate.
Respondent No.1 in CP/ Federation in petition:	Through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General along with Mr. Hussain Bohra, Assistant Attorney General.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Through this common judgment we intend to dispose of Special Customs Reference Application under section 196 of Customs Act, 1969 and the connected petition as they involve common question and for the sake of convenience the Reference Application is being treated as leading matter and the answer to the question proposed in the Reference will decide the fate of the petition as well, which was filed for compliance of Tribunal's order.

2. This Special Customs Reference Application has been filed by the department on the question of law which was reframed in terms of statement dated: 28.01.2021 and is reproduced as under:-

“Whether the Custom Appellate Tribunal has erred in law while not considering that possession of a vehicle imported under diplomatic privilege by non-privilege person without payment of duties and obtaining prior permission from Ministry of Foreign Affairs and NOC from Customs Department in accordance with SRO 577(I)/2006 is not lawful possession for the purpose of Customs Act, 1969?”

3. It is case of the applicant, as disclosed in the show-cause notice, that the subject vehicle i.e. Toyota Land Cruiser Jeep bearing registration No.BC-5831, Chassis No.HDJ101-0013385, Engine No.IHD-0175483, was imported by the Consulate General of Afghanistan vide goods declaration (GD) No.KAPR-HC-52613 dated 31.10.2002 and reregistered with the Motor Registration Wing Karachi in the name of one Mirajuddin, Second Secretary, Consulate General of Afghanistan. It was registered as BC-5655 apparently on the request of Consulate General Afghanistan which was followed by initial registration certificate of Ministry of Foreign Affairs. The request in shape of letter is available at page 43 to Counter-affidavit as Annexure D-2 dated 19.08.2004. The vehicle was then transferred and registered in the name of another person namely Muhammad Shahan Shaikh vide Book No.NC 412374 allegedly in violation of restrictions imposed under the law for transfer of non-duty paid/exempted vehicle to a private person.

4. Another transfer of the registration of the vehicle took place in the name of Abdul Hafeez Pirzada vide registration book No.NC 492929 with another registration No.BC-5831. The vehicle was again transferred in the name of earlier transferee Muhammad Shahan Shaikh vide registration book No.NC 410533. Ultimately it was transferred in the name of Haji Abdul Jamal vide registration Book No.B-0502008, a leaflet of which was presented by the respondent’s counsel in the Court room along with four registration books, and copy of initial registration by Ministry of Foreign Affairs, referred above.

5. *Transfers of this vehicle shall be discussed separately as there appears to be a deliberate attempt to hide date of actual transfer at least in one of the transfer of Muhammad Shahan Shaikh (subsequent one).*

6. The forensic report was obtained on 09.04.2019 from AIG Police, Forensic Division Sindh which confirmed that no other number has been deciphered under the present Chassis serial (HDJ101-0013385). M/s PRAL User Support Group has also confirmed the import of the said vehicle vide aforesaid GD in the name of Consulate General of Afghanistan under diplomatic privilege scheme.

7. On the basis of aforesaid facts, show-cause notice was issued to the last occupant namely Falak Jan who is in fact son of Haji Abdul Jamal, the last transferee of the subject vehicle being imported by Afghan Consulate. The adjudicating officer vide Order-in-Original No.1248/2018-19 dated 28.06.2019 held charges against the respondent and ordered for outright confiscation of seized vehicle being non-duty paid vehicle for violation of provisions of Customs Act, 1969, as disclosed in the show-cause notice. Aggrieved of it appeal was preferred before the Tribunal which appeal was allowed and the Order-in-Original was set aside vide order dated 11.10.2019 hence this Reference as well as the petition.

8. It is applicant's case that the exemption available under diplomatic privilege scheme was misused and consequently duties and taxes were avoided and are recoverable against the subject vehicle along with fine/penalty on the basis of SRO 577(I)/2006 dated 05.06.2006.

9. Respondent's counsel on the other hand has pleaded ignorance and argued that respondent's father purchased it from previous buyer without knowledge of evasion of duty by predecessors in interest.

10. We have heard learned counsel for the applicant as well as respondent who have taken us to entire history since it (vehicle) was imported till it was last discovered/found in occupation of the respondent, and all other material available on record and presented during hearing by respective counsel.

11. Exemption is a privilege being enjoyed by diplomats and other dignitaries. If we trace history of last 50 years (though there were earlier SROs also), we come across initial SRO 53(I)/70 issued in exercise of powers available under Section 19 of Customs Act for all articles of household and personal effects including motor vehicles for the personal use by the ruler of any of the Gulf Sheikhdoms including vehicles imported by the UAE dignitaries which includes use and donations to welfare projects in Pakistan with conditions, such as articles will not be sold without prior consent of Central Board of Revenue, as it then was. It was persons specified SRO as it contained list of all such dignitaries with a table attached.

12. After Vienna Convention on Diplomatic Relations 1961 and Vienna Convention on Consular Relation 1963, Federal Government acceded to such conventions and Federal Government found indispensable to legislate properly on the subject. Diplomatic and Consular Privileges Ordinance, 1972 which was originally introduced, followed by Act No.IX of 1972 as Diplomatic and Consular Privileges Act, 1972.

13. It provides restriction and conditions on all such privileges and immunities enjoyed and a certificate of Federal Government was required to ensure such privileges and immunities were available to such dignitaries. First schedule to the Act of 1972 provides some of the Articles incorporated from the said conventions for Diplomatic relation and Second Schedule is for consular relations. It is thus in pursuance of such privileges that concerned ministries from time to time extended

such exemptions by introducing SROs. However, for the purposes of present controversy it would be unfair if SRO 577(I)/2006 is applied directly, hence we made an attempt to trace its forerunners.

14. For the purposes of present controversy, the cause kicked off when vehicle was imported and Goods declaration was filed in October/November, 2002. Initial SRO, in pursuance of above scheme was issued in June, 1988 i.e. SRO 506(I)/88 which was a follow up of SRO 878(I)/85. Simultaneously there was another SRO 507(I)/88 of same date but for different entities which was followed by SRO 403(I)/96. The sequence of all such SRSs, including reproduction of the two relevant SROs, is as under:-

Sr. No.	For <u>Diplomatic representative or mission of a foreign Government in Pakistan</u>	For <u>privileged organization, offices or agencies</u>
(1)	S.R.O. 878(I)/85 dated 18 th September, 1985	S.R.O. 507(I)/88 dated 26 th June, 1988
(2)	<p>S.R.O. 506(I)/88(dated 26th June, 1988).- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969) and section 7 of the Sales Tax Act, 1951 (III of 1951) and in suppression of this Ministry's Notification No. <u>SRO 878(1)/85</u>, dated the 18th September, 1985, the Federal Government is pleased to exempt motor vehicles falling under respective sub-heading of Heading Nos. 87.02,87.03, 87.04 and 87.11 of the First Schedule to the Customs Act, 1969 (IV of 1969), and imported into Pakistan by <u>diplomatic representative or mission</u> of a foreign Government in Pakistan from the whole of the customs-duties and sales tax leviable thereon, subject to the following conditions, namely:-</p> <p>(1) <u>No such motor vehicles shall be sold or otherwise disposed of in Pakistan except with the prior consent of the Federal Government in the Ministry of Foreign Affairs given on an application made to it in the form set-out below.</u></p> <p>(2) No such motor vehicle shall be sold or otherwise disposed in Pakistan within two years of its importation to anyone other than the Department of Investment Promotion and Supplies or a diplomatic</p>	<p>S.R.O.403(I)/96(Dated 13th June, 1996).- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969) and in suppression (supersession) of this Ministry's Notification No. <u>SRO 507(1)/88</u>, dated the 26th June, 1988, the Federal Government is pleased to exempt vehicles including motor cars, falling under respective headings of Chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969), imported into Pakistan free of customs duties by <u>privileged organization, offices or agencies</u> and subsequently sold or otherwise disposed of in the country to non-privileged persons, from so much of the custom-duties as would be in excess of that leviable as set-out below, subject to the following conditions, namely:-</p> <p>(i) No such motor vehicle shall be sold, transferred or otherwise disposed of in Pakistan by a privileged organization/ agency/office/NGO except with the prior permission of the Central Board of Revenue given on an application made to it.</p> <p>(ii) no such motor vehicle shall be sold, transferred or otherwise disposed of within two years of its importation to any one other than a department, agency or office of the Federal Government or a Provincial</p>

<p>representative or mission of a foreign Government in Pakistan, except when the diplomatic representative by whom it was imported is transferred from Pakistan within two years of its importation and it has been used by him for not less than one year of his arrival in Pakistan.</p> <p>(3) No such motor vehicle shall be sold or otherwise disposed of in Pakistan before the expiration of five years from the date of its importation without payment of customs-duties and sales tax at the following rates, namely:-</p> <p>(i) ...</p> <p>Provided that, if due to the transfer from Pakistan of the diplomatic representative by whom it was imported, the motor vehicle is sold or otherwise disposed of during the third year of its importation, the duty and sales tax payable shall be 60% of the duty and sales tax which would have been so leviable as foresaid:</p> <p>Provided further that no duty shall be payable if the motor vehicle is sold to the Department of Investment Promotion and Supplies or the diplomatic representative or mission of a foreign Government in Pakistan.</p>	<p>Government;</p> <p>(iii) subsequent disposal of vehicles by the recipient department of the Government shall be governed by condition (iv); and</p> <p>(iv) ...</p>
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15. Historically, Federal Government was maintaining two classes of entities such as diplomats and privileged organization, offices and agencies and separate conditions were being observed. It appears that all classes of such entities were then again merged when a common SRO 447(I)/2004 dated 12.06.2004 was issued, dealing with diplomats and other privileged organizations, offices and/or agencies with their respective conditions as maintained. Such SRO, for the sake of convenience, is reproduced as under:-

“S.R.O. 447(I)/2004.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990 and in supersession of its Notification Nos. S.R.O. 506(I)/88 dated the 26th June, 1988 and S.R.O. 403(I)/96 dated the 13th June, 1996, the Federal Government is pleased to exempt vehicles, including motor car, falling under respective headings of Chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969), imported into Pakistan free of customs- duty and sales tax by diplomatic representatives or mission of a foreign government in Pakistan or privileged person, organization, office, agency and subsequently sold or otherwise disposed off in the country to a person

entitled to import the same without payment of customs duty and sales tax under this notification, from so much of customs-duty as is in excess of that leviable as set out below, subject to the following conditions, namely:-

(a) no such motor vehicle shall be sold, transferred or otherwise disposed of in Pakistan except with the prior permission of the Central Board of Revenue, except for vehicles imported under diplomatic privileges for which Ministry of Foreign Affairs issues the sale permission with a copy of sale permission of each vehicle provided to the Collector of Customs of port of import;

(b) no such motor vehicle except for vehicles imported under diplomatic privileges shall be sold or otherwise disposed of in Pakistan before the expiration of five years from the date of its importation, without payment of customs-duty and other taxes at the following rates namely:-

(i)	if sold or otherwise disposed of before the expiration of five years from the date of importation;	whole of the customs-duty and other taxes leviable at the prevailing rates of exchange and duties/taxes on value determined in foreign currency at the time of importation.
(ii)	if sold or otherwise disposed of after the expiration of five years from the date of importation; and	75% of the customs-duty and other taxes leviable at the prevailing rates of exchange and duties/taxes on value determined in foreign currency at the time of importation.
(iii)	if sold or otherwise disposed of after the expiration of five years from the date of importation; and	25% of the customs-duty and other taxes leviable at the prevailing rates of exchange and duties/taxes on value determined in foreign currency at the time of importation;

(c)

(i)	if vehicle imported under diplomatic privileges and sold after three years from the date of importation but before the 31 st March, 2005; and	45% of duty and taxes shall be leviable at the prevailing rates of exchange of currency and duties/taxes on the value determined in foreign currency at the time of importation.
(ii)	if vehicle imported under diplomatic privileges and sold after ten years from the date of importation but before the 31 st March, 2005.	25% of duty and taxes shall be leviable at the prevailing rates of exchange of currency and duties/taxes on the value determined in foreign currency at the time of importation.”

(d) for vehicles imported under diplomatic privileges and sold after 1st April, 2005, Ministry of Foreign Affairs will issue authorization for local sale on payment of taxes as per the following Schedule depending upon the category of country of origin of the diplomat based on reciprocity as determined by the Ministry of Foreign Affairs and approved by the Foreign Secretary with copy of each to the Central Board of Revenue;”

16. Throughout the regime, the diplomats, privileged person, organization, office, agency, were continuously enjoying privileges. Minimum threshold was to the extent that sale of vehicle shall be subject to prior consent of the Federal Government from the Ministry of Foreign Affairs and/or Central Board of Revenue, as the case may be, therefore, it would not matter as to whether SRO 447(I)/2004 or SRO 506(I)/88 or any of its predecessor would apply as all such SROs providing exemptions to the privileged class of diplomats were subject to a minimum condition that vehicles could not have been sold without prior permission of the authority concerned as named in the respective SROs, which is a primary point of consideration here.

17. Vehicle was imported in 2002 when SRO 506(I)/88 was active. It restricted the sale without prior permission of Federal Government, Ministry of Foreign Affairs, to be routed through a formal application. In other event, no such vehicle could have been sold within two years of its importation to anyone other than Department of Investment Promotion or diplomatic representatives or mission of foreign government, except when the diplomatic representative by whom it was imported is transferred within two years of its importation and it has been used by him for not less than one year. So nothing beneficial could be achieved by respondent through said SRO. When first transfer took place on 1st. September, 2004, the SRO issued prior to such transfer was 447(I)/2004 dated 12.06.2004. This SRO also deals with the exemption of duties and taxes in respect of motor vehicle falling in Chapter 87 of the First Schedule to the Customs Act imported into Pakistan free of customs duty and sales tax by diplomatic representatives or mission of a foreign government in Pakistan or privileged person, organization, office, agency and subsequently sold or otherwise disposed of in the country to a person entitled to import the same without payment of customs duty

and sales tax under the said SRO, from so much of customs duty as is in excess of that leviable as set out therein, subject to the conditions i.e.

(a) That no such motor vehicle could have been sold, transferred or otherwise disposed of in Pakistan except with the prior permission of the Federal Government (Central Board of Revenue) except for vehicles imported under diplomatic privileges for which Ministry of Foreign Affairs issued the sale permission with a copy of sale permission of each vehicle provided to the Collector of Customs of port of import; and

(b) Sale of the motor vehicles other than those of diplomats (above) restricted before the expiration of five years from the date of its importation, without payment of customs-duty and other taxes at the rate prescribed therein.

18. The relaxation of five years subject to permission is not attached with vehicles imported by diplomats. Diplomat class was separately dealt with who's vehicles could not have been subjected to sales on the basis of any period of its use and import as it was linked to permission of Ministry of Foreign Affairs and conditions therein.

19. Above restrictions continued in the subsequent regime of SRO 577(I)/2006 except for a "Second Vehicle" imported by spouse of a diplomat to whom diplomatic card has been issued by the Ministry of Foreign Affairs for residing in Pakistan, however, even that would have entailed 100% duty if sold prior to two years of its importation, which is not the case here.

20. Fact reveals that the subject vehicle was imported with the permission of Ministry of Foreign Affairs for Afghan Consulate and a certificate of registration was issued having Registration No.CC-01-18. Goods Declaration is not available on record but record shows that it was filed on 31.10.2002 and bill of entry disclosed a date of November, 2002. Registration which is on the basis of Ministry of Foreign Affairs is dated 30.08.2003 in the name of Mirajuddin, Second Secretary, Consulate

General of Afghanistan as available along with counter-affidavit filed by the occupant Falak Jan, respondent herein as Annexure D/2 to counter-affidavit at page 43. Second registration in the name of Mirajuddin took place on 01.09.2004 i.e. on completion of exactly one year. This registration was undertaken on the request of Consulate General of Afghanistan vide letter dated 19.08.2004 wherein registration of the subject vehicle was requested to be changed due to law and order situation in the country to a normal registration/ number plate of vehicle. Perhaps under the garb of hiding identity of Registration No.CC-01-18 of the vehicle being of Consulate General/ diplomat, this request was acceded and a new registration book of vehicle was issued by the Government of Sindh being Book No. NC 396127 with new registration No.BC-5655. This was done on 19.08.2004 at the request of Consulate General of Afghanistan when SRO 447(I)/2004 dated 12.06.2004 was active. The crucial date is 01.09.2004 when regular number plates were issued with new book, though in the name of Second Secretary of Afghanistan Consulate.

21. The respondent has not been able to disclose as to under what law and authority, this identity of the official vehicle was changed without any permission of the foreign ministry (at least not available on record). This perhaps was first sin which is supported by Motor Registration Wing which led to further complications when Mirajuddin transferred the vehicle to one Muhammad Shahan Shaikh, a private person, vide new Book No.NC 412374 and Registration No.BC-5655 on 12.10.2004. This is the third registration if the certificate of foreign ministry is considered as first registration book, which issued registration No.CC-01-18. This third transfer took place within 40 days of second registration which itself based on the apprehension shown in the letter of transfer dated 19.08.2004. Fourth book was issued in the name of

Abdul Hafeez Pirzada with another registration No.BC-5831 and Book No.NC-492929. This fourth transfer took place on 20.06.2005.

22. This was then followed by another book i.e. fifth registration with NC No.410533 but with same registration number in the name of Muhammad Shahan Sheikh (earlier transferee). No date of transfer is available on this book only previous date as 01.09.2004 is shown. Lastly i.e. sixth time the subject vehicle was allegedly transferred in the name of respondent being last occupant through Book No.B0502008 with same registration number on 18.07.2018. Only first leave of the book was filed without book itself, which also disclosed previous transfer date as 01.09.2004 which is misleading.

23. Chronological registration and transfer of the subject vehicle is as under:-

S. No.	Registration No.	Book No.	Date	Name of transferee
1.	CC-01-08	-	30.08.2003	Through Ministry of Foreign Affairs
2.	BC-5655	NC396127	01.09.2004	Mirajuddin, Second Secretary, Consulate General of Afghanistan
3.	BC-5655	NC412374	12.10.2004	Muhammad Shahan Shaikh
4.	BC-5831	NC492929	20.06.2005	Abdul Hafeez Pirzada
5.	BC-5831	NC410533	No date	Muhammad Shahan Shaikh
6.	BC-5831	NC492929	18.07.2018	Haji Abdul Jamal

24. Mysteriously letter/certificate of 19.08.2004 was written/issued by the Consulate General of Afghanistan and the same is unsigned and perhaps it was acted upon when a Book No.NC 396127 was issued on 01.09.2004 with its private registration No.BC-5655 though in the name of Mirajuddin Second Secretary of Afghan Consulate.

25. We have out rightly inquired from the respondent's counsel as to whether before transfer of this vehicle requirement of the effective SRO is observed, to which he pleaded ignorance. He only claimed that he is

innocent buyer without previous knowledge of tax evasion or permission from Ministry of Foreign Affairs. Ignorance of law, as settled, is no ground of an excuse. The respondent is involved in a deal of very expensive vehicle i.e. Toyota Land Cruiser and he had all documents in his custody which he presented in Court at the time of arguing the matter in Court i.e. four books of registration issued by the Motor Registration Wing from Sr. No.2 to 5 above and a leaflet of last registration book Sr. No.6 above. He (learned counsel) himself filed a counter-affidavit to the Reference Application although it is not required, which accompanied number of documents such as (a) certificate of registration duly endorsed by the Ministry of Foreign Affairs and registration authority of Islamabad Capital Territory, which is of 30.08.2003.

26. As observed above it was last transferred in the name of Haji Abdul Jamal with new Book No.B0502008. We have not been disclosed as the respondent has perhaps conceded that no receipt of duties and taxes along with permission of Foreign Ministry was handed over by any of the transferees which could exempt him/vehicle from any further claim of the customs department

27. Upshot of the above discussion is that the proposed question is answered in affirmative in consequence whereof the Special Customs Reference Application is allowed as prayed and impugned judgment dated 11.10.2019 passed by the Customs Appellate Tribunal Bench-II, Karachi is set aside. The four original registration books and a leaflet of sixth registration book, as presented by the respondent, are directed to be kept in safe custody by the Nazir of this Court. Junior Court Associate of the Court shall handover these registration books and leaflet to the Nazir who shall acknowledge the same under a receipt. Nazir shall retain these original registration books till further actions are initiated by the

customs authority in accordance with Order-in-Original passed on 28.06.2019 as contemplated under the law. Respondent may also obtain copies of the registration books and leaflet as retained in the file by Court Associate of this Court, if respondent so desires, to have for his record and to be used for presentation if the need be arises. Insofar as petition is concerned, since it is primarily filed for the purpose of implementation of the judgment impugned in SCRA, the same is dismissed accordingly.

28. 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.

Dated:

Judge

Judge