IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special C.R.A. No. 110 of 2014
a/w.
SCRAs No. 35/2010, 311/2013, 219/2014, 2391/2015, 386/2016, 80, 42, 419, 420, 541, 905/2017 & HCA No. 334/2017 & C. P. Nos.5230/2014, 3351, 7527/2017 & 5163/2018.

Date	*Order with signature of Judge*

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Abdul Maalik.

The Additional Director, Director General of
Intelligence & Investigation-FBR, Regional Office,
Karachi…….. ……Appellant

Versus

Imran s/o Ismail……. .. ……..Respondents

Date of hearing : 25.09.2018, 14.11.2018, 11.12.2018, 04.02.2019, 19.12.2019, 05.03.2019 & 06.07.2020.

Date of Judgment : 09.07.2020

Advocates in SCRAs
Mr. Kashif Nazeer, Advocate for the Applicant(s).
Mr. Muhammad Khalid Dogar, Advocate for the Applicant.
Ms. Afsheen Aman, Advocate for the Applicant.
Ms. Dilkhurram Shaheen, Advocate for the Respondent.
Mr. Zia-ul-Hassan, Advocate for the Respondent.
Mr. Shafqat Zaman, Advocate for the Respondent.
Mr. Pervez Ahmed Mastoi, Advocate for the Respondent.

Advocates in HCA.
Mr. Khalid Mehmood Siddiqui, Advocate for the Appellants.
Mr. Jawed Farooqui, Advocate for the Respondent.
Mr. Kashif Nazeer, Advocate for the Respondent.

Advocates in C.Ps.
Mr. Omer Soomro, Advocate for the Petitioner.
Mr. Khaleeq Ahmed, Advocate for the Petitioner.
Mr. Irfan Aziz, Advocate for the Petitioner.
Mr. Kashif Nazeer, Advocate for the Respondent.
Dr. Shahnawaz Memon, Advocate for the Respondent.
Mr. Khalid Mehmood Rajpar, Advocate for the Respondent.
Mr. Shaheryar Qazi & Sajjad Abbasi, Advocate for the Respondent.
Ms. Lubna Pervez, Deputy Attorney General.

J U D G M E N T

Aqeel Ahmed Abbasi, J: Aforesaid References have been filed by the Customs Authorities against various orders passed by the Customs Appellate Tribunal, dismissing the department appeals, whereas, some common questions have been proposed through all these References relating to allegation of smuggling against the importers in terms of Section 2(s) of the Customs Act, 1969, possession and use of smuggled vehicles and allegation of tempering chassis numbers etc. Alongwith aforesaid References, Constitutional Petitions have been filed by the petitioners, who claimed to be lawful owners of subject vehicles, which have been seized and detained by the Customs Authorities, including official of Directorate of Intelligence and Investigation on the allegation of being smuggled vehicles. Alongwith these cases, a High Court Appeal No. 334/2017 filed by the Customs Authorities, against the order passed by the learned ingle Judge of this Court in Civil Suit No.551/2017 has also been taken up for hearing. All these cases have been heard by the consent of all the parties for disposal through a common judgment in respect of common legal issues, involved in these matters.

2. In SCRA No.110/2014, vide order dated 14.04.2015, notices were issued to the respondents in respect of following questions, which according to learned counsel for applicants, are questions of law, arising from the impugned order dated 13.06.2013 passed by the Customs Appellate Tribunal, Bench-III, Karachi in Customs Appeal No.K-55/2013/948:-

> *"1. Whether banned goods (Notified vide Serial No. 26 of SRO 566(I)/2005 dated 06.06.2005, issued for the purpose of Section 2(s) and 156(2) of the Customs Act, 1969), could be released by the learned Customs Appellate Tribunal without any discussion*

much less examination and analysis of the facts and law involved?

2. Whether the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, has seriously erred in law by not taking notice and giving findings on the evidence of Chemical Examination Report No.AIG/FD/OR/274/2012 dated 06.11.2012, confirming therein tampering of the chassis frame?

3. Whether the learned Member (Technical), Appellate Tribunal, Bench-II, Karachi, 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 respondent/possession holder of the vehicle has failed to discharge burden of proof of lawful possession?

4. Whether registration of smuggled vehicle, having tamper3ed chassis number with Motor Registration Authority Civic Centre, Karachi can regularize a smuggled vehicle and absolve it from penal action under the Customs Act, 1969?

5. Whether "importation" and registration, in context of vehicles, are not different and distinct concepts, the former being under the Customs "Act, 1969 and the latter being the Provincial subj3xct and whether mere registration of vehicle absolves the owner/possessor of a vehicle to prove its legal importation under the Customs Act, 1969?

3. It would be appropriate if we refer to an order dated 22.12.2015 passed by the Divisional Bench of this Court in S.C.R.A.No.110/2014, whereby, an interim arrangement for the provisional release of the subject vehicles, which were detained by the customs authorities, was made, while placing reliance on a judgment of a Divisional Bench of this Court dated 06.02.2013 passed in SCRA No.263/2010 [*Saif-ur-Rehman & Waheed-ur-Rehman v. the Member Judicial-I, Customs Appellate Tribunal Bench-1, Karachi & others*] in the following terms:-

*"**22.12.2015***

Mr. Kashif Nazeer, Advocate for Applicant.
Ms. Dilkhurram Shaheen, Advocate for Respondent

We have been briefly assisted by learned counsel for the respective parties. Without prejudice to the case of any of the parties, it appears to us that some at least are the questions of law that are said by the department to arise out of the impugned order of the Appellate Tribunal may already stand covered answered by a Judgment of this Court dated 06.02.2013 in SCRA No.263/2010 etc. Learned counsel for the applicant department draws attention to the fact that the Supreme Court was petitioned for leave to appeal against this Judgment and by order dated 25.09.2013, the Supreme Court has been pleased to grant leave to appeal. The leave granting order has been placed before us. We note from the leave granting order that the judgment of this Court has not been suspended and we are informed that there are no interim orders made by the Supreme Court in the appeals now pending before it. We are further informed that an application has been filed by the department for fixation of the appeals in the Supreme Court and learned counsel states that this application is awaiting appropriate orders. (This information has been provided to us by learned counsel appearing in certain other matters involving similar decisions which are also listed today.) At the same time we are informed by learned counsel for the respondent that although the decision of the Appellate Tribunal is in favor of the respondent, the subject vehicle has still not been released.

Keeping in mind all of the forgoing factors, by way of interim arrangement and, as already noted, without prejudice to the case of any of the parties, we direct that the subject vehicle must within one week from today be handed over by the department o the Nazir of this Court along with all documents pertaining thereto. The Nazir of the Court, shall,

subject to proper verification and confirmation, release the vehicle to the respondent along with a copy of the registration documents relating to the vehicle, which copy shall be appropriately stamped by the Nazir that the original set is lying in the custody of the Nazir, pending orders from this Court in this reference application. This copy is being provided to the respondent only for the limited purpose to enable the respondent to address any queries that may be put to the respondent with regard to the subject vehicle. The respondent shall not in any manner deal with or dispose of the subject vehicle (whether by way of any purported sale, transfer, mortgage or otherwise) but must keep the same in his possession and use it only for permissible purposes in the ordinary course. The respondent shall be bound to immediately produce the vehicle for the inspection of the Nazir at any time that the Nazir so seems appropriate. The Nazir shall, if he so considers it appropriate, also issue necessary directions to the concerned registration authority to make a noting in respect of the subject vehicle in its record that any transfer of dealing whit the subject vehicle is prohibited unless this Court otherwise so directs.

The concerned departmental authorities are warned that if there is any delay in complying with this order and the interim arrangement that has been hereby made, strict action shall be taken against the concerned officers.

Let this matter come up in Court on 20.01.2016 only for purposes of ascertaining whether the interim order of the Court as made above has been complied with or not. Otherwise, the hearing of this reference application shall await the decision of the Supreme Court in the appeals referred to above."

4. In all the aforesaid references filed by the Customs Department against various orders passed by the Customs Appellate

Tribunal in favour of the respondents, it has been held that the allegations of smuggling in respect of subject vehicles are without any lawful basis, therefore, the detention of such vehicles by Customs Authorities has also been declared to be illegal.

Keeping in view the facts and circumstances as prevailing in these References, Constitutional Petitions and the High Court Appeal and the common allegations that subject vehicles, which are duly registered by the Motor Vehicle Registration Authority under the Motor Vehicle Ordinance, 1965 are smuggled because the owners / subsequent purchasers could not produce the import documents, we would reframe the questions as per legal issues involved in these cases, so that the same may be decided in accordance with law. Reframed questions read as follows:-

(i) Whether a motor vehicle, duly registered with the Excise & Taxation Department under the Motor Vehicle Registration Ordinance, 1965, can be detained/seized by the Customs Authorities on the charges of smuggling in terms of Section 2(s) read with Section 156(1)(89) and (90) of the Customs Act, 1969, if the owner is not in possession of the import documents?

(ii) Whether the Customs Authorities can ask for production of record, including import documents from owner in respect of a Motor Vehicle or any other importable item, beyond the period of five years in terms of Section 211 of the Customs Act, 1969?

(iii) Whether the Registration Book, Customs Auction Documents, Form of Transfer Order, Bank challans towards payments of additional duty and taxes, capital value tax (CVT), registration fee, transfer fee and other charges, unless proved to be bogus and forged, constitute other documents prescribed by or under any law for the time being in force in terms of Section 187 of the Customs Act, 1969?

(iv) Whether production of documents as prescribed by or under any law for the time being in force by the owner in respect of a motor vehicle or any other importable item shifts the burden of proof from the owner, upon the Customs Authorities to establish the charge of smuggling through positive evidence or any concrete material to the contrary, in terms of Section 2(s) read with Section 156(1)(89) and (90) of the Customs Act, 1969?

5. From perusal of the provisions of Section 2(s) of the Customs Act, 1969, it has been **observed that the term smuggled has been defined to mean "to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force [or en route pilferage or transit goods], or evading payment of customs duties or taxes leviable thereon**. Prima facie, the items mentioned in Section 2(s) do not refer to motor vehicles, however, in terms of Section 2(s)(ii) any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed one hundred and fifty thousand rupees in value, can be included for the purposes of attracting the charge of smuggling.

In none of these cases, there is any allegation against the owners/subsequent purchasers for having brought into Pakistan in breach of any prohibition or restriction for the time being in force, hence committed an act of smuggling, on the contrary, the common allegations against the owners/subsequent purchasers are that since they could not produce any lawful import documents, therefore, have smuggled the vehicles without payment of customs duty and taxes, which is an offence punishable under Section 156(89)&(90) of the Customs Act, 1969. It has been further alleged that documents of purchase of subject vehicles through Public Auction including Auction by the Customs Authorities, as well as the Registration Documents issued by Excise & Taxation Department under the

Motor Vehicle Registration Ordinance, 1965, are bogus and forged documents whereas, the same would otherwise, not absolve the owners from the charge of smuggling. It is pertinent to note that during the course of arguments, learned counsel for the respondents have heavily placed reliance on judgment of a Divisional Bench of this Court in S.C.R.A. No.263/2010 in the case of Saif-ur-Rehman & Waheed-ur-Rehman v. the Member Judicial-I, Customs Appellate Tribunal Bench-1, Karachi & others and have argued that all these questions have already been examined and answered by the Divisional Bench of this Court in the aforesaid reference. According to learned counsel, their case is fully covered by the aforesaid judgment passed by the Divisional Bench of this Court, therefore, prayed that the reframed questions proposed herein above, may be decided against the department and in favour of owners of subject vehicles.

6. In order to examine the relevant facts and the law points involved in the aforesaid Spl.C.R.A. and these cases, it will be advantageous to reproduce the relevant facts, legal points involved and decision of the Divisional Bench of this Court as recorded in the case of *Saif-ur-Rehman & Waheed-ur-Rehman v. The Member Judicial-I, Customs Appellate Tribunal & others* [**Spl. Customs Reference Application No. 263/2010**], which read as follows:-

> "7. The following three questions were referred to the Court by the applicants:
>
> 1. Whether the learned Member Judicial Customs, Appellant Tribunal Karachi has failed to properly read the evidence available on record provided by the Appellant at original stage and Appellants stage under section 187 of the Customs Act, 1969, shift burden of proof on the respondents?
>
> 2. Whether the learned Member Judicial Customs, Appellant Tribunal Karachi has rightly passed time bared order in appeal after 9 months in which time limit was extended sixty days as per section 194-B of the Customs Act, 1969 whether time barred order is maintainable in the eye of Law?

3. Whether learned Judicial Customs, Appellant Tribunal Karachi has failed to properly read the evidence available on record provided by the Appellant at original stage and Appellants stage and whether Law Fully Open Auctioned vehicle can confiscate without verifying produced documents?

36. The two questions that fall for determination have been noted above (see para 7). Of these, the second question, and certain other issues, already stand answered in favor of the Department (the respondent) and against the applicants (see paras 20 and 21). We turn therefore to consider the first question. Two points are to be noted. Firstly, the Department recorded a finding that the vehicle was smuggled, which was upheld by the Tribunal and this finding is not as such challenged before us. Therefore, this reference application has to be dealt with on this basis. Secondly, it is clear that the vehicle was auctioned off by the Punjab authorities, and was acquired by the applicant No.1 either from the auction purchaser or some intermediary transferee. The fact of the auction is indisputable. Although learned counsel for the Department sought to raise some doubt on this point, we are of the view that the impugned order shows that the Tribunal accepted the record with regard to the auction.

37. When the question now under consideration is looked at in the light of the discussion and analysis in the earlier part of the judgment, it will be seen that the first stage of the exercise had concluded with a finding that the vehicle was “smuggled goods” and hence, the matter came within clause (89). The reliance placed on the auction is thus a defense raised at the second stage. More formally, it is presented as a “lawful excuse”. The factum of the auction stands established. All the documents relating to the auction were available with the applicant and in any case, the Department confirmed the same with the Punjab authorities. Hence the onus of proving the excuse, which lay on the applicants, had been discharged. The only question is whether the auction and the disposal of the vehicle in terms thereof constituted a “lawful excuse” for purposes of clause (89)?

38. Having considered the matter, we are of the view that this question should be answered in the affirmative. As the Privy Council observed in Wong Pooh Yin it is the “excuse or exculpatory reason” that must be the focus of attention. The auction was carried out by the Provincial authorities as part of their official business. It is the “excuse” advanced by the applicants for being in possession

of the smuggled goods. There can be no doubt that the excuse itself is lawful. It is also a readily believable basis showing how the applicants came to acquire the vehicle. In our view, it comes squarely within the ambit of clause (89). Hence, even though the vehicle was smuggled, no action could be taken against the applicants in terms of the said clause. This was the proper legal inference and conclusion that necessarily and naturally flowed from the factum of the auction and therefore the Tribunal erred materially in coming to a contrary conclusion.

39. Learned counsel for the Department relied upon *Ch. Maqbool Ahmed v. Customs, Federal Excise and Sales Tax, Appellate Tribunal and others 2009 PTD 77, PTCL 2009 CL 129 (SC)* (also referred to in the impugned order). The case before the Supreme Court also involved outright confiscation of a vehicle under clause (89). The findings of the Department that the vehicle was smuggled and that the chassis had been tampered with were upheld by the Tribunal and the reference application was dismissed by the Lahore High Court. It was urged before the Supreme Court that since the petitioner before it was a bona fide purchaser, he should have been allowed to redeem the vehicle on payment of the redemption fine. This submission was repelled in terms of the following observation (PTD at pp. 80-81)

> "The contention of the learned counsel for the petitioner that the petitioner is a bona fide further purchaser and the vehicle may be released on payment of duties and taxes on the payment of 30% of the duties and taxes under S.R.O. No.179(1)/2006, dated 2-3-2006, has also no force. Such a request was made before the Hon. High Court as well which was lawfully declined because it is a case involving a smuggled vehicle with tampered chassis frame and not a case of a smuggled vehicle with non-tampered chassis frame."

Leave to appeal was refused. Learned counsel for the Department relied on this passage to contend that the Tribunal had correctly read the evidence in the case presently at hand. With respect, we are unable to agree that the meaning sought to be ascribed to the Supreme Court's decision by learned counsel is correct. In our respectful view, the cited decision could perhaps be relied upon in support of a proposition that for purposes of clause (89), the fact that the person found to be in possession of the smuggled vehicle, or removing, keeping, dealing, etc. with it was bona fide purchaser for valuable consideration and without notice, would not constitute a "lawful excuse". That of course, is not the

case at hand. Here, the defense of "lawful excuse" rests on an official auction carried out by the Provincial authorities. However, even with regard to the postulated proposition, we would, with respect, hesitate for the reason that it appears that neither the Supreme Court nor the Lahore High Court was specially assisted on the point of "lawful excuse". With respect therefore, the cited decision provides no assistance to learned counsel.

40. The Tribunal itself in the impugned order referred to a decision of a learned Division Bench of this Court in Sp. Cus. R.A. 236/2008. This is in fact reported as *Agha Masiihuddin v. Additional Collector of Customs and others 2009 PTD 523*. In this case, the vehicle was found to be smuggled (and hence clause (89) applied) but was allowed in the redeemed on payment of the redemption fine. It was observed by the learned Division Bench that it was the "sheer luck" of the applicant before it that he was not prosecuted for the criminal offence (which, as noted above, is one of the penal consequences if clause (89) applies). Certain general observations of an essentially factual nature, were made by the learned Division Bench. It was observed that the applicant claimed to be a bona fide purchaser and although the seller was known to him and resident of the same town, he (the applicant) had taken no action against the seller for having sold a smuggled vehicle. No FIR has been registered nor a civil suit filed. It was observed that prima facie showed "that the applicant had conscious knowledge that the subject vehicle was a smuggled one". In our respectful view, the facts and conclusions of this decision are quite different from the case at hand. To put the matter in terms of the analysis and discussion carried out in the earlier part of this judgment, even if in terms of clause (89) the applicant had sought to raise the defense on "lawful excuse" on the basis that he was a bona fide purchaser for consideration and without notice, this would have failed. The onus would of course, have lain on the applicant and since the learned Division Bench concluded that he had "conscious knowledge" that the vehicle was smuggled he would have failed to discharge it. In our view, with respect, the Tribunal was wrong to refer to this decision since its facts and the observations made by the learned Division Bench were not materially relatable to the case presently at hand.

44. In view of the foregoing, we would answer question No.1 (see para 7 above) in favor of the applicant and against the Department. Accordingly, the reference is allowed with the result

that the impugned order of the Tribunal and the orders of the customs authorities below stand set aside.

45. It will be recalled that in these reference applications the applicant is the Department. The questions settled by this Court on 18.01.2011 have been set out in paras 13 and 18 above respectively. because of any overlap of the questions involved, it will be convenient to take up the two references together. We begin with question No. 5 in SCRA 245 and question No. 4 in SCRA 253. Both questions relate to the effect of the decision of the Lahore High Court in *Ch. Muhammad Ashraf v. Deputy Superintendent, Anti-Smuggling Squad and others* PLD 1977 Lah 300. In view of the detailed consideration just undertaken of this decision, these questions must be answered against the Department and in favour of the respondents.

46. The basis on which the Tribunal set aside the orders of the customs authorities has been set out in para 12 above. The relevant extract from the decision of this Court in *Shahzad Ahmed Corporation v. Federation of Pakistan and others* 2005 PTD 23 (DB) onn which the Tribunal based itself has also been reproduced. We are in full agreement with the views expressed by the learned Division Bench (which are in any case even otherwise binding on us). However, the conclusion reached by the Tribunal, namely that if the seizure of the vehicle, the "initial action", was bad in law all the subsequent proceedings were also illegal cannot be sustained. Certainly, it finds no support from the cited decision. The reason is that an order of confiscation is made under section 180. It is well settled that as long as the requirement of the section is fulfilled, the fact that there was no seizure at all of if made was bad in law will not render any order of confiscation made under section 180 illegal: see, among others, *Abdul Zahir and another v. Director-General, Pakistan Coast Guards and others* PLD 1990 Kar 412 (DB), *Sikandar and Brothers v. Government of Pakistan and another* PTCL 1991 CL 177 (SHC; DB) and *Khurram Jamal v. Collector of Customs* 2007 PTD 131 (SHC; DB). To this extent and in the foregoing context, question No. 4 in SCRA 245 can be regarded as being answered in favor of the Department and against the applicants therein. Nonetheless, the essential point raised by the Tribunal is sound: was the basis on which the vehicles were held to be smuggled goods, and clause (89) (or indeed, clause (90)) made applicable thereto, legally valid and proper? It is this question of law

that in our view arises, in essence, out of the impugned orders of the Tribunal.

47. Question No. 1 in SCRA 245 relates to the applicability of section 187. In our view, this section cannot be regarded as applying to a situation where either of clauses (89) or (90) is sought to be invoked. This section places the burden of proof on the person alleged to have committed an offence under the Customs Act if a question arises that he did an act or was in possession of anything with lawful authority or under a permit, licence, etc. prescribed by or under any law for the being in force. Now, clauses (89) and (90) in any case place the burden on the person concerned to show any "lawful excuse" for having acquired possession of or carrying removing, depositing etc. any smuggled goods, etc. As made clear by the Privy Council in *Wong Pooh Yin,* the scope of "lawful excuse" is broader than that of "lawful authority". A person who is unable to show the latter may yet succeed in establishing the former. Thus, to apply section 187 to clauses (89) or (90) would narrow the scope of what it is permissible for the concerned person to establish in the fact of express and clear language contained in these clauses. This would, in our view, be contrary to established rules of interpretation. Secondly, if at all, section 187 can be regarded as a "general" provision, which reverses the burden of proof in the sort of situations to which it can apply. If it is at all applicable to the situations covered by clauses (89) or (90), then these can be regarded as "specific" provisions. The rule of interpretation is that the specific overrides the general and therefore the language used in the clauses will override anything to the contrary in the section. For this reason also, the right to show "lawful excuse" must be regarded as overriding as it were the more general requirement of showing "lawful authority". (We leave open the question whether section 187 applies at all to adjudicatory proceedings, or its operation is confined to criminal trials on a prosecution before the Special Judge.) Therefore, question No. 1 must be answered against the department and in favour of the applicants in SCRA No.245.

48. Question No. 2 in SCRA 245 and question No. 3 in SCRA 253 are substantially the same. These questions, alongwith question No. 3 in SCRA 245 can be regarded as going to the merits of the case, and to the important question whether it is clause (89) or (90) that was applicable. Now, as noted above, in both these reference applications, the subject vehicle was a 1991 model. Motor vehicles were notified for purposes of section 2(s) by means of an amending

notification dated 14.09.1998. In our view, the older the model of the vehicle relative to 14.09.1998, the greater the probability that it was brought into the country before the date and as noted in para 24 above, the only was in which section 2(s) could then apply was by virtue of the second limb of condition (B). In the facts and circumstances of both the reference applications under consideration it was likely (and perhaps probable) that the vehicles came into Pakistan before 14.09.1998. However, there was no application of mind at all by the appropriate officer to this aspect of the matter. Secondly, section 211 mandates a specific period up to which the record regarding importation is to be maintained. It necessarily follows that if such record is demanded by the customs authorities after that date and the person concerned is unable to produce the same, no adverse inference can or ought to be drawn. The record in relation to the vehicles was demanded only after their seizure in 2006 and 2005 respectively. This was quite clearly many years after the expiry of the period stipulated in section 211. The fact that the record was not produced did not, in our view, enable or allow the customs authorities to drawn any inference or reach any conclusion adverse to the applicant. Thirdly, in both cases, after seizure the matter was internally examined by the seizing authority by making enquiries with Custom House, Karachi. Again, these queries were being put many years after the time when the vehicles were brought into Pakistan. No thought was given to the possibility that the record of Customs House may not have been fully maintained or even that, while making the search in the record room (if any), where such any old record is maintained, the relevant files were missed or overlooked. The bill of entry furnished in relation to the vehicle in SCRA 253 was dismissed as a forgery or fabrication on the mere (and sole) ground that it would not be traced in Custom House. Again, the obvious question that this raised was missed entirely.

49. Having considered the matter, in our view, the appropriate officers in both cases completely misunderstood the law and misdirected themselves by failing to take the correct approach and reaching the lawfully permissible conclusions. There was a near complete failure to correctly apply the law. Therefore, it could not have lawfully been concluded by the appropriate officer that the vehicles in either of the reference applications were “smuggled goods”. In our view, it could not even be concluded that there was a “reasonable suspicion” that the vehicles were “smuggled goods”.

Hence, it could not be said that either of the situations envisaged by clause (89) was applicable. In our view, that clause clearly could not have been held to apply in the present facts and circumstances.

50. It will be recalled that in both the reference applications, the concerned appropriate officer in the order-in-original held the applicants simultaneously liable under both clauses (89) and (90). The illegality committed on this account has already been highlighted. In our view, the inability of the appropriate officer to decide which of the clauses was applicable may also have stemmed from his being unable to conclude firmly whether either of the two situations covered by clause (89) was attracted. In other words, the (illegal) simultaneous application of both clauses may have stemmed either from a failure to understand the law or any inability to conclusively decide on the facts or both. Either way, the orders in orders in original were clearly unlawful.

51. If clause (89) was inapplicable, then the next question is whether clause (90) was applicable. This question was not independently addressed at all by the customs authorities and that in itself is sufficient to give an answer in the negative. However, the question is an important one and of general interest and should therefore be looked into as well. In order to do so, it will be convenient to again reproduce clause (90) to the extent relevant:

> "If any person, without lawful excuse the proof of which shall be on such person, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods, not being goods referre3d to in clause 89 … which are chargeable with a duty which has not been paid, or with respect to the importation … of which there is a reasonable suspicion that any prohibition or restriction for the time being in force under or by virtue of this Act has been contravened, or if any person is in relation to any such goods in any way, without lawful excuse, the proof of which shall be on such person, concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon, or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods."

It will be seen that clause (90) applies to two broad categories, each of which has two limbs. The first category is those goods in respect of which duty has not been paid (the first limb) or there is a reasonable suspicion that any prohibition or restriction by reason of the Customs Act has been contravened(the second limb). The second category has essentially the same two limbs but applies if there bas been a "fraudulent evasion" or attempt at such evasion. Clause (90) therefore is a rather complex provision, which can apply

in four distinct situations. However, in respect of each situation, the exercise remains two-stage as noted before in the earlier part of this judgment.

52. When the facts and circumstances of the two reference applications under consideration are examined in the light of the foregoing, it is clear that the record cannot sustain a finding in terms of any of the four situations. The reasons for this are substantially the same as noted above and hence need not be repeated. In our view, the customs authorities were quite unable to make out a case on the merits of either of the reference applications. Question Nos. 2 and 3 in SCRA 245 and question No. 3 in SCRA 253 must therefore be answered against the Department and in favor of the applicants.

53. Insofar as question No. 2 in SCRA 253 is concerned, this clearly stands answered in terms of the detailed discussion and analysis carried out in the paras above. The only aspect of this question that requires specific consideration is the reference to clause (77) of section 156(1). In our view, the issuance of a show cause notice on the basis of this clause was clearly incorrect because it only imposes a criminal liability, i.e. can be applied only by the Special Judge in a criminal prosecution. It does not apply in relation to adjudication proceedings and no order can be made on the basis thereof by the customs authorities. It is not necessary therefore, to consider this clause in any detail. Question No. 2 must also stand answered against the Department. In view of the foregoing, there is no need to address question No.1 in SCRA 253, which in our view in any case does not arise on the facts.

54. Learned counsel for the Department relied on *Agha Masihuddin v. Additional Collector of Customs and others* 2009 PTD 523 and *Ch. Muhammad Ashraf v. Deputy Superintendent, Anti-Smuggling Squad and others* PLD 1977 Lah 300. These decisions have already been considered and need not be examined again. Learned counsel also relied on the order dated 27.04.2009 of the Supreme Court refusing leave to appeal against the decision of this Court in the *Agha Masihuddin* case. However, the question on which the Supreme Court was petitioned for the grant of leave of appeal was quite different from the questions raised in the present references. The leave refusing order does not therefore, with respect, assist learned counsel in any way.

55. In view of the foregoing, we conclude as follows in respect of each reference application:

a. SCRA 263/2010: Question No.1 is answered in favor of the applicant and against the Department. Question No.2 is answered in favor of the Department and against the applicant. In view of the answer to question No.1, the reference stands allowed. If the subject vehicle is with the customs authorities, the same must be released immediately to the applicant along with all the record seized in relation thereto.

b. SCRA 245/2008: All questions (save one) stand answered against the applicant Department and in favor of the respondents. The reference application is dismissed.

c. SCRA 253/2008: All questions (save one) stand answered against the applicant Department and in favor of the respondents. The reference application is dismissed."

7. We have reproduced the relevant facts, questions proposed and the findings recorded thereon by the Divisional Bench of this Court in the aforesaid reference application at length, as we are of the view that the facts and legal issues involved in all these cases are similar to the facts and legal issues of the above cited case, and, therefore, would be relevant to decide the questions of law and legal points involved in these reference applications and the connected petitions as well as High Court Appeal. As we have already observed that in none of these cases, there is any allegation against the owners/subsequent purchases for having committed an act of smuggling in terms of Section 2(s) of the Customs Act, 1969, as neither they have imported subject vehicles nor they have brought such vehicles into Pakistan from routes other than specified under Section 9 or 10 from any place other than a Customs Station, nor any evidence or material has been produced by the Customs Authorities, which could otherwise establish that documents produced, e.g. Registration Books issued by Excise & Taxation

Department, Motor Vehicle Registration Authority, Government of Sindh, Form of Transfer Order, the sale/purchase agreements, the Custom Auction documents, Bank Challans towards payment of Additional Customs duty and taxes, CVT, registration fee, transfer fee and other charges etc., produced in respect of subject vehicles, are forged or bogus documents. Admittedly, all the owners of the subject vehicles in these cases are second, third or even fifth owners, and have supplied the above documents which, prima-facie, show that initial burden of proof to the effect that they are the bona-fide lawful owners/purchasers of the subject vehicles and have not committed any act of smuggling nor they are in possession of smuggled vehicles. The subject vehicles do not fall within the category of banned items as defined in Appendix-A of the Import Policy Order 2009, 2012, and 2016, however, their import is subject to certain conditions prescribed by the Federal Government through Notifications issued in terms of Section 2(s)(ii) read with 156 (2) of the Customs Act, 1969, Import Policy Order 2009, 2012, 2013 and 2016, which includes restriction of five years as to the age of manufacture of a vehicle to be

imported. In fact none of the Motors Vehicles, subject matter of instant cases, is less than 5 years old rather, they are mostly old Models of 1998 to 2004, therefore, reference to provisions of Section 211 of the Customs Act, 1969, becomes relevant as it provides that **record required under sub-section (i) of Section 211 of the Customs Act, 1969, in respect of any imported item shall be kept for a period of not less than five years in such form as the Board may by Notification in the official gazette, specify.** In other words, any importer or owner of the imported items is under no legal obligation to maintain any record pertaining to import beyond the period of five years under the Customs Act, 1969, nor the Customs Authorities can demand such record under the Customs Act, 1969,

hence non-availability of customs documents, older than five years, particularly in cases of Registered Motor Vehicles, would not attract the provisions of Section 2(s) read with Section 156(1)(89) and (90) of the Customs Act, 1969.

8. We would now examine the provisions of Section 187 of the Customs Act, 1969, relating to discharge of burden of proof, according to which, when any person alleged to have committed an offence under this Act, and any question arises whether he did any act or was in possession of anything with lawful authority or under a permit, license or **other document prescribed by or under any law for the time being in force**, the burden of proving that he had such authority, permit, license or other document shall be upon such person. However, in all the above cases, respondents have produced original Registration Books issued by Motor Vehicle Registration Authority, along with Customs Auction documents, Bank Challans towards payment of Additional duty and taxes, Form of Transfer Order, Capital Value Tax (CVT), Registration Fee and other charges before the Customs Authorities to justify the lawful ownership/possession of the subject vehicles towards discharge of initial burden of proof in terms of Section 187 of the Customs Act, 1969. In the afore cited judgment, the learned Divisional Bench of this Court has elaborately dilated upon all the above legal issues and has been pleased to hold that record beyond the period of five years in terms of Section 211 of the Customs Act, 1969, cannot be requisitioned by the Customs Authorities, whereas, in terms of Section 187 of the Customs Act, 1969, once the initial burden relating to ownership and lawful possession of the imported vehicle has been discharged through production of original Registration Book issued by the Motor Vehicle Registration Authority or any other document prescribe by law or under any other law for the time being in force,

then burden shifts upon the Customs Authorities to establish that either the Documents produced are forged, bogus or the same have been obtained illegally, hence of no legal consequence. No proceedings, whatsoever, have been initiated either against the previous owners of the subject vehicles, whose particulars have been provided by the respondents to the Customs Authorities, nor any action against the officials of the Motor Vehicle Registration Authority and the Customs Authorities has been taken, for having issued the Registration Books on the basis of allegedly forged and bogus documents. On the contrary, in the absence of any material, inquiry/investigation or any steps required to be undertaken for establishing the charge of smuggling in terms of Section 2(s), or to make out a case that owners of the vehicles are found in possession of smuggled vehicles in terms of Section 156(89)&(90) of the Customs Act, 1969, without following the legal course of adjudication as provided under Chapter XIX of the Customs Act, 1969, subject vehicles have been detained/seized on the charges of smuggling. In all these cases, subject vehicles have been detained/confiscated in a highly arbitrary manner by the Customs Authorities while the same were playing within the city limits, inspite of the fact that initial burden to prove lawful possession of Registered Vehicles was discharged by the owners through production of aforesaid documents. Reliance in this regard can be placed in the case of **M/s. Muhammad Ateeq Paracha and others v. The State (PTCL 2004 CL. 551)** and **Abdul Razzaq v. Directorate General of Intelligence and Investigation – FBR and 2 others (PTCL 2016 CL. 837)**.

9. This Court in a recent judgment in the case of **Collector of Customs vs. M/s. Muhammad Tahir Construction Company, Loralai [(2020) 121 TAX 369 (High Court, Karachi)]** while examining the scope of importability of Hino Trucks in term of Import

Policy Order 2016 and the provisions of section 187 of the Customs Act, 1969, relating to discharge of burden of proof, has been pleased to hold as under:

> "7. Learned counsel for the applicant has not been able to point out any factual error or illegality in the impugned order passed by the Customs Appellate Tribunal in the instant case, nor could assist this Court as to how, on the basis of a purported certificate obtained from local manufacturer of Hino Pak Truck, the age of imported Hino Truck can be ascertained. Moreover, record shows that respondent has discharged the initial burden to prove that the subject vehicles were imported in conformity with paragraph 9(ii)(5) of the Import Policy Order, 2016, whereas, applicant has failed to produce any evidence or material which could otherwise support the allegations of violation of para 9(ii)(5) of the Import Policy Order, 2016. The ratio of the case relied upon by learned counsel for respondent as referred to hereinabove is also squarely attracted to the facts of the instant case.
>
> 8. Accordingly, we do not find any substance in the instant Reference Application, whereas, the finding as recorded by the Appellate Tribunal in the instant case is predominately based on the findings of facts which does not suffer from any factual error or legal infirmity, hence does not require any interference by this Court. Reference in this regard can be made to the case of *Irum Ghee Mills v. Commissioner Income Tax 2000 SCMR 1871.* Accordingly, the proposed questions are answered in ***negative*** against the applicant and in favour of the respondent."

10. To be more specific about the brief facts and the legal issues involved in all these cases, we deem it appropriate to mention the same in following terms so that there remains no ambiguity regarding the facts and the legal controversies involved in all these cases. In C.P. No.D-5230 of 2014, the description of subject vehicle has been given as Toyota Land Cruiser, bearing registration No.BD-6648, Model 1998, Chassis No.HDT-101-0004534 and Engine No.015719. The petitioner has attached registration book, issued by Excise & Taxation Department, Government of Sindh along with customs auction documents issued by Director General, Intelligence and Investigation (Customs & Excise), Government of Pakistan, including Certificate under Rule 72, paid bank challan of the bidding amount i.e. CVT, registration charges, transfer charges etc., and Form of Transfer Order. In C.P. No.D-7527/2017, the description of subject

vehicle has been given as Toyota Hilux Surf, bearing registration No.BF-6328, Model 2001, Chassis No.VZN185-9056058, Engine No.5VZFE-1269447, whereas, petitioner has attached registration book, issued by Excise & Taxation Department, Government of Sindh along with customs auction documents issued by Collectorate of Customs Appraisement, AICT, Mauripur Road, Karachi, including Certificate under Rule 72, paid bank challan of the bidding amount i.e. CVT, registration charges, transfer charges etc., and Form of Transfer Order. In C.P.No.D-3351/2017, the description of subject vehicle has been given as BMW Sports Car, bearing registration No.BEE-924, Model 2005, Chassis No.WBAEK3205OB740093, Engine No.N25B3000, whereas, petitioner has attached registration book, issued by Excise & Taxation Department, Government of Sindh along with customs auction documents issued by Model Collectorate of Customs Appraisement, Karachi, including Copy of Order-in-Original whereby the petitioner has been given an option to redeem in terms of SRO 172(I)2013 dated 05.03.2013, paid bank challan of additional duties and taxes, CVT, registration charges, transfer charges etc., and Form of Transfer Order. In C.P. No.D-5163/2018, the description of subject vehicle has been given as Toyota Land Cruiser (Jeep), bearing registration No.BE-0563, Model 2000, Chassis No.HDT101-00076362UZ-9002918, Engine No.T58857, whereas, petitioner has attached registration book, issued by Excise & Taxation Department, Government of Sindh along with customs auction documents through approved Government auctioneer, paid bank challan of the bidding amount i.e. CVT, registration charges, transfer charges etc., and Form of Transfer Order. In HCA No.334/2017, the description of subject vehicle has been given as Toyota Hilux Surf (Jeep), bearing registration No.BF-8588, Model 2004, Chassis No.VZN215-0006060, Engine No.5VZ-1828615, whereas, the appellant has

attached Registration Book, issued by Excise & Taxation Department, Government of Sindh along with customs auction documents issued by Collectorate of Customs Appraisement and Directorate of Intelligence and Investigation, Customs House, Karachi, including Certificate under Rule 72, paid bank challans of the bidding amount, Addl. duty and taxes, CVT, Registration charges, transfer charges etc., and Form of Transfer Order. In all these cases, the owners have claimed to be owners/subsequent purchases, and have produced the aforesaid documents to the customs authorities to discharge the initial burden of proof regarding their lawful possession of the subject vehicles in terms of Section 187 of the Customs Act, 1969, however, customs authorities, without adopting legal course of adjudications or to establish that the documents produced by the owners/subsequent purchasers are forged or bogus, and the subject vehicles are otherwise smuggled, detained the same in violation of law, merely on the unlawful presumption that since the owners could not produce the import documents of the subject vehicles, which are admittedly manufactured beyond the period of five years, whereas, there is no material or even allegation that these vehicles have been smuggled within five years from the date of their manufacture. If such authority is given to the public functionaries to charge the owners of the vehicles of a criminal offence of smuggling in the absence of any evidence or material to this effect, would amount to giving them unbridled powers to act arbitrarily and to abuse the process of law, which is neither the intent of law nor could be approved by Courts under any circumstances.

11. We have also observed that in some of the cases, there have been allegations by the Customs Authorities that the chassis numbers of the vehicles are found tempered, however, such

allegations have been seriously disputed, whereas, there has been no specific FSL Report to show as to whether chassis numbers of the vehicles were erased for the purpose of theft or for any other purpose. Mere allegation of tempering of chassis numbers and such sketchy stereotype FSL Report, cannot be considered as conclusive proof to establish a charge of smuggling, particularly, when the **make, model, engine number and other particulars of the vehicles in question are found to be the same as mentioned in the documents**, including import documents, customs Auction and bidding documents, paid bank challans and the original Registration Books issued by the Motor Vehicle Registration Authority. The Hon'ble Supreme Court in the case of *Federation of Pakistan through Director-General of Intelligence and Investigation FBR, Karachi v. Muhammad Jamal Rizvi and others* [**2012 PTD 90**], while examining the fate of similar allegation regarding tempered chassis number and the FSL Reports has been pleased to hold as under:-

> *"5. Perusal of the impugned judgment reflects that the FSL Report was not found specific and various queries made by the Investigating Agency remained un-answered. In this behalf learned Division Bench of the High Court observed that, "The FSL report shows that the chassis numbers on the vehicle were tampered. The FSL report is not specific and creates doubts as to whether the chassis numbers of the vehicle were erased for the purpose of theft and or for any other purpose. This issue is not answered in the FSL report though the Directorate of Customs, Intelligence and Investigation had sought report through a letter calling upon FSL to specifically mention the status of chassis numbers. The FSL report is silent on queries made by the investigating agency, except that chassis numbers were tampered. The report of the FSL was insufficient to authorize the*

Directorate of Customs, Intelligence and Investigation, to detain and or seize the vehicle, inter alia, on the ground that it was smuggled vehicle." When asked, learned counsel had no reply to furnish on the observation so made, however, he admitted that the make, model, Engine number and other material about the vehicle in question were same as were in the documents noted hereinabove."

12. Accordingly, we do not find any substance in all the aforesaid References filed by the Customs department, as the findings as recorded by the Customs Appellate Tribunal in the impugned orders are based on correct appraisal of the facts and proper application of law, which does not suffer from any factual error or legal infirmity, therefore, requires no interference by this Court under Section 196 of the Customs Act, 1969. Consequently, the reframed question Nos. (i) & (ii) as proposed in Para 4 above are answered "NEGATIVE", whereas, questions (iii) and (iv) are answered in "AFFIRMATIVE" all against the applicant department and in favour of the respondents.

13. For the reasons disclosed hereinabove while dismissing the above reference, the aforesaid Constitutional Petitions are allowed along with listed application, whereas, High Court Appeal filed by the department is hereby dismissed. The interim orders for the provisional release of the vehicles passed in these cases would be given effect accordingly.

14. All the above cases stand disposed of in the above terms alongwith listed applications.

JUDGE

JUDGE

Nadeem/A.S.