

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

SCRAs 311 to 313 of 2020 : Collector of Customs vs.
Super Star Company

For the Applicant : Mr. M. Khalil Dogar, Advocate

For the Respondent : Mr. Ahmed Ali Hussain, Advocate

Date of hearing : 08.02.2021

Date of announcement : 10.03.2021

JUDGMENT

Agha Faisal, J. Briefly stated, the respondent imported consignments that were subjected to show cause notices dated 07.04.2018, whereby the respondent was asked to answer as to *inter alia* why the consignments ought not to be confiscated since they had remained un-cleared at the port since 2016. The proceedings culminated in orders in original dated 08.08.2018, whereby the outright confiscation of the consignment was ordered on the premise that the consignment arrived post the cut-off date prescribed by the Ministry of Commerce in such regard. In appeal, the learned Tribunal was pleased to set aside the orders in original, vide Judgment dated 12.12.2019 (“Impugned Judgment”); hence, the present reference applications. It is considered illustrative to reproduce the operative constituents of the instruments, referred to supra, herein below:

Show Cause Notice

“Whereas the subject consignment was imported in the year 2016 and despite of lapse of a considerable period neither the same has been cleared nor any written explanation in this regard has been received.

2. Importation of Arms and Ammunition is subject to conditions in terms of Sr. 63 of Appendix-B read with letter F. No. 2(8)/2004-RO(IMP) dated 25.01.2005 of Ministry of Commerce. As per aforementioned conditions, in order to import arms ammunitions importers should possess valid import license issued by Ministry of Interior, obtain permission from Ministry of Commerce, and thereafter open Letter of Credit.

3. It has been observed that the goods are lying at the port since 2016, and no Goods declaration has been filed to clear the same, despite issuance of notice under section 82 of the Customs Act, 1969. Further, the importer has also not provided any documentary evidence to establish the genuineness of the import and fulfillment of I.P.O conditions read with Ministry of Commerce letter No. F. No. 2(8)/2004-RO(IMP) dated 25.01.2005.

4. Since the goods have not been cleared and no documents as mentioned earlier have been provided therefore, importer has violated provisions of Section 16, 32 and 79 of the Customs Act, 1969 read with Section 3(I) of the Import and Export (Control) Act, 1950 punishable under clauses (1), (9) and (14) of Section 156(1) of the Customs Act, 1969 read with Section 3(5) of Import and Export Control Act, 1950 further read with CGO 12/2002.

5. M/s. Super Star Company, Arms Ammunition, Dealer Opposite Govt. High Secondary School, G.T. Road, Peshawar, are hereby called upon to show cause as to why action under the aforementioned provisions of law should not be taken against them. Written reply to this show cause notice should reach the undersigned on or before Additional Collector, Once Customs, 2nd Floor, Custom House, Karachi.

6. Hearing in this case is fixed on 24-04-2018 at 1100 hours when the importer, their representative or duly briefed lawyer may appear to attend the hearing and to represent the case in the office of the undersigned. If no one appears or no written reply is received, it will be presumed that importer has nothing to say in their defence and the case shall be decided exparte on merits."

Order in Original

"I have gone through the record of the case and given due consideration to the arguments advanced by the representative of the importer and found that import of arms and ammunition is subject to condition of Sr. No.65-68, Appendix-B, Part-I of Import Policy Order(IMP) 2016 read with SRO 1112(I)/2014 dated 16.12.2014 and Ministry of Commerce's office Memorandum No. 17(I)/2016-Imp-I dated 14.09.2017. Regarding the importer's contention that the consignment faced delay in shipment, the issue has been examined in the light of Ministry of Commerce's Office Memorandum No. 20(7)/2005 dated 21.10.2015. The Ministry vide said memorandum has allowed for release of those delayed shipments of Arms and Ammunition imported in contravention of SRO 1112(I)/2014 dated 16.12.2014, which arrived upto 20.10.2015. Perusal of the record shows that the impugned goods were imported vide IGM No.001/2016 dated 08.01.2016, Index No.42 against B/L No. DALKAR09 dated 22.12.2015. The under reference consignment, therefore, had clearly arrived after the cut-off date fixed by the Ministry of Commerce. Since the importer failed to fulfill the aforementioned conditions of the IPO, 2016, relevant SRO and office memoranda issued by the Ministry of Commerce, violation of section 16 of the Customs Act, 1969 stands established. In terms of powers vested in me under clause 9 of section 156(1) of the Customs Act 1969, I therefore, order for outright confiscation of the goods under reference."

Impugned Judgment

"5. Appellant's stance is that their goods be assessed on value base while respondents contended on the quantity base. Representative of Respondents vehemently resist and stated that after issuance of amended SRO. 1112(I)/2014 dated 16.12.2014, wherein the value base method has been changed and the quantity based assessment was introduced. The consignments of the appellants were reached at port on 16.12.2015 hence its fall under the amended SRO.1112(I)/2014 and to be assessed on quantity based. On the other hand appellants established contract for the goods with Habib Bank Limited bearing No.LICO No.2796214 on 22.04.2014, which was prior to issuance of SRO.1112(I)/2014, and asserting that, these goods be assess on value based. Promissory estoppel shall operate against the department as SRO could not override the right which has been acquired to the appellants. Confidence in the establishment could only be created, once it adheres to the promises it had made and any amendments thereto are made prospectively after taking the stakeholders on board. In these cases nothing has done to seek confidence of the stake holders. Rather adverse action was taken, which was not only against the spirit of law and principals of natural justice but also violate of Articles 12 and 18 of the Constitution of Islamic Republic of Pakistan.

6. Amendment made vide SRO.1112(I)/2014 dated 16.12.2014 in the Import Policy Order of 2013 by virtue of Rule 3 of SRO, the value based authorization was substituted by quantity based authorization and these changes are not applicable on the consignments of appellants retrospectively as clause 4 of the said Import Policy Order protects the rights of the appellants as regarding the said consignments contract between present appellants (importer and the exporter) are prior to the amendment in SRO.1112(I)/2014 dated 16.12.2014.

7. It was held by August Supreme Court of Pakistan in case titled "Anoud Power Generation Limited Vs Federation of Pakistan reported as PTCL CL 277", The petitioner companies who have opened LCs after the issuance of amended notification SRO 584(I)/95 dated 15th July, 1995 are not entitled for the benefit of original notification NO.279(I)/94 dated 2nd April, 1994 as they cannot be placed in similar circumstances qua the companies who have fulfilled the condition laid down in the un-amended notification and have filed letter of credit and bills of entry prior to its amendment.

8. Clause 4 of both the Import Policy Order, 2013 and 2016 respectively reproduced as under:

Import Policy Order 2016 Clause 4 Import of Goods:

Import of all goods is allowed from worldwide sources unless otherwise elsewhere specified to be banned, prohibited or restricted in this Order:

Provided that the amendments brought in this Order from time to time shall not be applicable to such imports where Bill of Lading (B/L) or Letters of Credit (L/C) were issued or established prior to the issuance of amending Order. Import Policy Order 2013 Clause 4 Import of Good. Import of all goods is allowed from worldwide sources unless otherwise elsewhere specified to be banned, prohibited or restricted in this Order:

Provided that the amendments brought in this Order from time to time shall not be applicable to such imports where Bill of Lading (B/L) or Letters of Credit (L/C) were issued or established prior to the issuance of amending Order.

9. It is clear in light of Para-4 reproduced above, the amendment made through SRO.1112(I)/2014 cannot be applied to imports whose bank contracts/L/Cs had been established prior to the issuance of amending order/ SRO dated 16.12.2014. It is important to note that the appellants had established bank contracts in light of Value Based Authorization extended by the Ministry of Commerce. In fact, the appellants are unable to honor their contracts for the reason that an amendment had been made in the

Import Policy Order and that was applied to the past contracts as well. It is trite law when vested rights have been created the same cannot be disturbed by the retrospective legislation. In this case by the promulgation of Order SRO.1112(I)/2014 has disturbed the past contracts by insertion of second proviso to sub Rule (4) to Rule 3 of the said Order/SRO 2014. Doctrine of Promissory estoppels is very much applicable here which says that it is an equitable doctrine with the object of preempting suffering of any loss arising out of a promise made and is invoked so as to prevent violation of and to safeguard rights accrued pursuant to such promise. In the instant case the rights were accrued pursuant to such promise. In the instant case the rights were accrued pursuant to a promise made in terms of Ministry of Commerce letter dated 25.01.2005. Reliance is placed on the judgment of august Supreme Court of Pakistan in the case of Molasses Trading Limited, 1993 SCMR 1905. It is important to note that the Ministry of Commerce vide its O.M. dated 21.10.2015 had allowed release of consignments which had arrived up to 20.10.2015. This was a discriminatory treatment meted out to the appellants and also against the spirit of Rule 4 of IPO 2013. It is imperative to reproduce below section-6 of Protection of Economics Reforms Act, 1992 which gives protection to the investors:

Section 6 protection fiscal incentive for setting-up of industries:

The fiscal incentives for investment provided by the Government through the statutory order listed in the schedule or otherwise notified therein and shall not be altered to the disadvantages of the investors”

10. In fact, the bank contracts were linked prior to issuance of Order 2014 and had acquired the vested rights. Promissory estoppel shall operate against the department as Order/SRO 2014 could not override the rights which had been acquired by the appellants. The preamble to the said Act provides that:

“AND WHEREAS it is necessary to provide legal protection to these reforms in order to create confidence in the establishment and continuity of the liberal economic environment created thereby.”

This disputed amended clause of SRO.1112(I)/2014 dated 16.12.2014d has been repealed by SRO.772(I)/2018 dated 19.06.2018 which is reproduced as under:-

“The Commercial import of prohibited and non-prohibited Weapons and Ammunition (Regulation) Order, 2014 notified vide SRO No.1112(I)/2014 dated 16th December 2014 is repealed.”

11. In view of the above, it is cleared that the contract is established by the appellant prior to issuance of amended in SRO furthermore, the SRO, has been further amended on 19.06.2018 while the show casue notice was issued on 03.05.2019 which is also defective one. Perusal of record reveals that all the import authorization issued by Ministry of Commerce are according to office Memorandum dated 29.01.2014 whereby the category of Prohibited and non-Prohibited of Arms and Ammunition has been described.

12. In view of the above, I allow these appeals, set aside the impugned the Order-in-Original NO.14/2018, Order-in-Original No.17/2018 and Order-in-Original No.20/2018 all dated 08.08.2018 passed by the Additional Collector Customs (Appraisalment), West Karachi.”

(Underline added for emphasis)

2. Applicant’s learned counsel assailed the Impugned Judgment and submitted that for the reasons contained in the relevant orders in original the outright confiscation of the consignment/s ought to have been maintained. The respondent’s learned counsel supported the Impugned Judgment and submitted that it merited no interference herein; *inter alia* for the reason that the respondent was entitled to the retrospective beneficial effect of a subsequent notification.
3. We have heard the respective learned counsel and have also perused the documentation to which our surveillance was solicited.
4. The starting point of this deliberation is SRO 1112(I)/2014 (“SRO 1112”) that *inter alia* substituted the value based authorization in respect of the concerned consignments to a quantity based authorization. It stipulated that clearance would be made only against a letter of credit issued or a contract executed before commencement thereof and further that a contract covered

under the said stipulation would stand cancelled in any event by 30.06.2015. The relevant constituents of SRO 1112 are reproduced herein below:

"3. Substitution of value-based authorizations.-(1) On commencement of this order, a VBA for import of arms and ammunition by an authorized importer shall be required to be substituted by a QBA.

(2) A VA shall be deemed to have been cancelled where no import was made against it during last three years.

(3) For substitution under sub-paragraph (1) of his authorization for import of arms and ammunition, the importer of VBA shall make to the Federal Government an application along with supporting documents specified under paragraph 5.

(4) No VBA shall, on commencement of this order, be valid for opening of letter of credit or execution of contract:

Provided that clearance shall be made by the Customs only against a letter of credit issued or, as the case may be, a contract executed before commencement of this order, if otherwise in order.

Provided further that all contracts made against VBAs prior to the date as specified in column (2) of the Table below shall stand cancelled on the date specified against it in column (3) thereof, namely:

TABLE

S. No.	Contracts made against VBAs	
	prior to (2)	stand cancelled on the (3)
1.	June, 2009	the 31 st December, 2014
2.	June, 2011 but after the 31 st May, 2009	the 31 st March, 2015

Provided also that a contract, other than a contract covered under the second proviso, shall stand cancelled on the 30th June, 2015."

It is pertinent to mention that no cavil has been articulated before us to the factum that the respondent's contract was executed on 22.12.2014, hence, within the qualification parameters of SRO 1112. Therefore, the issue to be considered is the implication of the respondent's consignments not having been cleared in the prescribed time.

5. It is imperative to denote at this juncture that the show cause notice/s to the respondents were issued in 2018, post the clearance timeframe enunciated in SRO 1112; however, the respondents were required to demonstrate as to why the relevant import documentation had not been submitted till that date. The ostensible reasons for the delay in seeking clearance, per the respondent's counsel, *inter alia* was belated arrival due to supplier issues and the change in the nature of authorization from value based to quantity based. However, the relevant consignments did in fact arrive post the cut-off date provided in SRO 1112.

6. It deserves to be highlighted that during the pendency of the adjudication proceedings, before the Additional Collector Adjudication, SRO 772(I)/2018 ("SRO 772") was issued on 14.06.2018 and therein SRO 1112 was repealed. It is considered appropriate to reproduce the relevant content herein below:

“the following further amendment shall be made in the Import Policy Order, 2016, namely:

in the aforesaid Order, in Appendix-B, in Part I, in the Table, in column (1), against Sr. No. 65, for the entry in column (4), the following shall be substituted, namely:

“(a) Importable only by individual licence holders or arms dealership licence holders to whom licence is granted by;

- (a) Provincial Home Department, in case of dealers located in that Province; or
- (b) Ministry of Interior, in case of dealers located in Islamabad Capital Territory;

(c) a license holder under condition (a) shall also have certificate from Original Equipment Manufacturer (OEM) in case of imported from an OEM, otherwise a certificate from any of the prescribed PSI companies as listed in Appendix-H of IPO 2016, specifically mentioning,-

- (a) weapon’s nomenclature;
- (b) weapon’s caliber or bore or gauge; and
- (c) weapon’s manufacturer’s logo, weapon’s serial number embossed thereon and other related information; and

(c) the weapon shall be importable only through air and sea ports.”

(b) the Commercial Import of Prohibited and Non-Prohibited Weapons and Ammunition (Regulation) Order, 2014 notified vide S.R.O. No. 1112(I)/2014 dated the 16th December, 2014 is hereby repealed.”

(Underline added for emphasis)

The adjudicating officer did not appreciate the aforementioned SRO in its proper perspective and proceeded to order the outright confiscation of the consignments, pursuant to a notification admittedly repealed during the pendency of proceedings there before.

7. It is trite law that notifications conferring a beneficial effect may be given retrospective effect, as maintained by an earlier Division Bench of this Court in the *Asif Traders case*¹. The aforesaid maxim has been recognized by the august Supreme Court time and time again, as seen in the *Shahida Anwar case*². The question that merits to be addressed now is whether a beneficial notification issued during the pendency of adjudication proceedings can be given retrospective effect.

8. The aforesaid question was answered by a Division Bench of this Court in the *Rasool Flour Mills case*³ and it was held that issuance of a beneficial notification may be given qualifying retrospective effect if the matter was pending before the concerned authorities. The said judgment was assailed before the honorable Supreme Court⁴, wherein the pronouncement of this High Court was maintained and the august Court was pleased to complement that a beneficial notification may be given qualifying retrospective effect even if the matter was pending before the adjudicating authority.

¹ Per Muhammad Junaid Ghaffar J in *Asif Traders & Another vs. Collector of Customs and Another* reported as 2014 PTD 1057.

² Per Mian Saqib Nisar J (as he then was) in *Collector of Customs & Others vs. Shahida Anwar* reported as 2012 SCMR 1698.

³ *Rasool Flour Mills (Private) Limited vs. Federation of Pakistan (CP D 462 of 2013)*; judgment dated 23.11.2018.

⁴ *Collector of Customs & Others vs. Rasool Flour Mills (Private) Limited & Others (Civil Petition 2-K of 2019)*; judgment dated 28.05.2019.

9. Notwithstanding the foregoing, it is evident from the record that even in respect of the tenancy of the repealed SRO 1112, waivers were granted by the competent authority in respect of the timelines prescribed vide SRO 1112 and the *otherwise delayed* consignments were released. It is considered illustrative to reproduce the pertinent constituents of a relevant memorandum herein below:

Office Memorandum dated 21.10.2015

"1. The undersigned is directed to state that the requests of different arms importers for release of delayed shipments of arms and ammunition imported in contravention of SRO 1112(I)/2014 dated 16-12-2014, which are currently held up at various ports, have been analyzed and this Ministry has decided to allow release of only those consignments which have been arrived upto 20-10-2015.

2. All concerned Collectorates of Customs may; therefore, allow release of the delayed consignments, imported by authorized commercial importers of arms and ammunitions arrived upto 20-10-2015, after payment of duties/taxes, if otherwise in order."

10. It is our deliberated opinion, rested upon consideration of the reasoning assigned⁵ in the Impugned Judgment coupled with our observations herein, that no case has been set forth before us to disentitle the respondent to the retrospective beneficial effect of SRO 772; especially in view of the admitted factum that even in respect of the tenancy of the repealed SRO 1112, waivers were granted from the prescription of timelines therein contained; hence, the Impugned Judgment is maintained.

11. Various argumentative and narrative questions were proposed in the references under consideration, however, it is our considered view that the same did not arise from the impugned judgment. The only question of law before us is "*whether in the present facts and circumstances the respondent was entitled to the retrospective beneficial effect of SRO 772*". This question is answered in affirmative, hence, in favour of the respondent and against the applicant. These reference applications stand disposed of in the above terms. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, as required by section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

⁵ Repetition whereof is eschewed as the same is already particularized supra.