

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar, J.

Agha Faisal, J.

SCR 212 to 323 of 2016 : The Collector of Customs vs.
Mian Azam Waheed

SCR 324 to 329 of 2016 : The Collector of Customs vs.
M/s. MSW & Co.

SCR 330 to 361 of 2016 : The Collector of Customs vs.
M/s. MAW & Co.

For the Applicant : Mr. Shahab Imam,
Advocate

For the Respondent : Mr. Aqeel Ahmed Khan,
Advocate (in SCRA Nos.212/2016, 324/2016 &
331/2016)

Date of hearing : 22.03.2021

Date of announcement : 22.03.2021

JUDGMENT

Muhammad Junaid Ghaffar, J. Through these Reference Applications, the Applicant has impugned a common judgment dated 23.11.2015, passed by the Customs Appellate Tribunal, Karachi in Customs Appeal Nos.1075 to 1109/2015 (35 cases), 1110 to 1186 of 2015 (77 cases), 1187 to 1192 of 2015 (6 cases) & 1193 to 1224 of 2015 (32 cases), proposing the following questions of law:

- a) Whether the learned members of the Hon'ble Appellate Tribunal erred in law and facts while directing the release of goods on declared value instead of on value as determined by the committee comprising of three collectors vide ruling dated 20.10.2012?
- b) Whether under the facts and circumstances of the case, the Hon'ble Appellate Tribunal erred in law and facts while observing that there was provisional assessment and that same was not finalized in compliance of statutory provisions of Section 81 of the Customs Act, 1969?
- c) Whether the Hon'ble Tribunal misread the law and facts of case, since as a matter of fact initially the goods of the Appellants were finally assessed on the basis of valuation Ruling No.216 of 2010, however later on goods were allowed provisional release on orders of the Hon'ble High Court at Islamabad where the importers had impugned the Valuation Ruling 216 of 2010 and therefore the requisites of the Section 81(4)(5) of the Act were not applicable in the case?
- d) Whether the learned Appellate Tribunal was justified in passing the impugned order and whether such order has any force of law?

2. Learned Counsel for the Applicant submits that the learned Tribunal has erred in law as well as in facts inasmuch as this was never a case of any provisional assessment strictly under Section 81 of the Customs Act, 1969 (“Act”) as there were certain interim orders passed by the learned Islamabad High Court for release of the goods and therefore, the limitation as provided under Section 81 *ibid* to finalize the assessment would not apply. He has further argued that notwithstanding the above, assessments were done after remand of the matter by the learned Islamabad High Court through a high powered Valuation Committee consisting of at least three Collectors and therefore, no exception can be drawn to this determination of values. Lastly, he submits that the Tribunal had also come to the conclusion that the Order in Appeal was a non-speaking order; hence in that case, the matter ought to have been remanded for passing of an appropriate order. He has prayed for setting aside the impugned Judgment of the learned Tribunal by answering the proposed questions in favor of the Applicant.

3. On the other hand, learned Counsel appearing on behalf of three Respondents in Special Customs Reference Application Nos. 212 of 2016 (Mian Azam Waheed), 324 of 2016 (M/s M.S.W & Co.) and 331 of 2016 (M/s M.A.W. & Co.) has filed his Vakalatnama and has supported the impugned judgment and submits that notwithstanding the orders passed by the Islamabad High Court for releasing the consignments under Section 81 of the Act provisionally, it was incumbent upon the department to pass a final assessment order within the limitation period provided under Section 81 *ibid*. According to him, the committee constituted after remand of the order had no authority and jurisdiction to determine values under Section 25A of the Act; hence entire exercise was unwarranted in law. He has further argued that without prejudice, the exercise carried out by the said committee was in violation of the judgment passed by this Court in the case of *Goodwill Traders*¹ and therefore the Reference Applications merit dismissal.

4. We have heard both the learned Counsel and perused the record. From the facts as available before us, it appears that the Respondents had imported a number of consignments of Tiles from China during 2010 to 2012 and filed Goods Declarations on the basis of declared values for assessment purposes. The Applicant/department refused to accept such values and determined the same in terms of Valuation Ruling No.216/2010 dated 03.02.2010 issued in terms of Section 25A of the Act. The Respondents impugned the said Ruling before the learned Islamabad High Court vide Writ Petition No.1756 of 2010

¹ 2014 PTD 176

and other connected matters wherein learned Court passed interim orders directing release of the said goods provisionally by securing differential amount of duties and taxes against post-dated cheques, pending court's final decision. It further appears that such consignments were released accordingly from time to time (i.e. 03.02.2010 to 29.5.2012) and thereafter through a common judgment dated 29.05.2012, the said Ruling was set-aside with the following directions: -

20. In the above said circumstances, impugned valuation orders are set aside and all the cases are remanded back with the direction that the *Collector of Customs* or the *Director of Customs* valuation may pass a fresh order regarding determination of customs value of above said items in accordance with law and rules as well as guidelines provided in this judgment. All the writ petitions are disposed of in the above terms.

5. It further appears that thereafter W.P. No.1611/2012 was also decided vide judgment dated 14.06.2012 in the light of judgment dated 29.05.2012 passed in Writ Petition No.1756 of 2010, and this was impugned in Intra Court Appeal No.376 of 2012 and a Learned Division Bench of Islamabad High Court passed order dated 28.03.2013, whereby the said judgment of the single Judge was suspended in the following terms: -

28.03.2013. Raja M. Iqbal, Advocate

This intra Court Appeal, is preferred against the judgment dated 14.06.2012, passed by learned Single Judge in Chambers, whereby Writ Petition No.1611/2012, filed by respondent No.1 was disposed of in the light of the judgment rendered in Writ Petition No.1756/2010, whereby impugned violation orders were set-aside and the cases were remanded back with the direction to the Collector of Customs or Director to pass a fresh order regarding the determination of customs value of the items in accordance with law and rules.

It is inter alia contended that the learned Single Judge in Chambers failed to appreciate law and facts of the case as this Court lacks territorial jurisdiction over the matter due to the fact that parties to lis are stationed at Karachi.

It is next submitted that the respondents could have been conveniently availed the remedy by approaching concerned forum, available in the hierarchy of customs laws and, therefore, jurisdiction conferred upon such forum, could not be exercised by the High Court under the garb of Article 199 of the Constitution.

It is also contended that where statute provides alternate and efficacious remedy, invoking of constitutional jurisdiction has been disapproved by the Honourable Apex Court.

Lastly it is contended that since the controversy requires through factual probe into the matter on the basis of material to be brought on record by the parties, the remedy, if any, available to the respondents is to approach the competent forum. In support of his submissions, learned Applicant placed reliance upon case laws reported as PLD 1997 SC 334, PLD 1994 Supreme Court 363, 2007 SCMR 68, PLD 1992 SC 847, 2005 SCMRs 37 and 2010 SCMR 115.

Points raised need consideration.
Issue notice to the respondents for a date after fortnight.

CM No.01-E/2012

Dispensation sought for is allowed, subject to all just and legal exceptions. CM stands disposed of.

CM No.01/2013

Notice. Meanwhile, operation of the impugned judgment dated 29.05.2012 shall remain suspended till next date of hearing.

6. Notwithstanding pendency of Intra Court Appeal and review application, without prejudice, the department proceeded to implement judgment dated 29.5.2012 as the same was not suspended till 28.3.2013 and a committee² was constituted which conducted various meetings and finally determined values on 20.10.2012 of consignments assessed provisionally pursuant to directions of the Court between 3.2.2010 to 29.5.2012. This apparently was done without prejudice to the outcome of Intra Court Appeal and the review application filed by the department. It is also a matter of record that barring a few, most of the Importers had accepted the values so determined and paid the outstanding amount of duties and taxes to settle the matter once for all. The present Respondents didn't; and agitated the same and it appears that the department then issued them some calculation sheets on the basis of Valuation Ruling No.538/2013 which had then come into field. The Respondents once again felt aggrieved and approached this Court through C.P.No.1453/2015 which was disposed of vide order dated 27.5.2015, directing the Respondents to file Appeals before the Collector Appeals which shall be decided within 30 days. The Collector Appeals dismissed the same vide order dated 7.7.2015 which was then impugned before the Tribunal and vide impugned order they have been allowed by setting aside the orders of the department.

7. Record further reflects that judgment of the learned single judge dated 23.05.2012 was also under challenge before the Hon'ble Supreme Court and vide order dated 14.06.2013, in Civil Appeal No.371 to 379 of 2013 matter was remanded to the learned Islamabad High Court to first decide the question of territorial jurisdiction of the Court. Thereafter, the learned Islamabad High Court vide judgment dated 23.11.2015 has been pleased to dismiss all such petitions for lack of territorial jurisdiction in the following terms: -

² Collector (PaCCS), Collector (Port Qasim) and Collector (Appraisement)

7. I am in agreement with the arguments advanced by the learned Applicant for the respondents that this Court lacks territorial jurisdiction, as dominant object of filing these writ petitions existed at Karachi because these petitions were filed to get the release and clearance of goods lying at Customs Dry Port at Karachi, which fell within the territorial jurisdiction of the Hon'ble Sindh High Court at Karachi. Moreover, the respondents are stationed at Karachi and the impugned Valuation Ruling was prepared and issued at Karachi so, cause of action accrued at Karachi as such this Court lacks territorial jurisdiction to adjudicate upon the present matters.

8. Likewise, in W.P. No.1066-2012, the cause of action has arisen at Lahore, as the amount as well as post-dated cheques were deposited at Lahore, which comes within the territorial jurisdiction of the Hon'ble Lahore High Court, Lahore.

9. The High Court is debarred to entertain such like matters, as the interference of this High Court would amount to allow the use of remedy of writ petition as a mischief against the State functionaries to compel them to act and proceed against the mandate of law. Moreover, High Court, under Article 199(I)(a)(i), Constitution of Pakistan (1973), has power to issue a direction to a person performing within its territorial jurisdiction functions in connection with the affairs of Federation, a Province or a local authority to refrain him from doing anything he is not permitted by law to do or to do anything he is required by law to do. In this regard, I am further fortified by the following case law:-

- i) PLD 1997 SC 334
- ii) 1997 SCMR 1874
- iii) 2005 SCMR 1746
- iv) 2014 SCMR 15

6. So in the light of above, all the above titled writ petitions are dismissed with all enlisted CMs due to lack of territorial jurisdiction.

8. On perusal of the entire record and the discussion hereinabove, it appears that firstly the Tribunal does not appear to be justified in reaching the conclusion that the provisional assessments were not finalized within the period provided in Section 81 *ibid*, and the final assessments are time barred. In fact, it was never a case of a provisional assessment *stricto sensu* in terms of section 81 of the Act. When a Court issues certain directions to release the goods provisionally against some security, it is not an assessment under section 81 of the Act, by mere use of the words "*provisionally*". It is an order of the Court exercising jurisdiction under Article 199 of the Constitution in a writ petition and not under s.81 *ibid*. And such provisional arrangement is always subject to final decision of the Court. Provision of section 81 of the Customs Act, 1969 requiring finalization of provisional assessment of the duty within six months was not attracted in these cases as the goods were released on the provisional assessment made in pursuance of an interim order passed by learned High Court pending decision³. Therefore, the Tribunal's conclusion that the provisional assessments in these cases were never finalized in time cannot be sustained.

³ Flying Board and Paper Products (Pvt) Ltd v Deputy Collector (2006 SCMR 1648)

9. Secondly, and notwithstanding the above, the learned Islamabad High Court had finally decided the case of the respondents through its judgment dated 23.05.2012, which was never further challenged by the Respondents, whereby after setting aside impugned Valuation Ruling, certain directions were given. If the department, notwithstanding filing of appeal and review, made an effort to implement the judgment of learned Islamabad High Court; then such action cannot be challenged by the respondents as not being in accordance with law. After remand of the matter, it was open to the department to determine values afresh of the goods released in the interregnum. Therefore, in that case also we do not see as to how the learned Tribunal decided the matter without appreciating this aspect of the case.

10. Nonetheless, the most crucial and pertinent legal point involved which escaped the attention of the Learned Tribunal is that that the judgment of the learned Single Judge was suspended; though belatedly, but ultimately all the petitions of the respondents as well as other parties were dismissed for lack of territorial jurisdiction, which were decided pursuant to an order passed by the Hon'ble Supreme Court with regard to the territorial jurisdiction of the learned Islamabad High Court in these matters. Therefore, the entire controversy ended against the respondents who have never challenged the same before any forum. Their petitions stood dismissed, which also includes the passing of interim orders and ad-interim relief granted to them. The stay order granted by the Court is insignificant in the instant case as the matter was finally decided against the Respondents resulting in the withdrawal of the stay order, as if it never existed⁴. It is settled law that if a case or petition is finally dismissed; then a party cannot take shelter under the garb of an ad-interim order; and that too in respect of limitation as against the Applicant/department. No litigant can derive benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that writ is found ultimately, devoid of any merit, shows that a frivolous writ petition had been filed⁵. An interim order merges with the final order and if the final order is against the petitioner, it is deemed that the petitioner had no favorable order in his favor at any time⁶. As a consequence, thereof, the challenge to the impugned Valuation Ruling No.216/2010 no more remained alive; resultantly,

⁴ Secretary Revenue Division v Iftikhar Ahmed Tabassam (PLD 2019 SC 569)

⁵ Amarjeet Singh and Others v Devi Ratan and Others (AIR 2010 SC 3676)

⁶ V.M.Aniyan v The University of Calicut and others (ILR 2017(3)Kerala 96)

upon dismissal of petitions finally, the Valuation Ruling stood revived and the assessments of the Respondents consignments made on the basis of the impugned Valuation Ruling before invoking jurisdiction of the Islamabad High Court stood restored. Any further proceedings, in absence of challenge to the impugned Valuation Ruling any further by the Respondents, would have no legal basis. This would include the challenge subsequently made against the determination and issuance of purported calculation sheets on the basis of a subsequent Valuation Ruling. The legal journey of the Respondents came to an end as soon as the petitions were dismissed subsequently, as they did not challenge the Valuation Ruling any further, either under the hierarchy, or before any competent Court of law; and took advantage of the proceedings initiated by the department in recovering the amount from them secured via postdated cheques pursuant to ad-interim orders of the learned Islamabad High Court. Unfortunately, such conduct of Respondents, partially supported by the department (as also noted by the Collector Appeals in his order) has resulted in prolonged litigation with no cause of action accruing in favor of the Respondents. This suffice as to the legal issues raised by the Respondents before the forums below, whereas, the learned Tribunal has miserably failed to take note of these crucial facts and has dragged itself into the limitation aspect for purported failure of the department in finalizing the assessments which was never the case.

11. In view of hereinabove facts and circumstances of the case, we are of the view that the learned Tribunal has fallen in grave error in deciding the Appeals in favor of the Respondents on extraneous considerations and on points of law which never emerged from the facts before it; hence, the impugned judgment cannot be sustained. Accordingly, question (a), (b) and (c) are answered in the affirmative; in favor of the Applicant and against the Respondents; whereas, question (d) need not be answered. The Impugned judgment stands set-aside and the orders of the forum below stands restored. Let copy of this order be forwarded to the Tribunal in terms of section 196(5) of the Act, and shall also be placed in all listed Reference Applications.

JUDGE

JUDGE