THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Zulfiqar Ahmad Khan
Mr. Justice Adnan Iqbal Chaudhry.

Spl. Customs Reference Application No.22 of 2022
[Collector of Customs (Enforcement) v. ARA Detergents & Chemicals FZE & others]

Applicant	:	The Collector of Customs (Enforcement), Customs House, through Mr. Hussain Ali Almani, Advocate.
Respondent 1	:	M/s. ARA Detergents & Chemicals FZE through M/s. Shahab Imam and Rana Sakhawat Ali, Advocates.
Respondents 2 & 3	:	Nemo.

Constitution Petition No. D – 7423 of 2021
[ARA Detergents & Chemical FZE v. Federation of Pakistan & others]

Petitioner	:	M/s. ARA Detergents & Chemicals FZE through M/s. Shahab Imam and Rana Sakhawat Ali, Advocates.
Respondent 1	:	Nemo.
Respondents 2 & 3	:	The Collector of Customs, Collectorate of Customs (Enforcement) and another through Mr. Shahid Ali Qureshi, Advocate.
Dates of hearing	:	15-02-2022, 16-02-2022, 18-02-2022, 22-02-2022 and 25-02-2022.

JUDGMENT

Adnan Iqbal Chaudhry J. - By judgment dated 09-11-2021, the Customs Appellate Tribunal allowed Customs Appeal No. K-7545/2021 filed by ARA Detergents & Chemicals FZE by setting-aside Order-in-Original No. 02/2021-22 dated 13-09-2021 to the extent of confiscation of goods, and allowed said appellant to re-export the goods under section 138 of the Customs Act, 1969. By the subject Reference under section 196 of the Customs Act, the Collector of Customs (Enforcement) has called in question said judgment of the

Tribunal to the extent it allows re-export of the goods; whereas by the subject constitution petition, ARA Detergents & Chemicals FZE seeks enforcement of the Tribunal's judgment.

2. The Reference proposes the following question of law said to be arising from the judgment of the Tribunal:

(a) *Whether under section 194A of the Customs Act, 1969 the CAT had jurisdiction to hear an appeal from and overturn the order dated 11.08.2021 passed by the Additional Collector under section 138 ?*

(b) *Whether an order of re-export of consignment under section 138 of the 1969 Act can be passed in a case of mis-declaration ?*

(c) *Whether the CAT could have treated the Respondent No.1 as consignor of the subject consignment in the absence of adjudication and recording of evidence ?*

(d) *Whether the orders dated 11.08.2021 and 13.09.2021, passed under distinct provisions of the 1969 Act, could be challenged in a single consolidated appeal?*

3. The facts of the case are most peculiar and a rigmarole of events. To discern whether the questions of law so proposed arise out of the judgment of the Tribunal, a narration of those facts is necessitated.

Facts:

4. On 24-02-2021, M.T. Morioka [the vessel] berthed at Karachi Port. As per the Vessel Intimation Report (VIR) and the Cargo Manifest (IGM) dated 21-02-2021 filed by East Wind Shipping Company under section 43 of the Customs Act as agent of the carrier (owner of the vessel) namely Chemsea Shipping Company China, the cargo aboard the vessel was as follows:

(a) 'Mixed Xylene' (a petrochemical) under 19 bills of lading showing the consigner as ARA Detergent & Chemicals FZE of the UAE [ARADC]; the consignees as 12 importers in Pakistan; and the port of loading as Sohar, Oman;
(b) 'White Spirit' under 6 bills of lading showing the consigner as Trust Oil Trading LLC of the UAE; the consignees as 3

importers in Pakistan; and the port of loading as Khor al Zubair, Iraq.

5. Per the department, the vessel was boarded for rummaging on 25-02-2021[1] with credible information[2] that the cargo had in fact been loaded from Iran and not Oman. It was averred by the department that the Master of the vessel first affirmed that the cargo was as per the IGM filed by East Wind Shipping, but on a further probe conceded that the cargo had been loaded from Iran; that the shipping documents presented by East Wind Shipping were falsified; that the transponder of the vessel had been switched off to hide the actual voyage; and that the log book of the vessel too had been falsified. Per the department, the shipping documents seized from the vessel revealed the following:

(a) as regards the xylene, the goods were of Iranian origin shipped only under 1 bill of lading; the port of loading was Bandar Imam Khomeini [BIK], Iran; the port of discharge was Sohar, Oman; the consignor/shipper was Esfahan Petrochemical Company; and the consignee was International Petrochemicals Ltd.

(b) as regards the white spirit, the goods were also of Iranian origin; the port of loading was BIK, Iran; the port of discharge was Karachi; the shippers/consignors were Kermanshah Oil Refinery Company and Esfahan Petrochemical Company; and the consignee was Sage Energy.

6. In response to a notice under section 72A of the Customs Act, East Wind Shipping replied that the IGM had been filed on the basis of bills of lading and other documents provided to it by it's principal, Chemsea Shipping Company China, who was the owner of the vessel, and that if such documents had been falsified by said principal in collusion with the Master of the vessel then East Wind Shipping had nothing to do with it.

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[1] As per the notice dated 04-03-2021 issued to East Wind Shipping under section 72A of the Customs Act, 1969.

[2] As per show-cause notice dated 07-07-2021 issued to East Wind Shipping.

7. On 24-03-2021, show-cause notice was issued to the Master of the vessel for violation of certain provisions of the Customs Act. At the hearing on 27-03-2021, the Master of the vessel is said to have admitted to the charges, accepting that the port of loading was BIK, Iran, and that the vessel never voyaged to Iraq or Oman but came directly to Karachi. He requested for leniency, offered to pay the penalty and requested for an immediate decision so as to leave Pakistan the same day. By Order-in-Original dated 27-03-2021, the Additional Collector imposed on the Master of the vessel a total penalty of Rs. 225,000 under clauses 26(i) and 39A of section 156(1) of the Customs Act, and on payment thereof, allowed the vessel to depart from Pakistan.

8. From here onwards, the record presented before us is confined to the consignment of xylene only inasmuch as the Reference and constitution petition brought before this Court do not concern itself with the consignment of white spirit.

9. In April and May 2021, the department issued notices to the importers/consignees of the xylene as per the IGM and the bills of lading presented by East Wind Shipping. These importers acknowledged that they had entered into contracts with ARADC for purchasing xylene, *albeit* sourced from Oman, and to opening letters of credit in the latter's favour. However, on being informed by the department that the goods were from Iran and not Oman and had come under issue with the department, these importers stated that they are cancelling their contracts with ARADC; that since they had yet to make payment to ARADC for said goods and had yet to receive the original bills of lading, the importers do not claim ownership to said goods; and that they have no objection if the goods are re-consigned to ARADC. One or two of the importers who had filed in-bound GDs, requested that such GDs be cancelled. In such circumstances, on 04-06-2021, ARADC filed an application with the Additional Collector for re-exporting the consignment of xylene under section 138 of the Customs Act and para 20(d) of the Import

Policy Order, 2020. The Additional Collector held-on to the application. Therefore, ARADC filed C.P. No. D–4342 of 2021 before this Court for a direction to decide the same. However, on the subsequent confiscation of the goods discussed *infra*, that petition was eventually disposed of as having served its purpose.

10. While ARADC's application for re-exporting the xylene was pending, on 07-07-2021, the department issued show-cause notices to East Wind Shipping for presenting a false VIR/IGM.

11. On 11-08-2021, the Additional Collector rejected ARADC's application for re-exporting the xylene on the ground that as per the true bill of lading seized from the vessel, the consignor of said goods was Esfahan Petrochemical Company and not ARADC; thus the latter did not have *locus standi* to seek re-export under section 138 of the Customs Act.

12. In show-cause proceedings against East Wind Shipping, it's stance remained that the VIR/IGM filed by it was correct; that since it had not been confronted with the bills of lading allegedly seized from the vessel, the bills of lading given to it by its principal (owner of the vessel) were true. Nonetheless, by Order-in-Original dated 13-09-2021 the Collector of Customs, relying on the admission of the Master of the vessel in the previous case, held *inter alia* that East Wind Shipping had mis-declared the IGM, thus violating sections 45, 72A and 75 of the Customs Act, and the provisions of Rule 665 of the Shipping Agent Rules; but taking a lenient view imposed only a penalty of Rs. 250,000/- under clauses 1(i) and 39A of section 156(1) of the Customs Act while passing an order for the outright confiscation of the goods/xylene under clause 42 of section 156(1) of the Customs Act.

13. ARADC, who claimed to be the consigner and owner of the xylene that had been confiscated by the above mentioned Order-in-Original dated 13-09-2021, and who was not party to said proceedings, filed Customs Appeal No. K-7545/2021 before the Customs Appellate Tribunal, praying for setting aside the order of

confiscation and also for permission to re-export the xylene. ARADC contended that it had entered into a sales contract dated 19-01-2021 with Sino Asia FZE of the UAE for purchasing the xylene and for its shipment to Pakistan; that in furtherance of such contract, Sino Asia had chartered the vessel for delivering the xylene to importers who had entered into contracts with and opened LCs in favour of ARADC; that since the original bills of lading of the xylene were still with ARADC, it was owner of the goods; and since the importers/consignees of the xylene had cancelled the contracts due to harassment by the department, ARADC was entitled under section 138 of the Customs Act and para-20 (b) of the Import Policy Order, 2020 to re-export the goods.

14. The learned Customs Appellate Tribunal allowed ARADC's appeal. The Tribunal held that the documents produced by ARADC demonstrated that it was owner and consignor of the xylene; that no order of confiscation of such goods could have been passed without notice to ARADC as mandated by section 180 of the Customs Act; that the fact that the department had put up the xylene for auction within 11 days of the order showed *malafides*; that the xylene was not a prohibited item under the Import Policy Order, 2020, nor did it fall within SRO 499(1)/2009 so as to justify an outright confiscation; that said goods were 'frustrated cargo' within the meaning of section 138 of the Customs Act read with Rules 86, 88 and 89 of the Customs Rules, and therefore it can be re-exported by ARADC.

Submissions of counsel:

15. Mr. Ali Almani, learned counsel for the Collector of Customs submitted that ARADC had in fact impugned two orders *via* one appeal before the Customs Appellate Tribunal; the first one being the Order-in-Original dated 13-09-2021 whereby the xylene was confiscated; and the second one being the previous order dated 11-08-2021 whereby ARADC's application for re-exporting the xylene under section 138 of the Customs Act was declined. Learned counsel submitted that section 194-A of the Customs Act does not provide for

an appeal against an order passed under section 138, and therefore the Tribunal had no jurisdiction to set-aside the order dated 11-08-2021 passed by the Additional Collector under section 138 of the Customs Act. Learned counsel relied on *Marvi Laboratories v. The Federation of Pakistan* (1996 MLD 131) and *Khatri Brothers v. Federation of Pakistan* (2010 PTD 1225) to submit that the Customs Appellate Tribunal is of limited jurisdiction and can hear appeals only against orders specifically listed in section 194-A of the Customs Act. The second argument advanced by Mr. Almani was that the case before the Tribunal was one of mis-declaration attracting section 32 of the Customs Act; and that it has been held by a learned Division Bench of this Court in *Collector of Customs, Karachi v. Mazhar-ul-Islam* (2011 PTD 2577) that section 138 of the Customs Act cannot be invoked in a case of mis-declaration. Mr. Almani's third submission was that the bill of lading seized from the vessel showed that the xylene was of Iranian origin and it was one Esfahan Petrochemical Company who was consignor thereof, not ARADC, and thus without any adjudication as to who was the consignor of such goods, the same could not have been released to ARADC. Learned counsel was queried that if said xylene was accepted to be of Iranian origin, whether it was prohibited under the Import Policy Order, 2020 ? Learned counsel accepted that it was not and candidly stated that the fact of the matter was that due to sanctions imposed by the USA on Iran, financial institutions do not extend credit in USD for importing Iranian petro-products.

16. Mr. Shahab Imam, learned counsel for ARADC submitted that an order by the Additional Collector declining an application to re-export goods under section 138 of the Customs Act was appealable before the Customs Appellate Tribunal under sub-section (1)(d) of section 194A of the Customs Act. He submitted that the allegation of mis-declaration, though misconceived, was leveled only against East Wind Shipping who was the agent of the carrier, not the agent of ARADC; that prior to confiscating the xylene, no show-cause notice was issued to ARADC under section 180 of the Customs Act even though it was in the knowledge of the department that ARADC was

claiming ownership to the goods/xylene; that as a consequence of section 168 of the Customs Act, the xylene had to be returned to ARADC; that *malafides* of the department are apparent from the fact that they do not allow ARADC to either re-consign the goods or to re-export the goods, rather they are bent upon auctioning the goods even though this is not a case of loss of revenue. He submitted that the bills of lading relied upon by ARADC were true; that the so called admission extracted by the department from the Master of the vessel was clearly by harassment; that the documents allegedly seized from the vessel had never been confronted to ARADC; that the ownership of the goods being a question of fact decided by the Tribunal in the favor of ARADC, the same could not be agitated by the department in Reference jurisdiction as held in *Pak Suzuki Motors Co. Ltd. v. Collector of Customs, Karachi* PTCL 2007 CL. 78). He submitted that where the importers/consignees had cancelled their contracts with ARADC due to harassment caused by the department itself, the goods were 'frustrated cargo' within the meaning of section 138 of the Customs Act which could be re-exported not only under section 138 of the Customs Act but also under para 20(b) of the Import Policy Order, 2020, and for that he placed reliance on judgment dated 05-11-2021 in C.P. No.D-6544/2020, *Driveline Motors Ltd. v. Federation of Pakistan*.

Opinion:

17. Learned counsel were heard and the record was perused with their assistance. The undisputed facts to which the law is to be applied are as follows:

(a) The goods in question i.e. the xylene, was not prohibited under the Import Policy Order, 2020; rather the violation alleged was that East Wind Shipping had mis-declared the xylene in the IGM as originating from Oman for shipment to Karachi, when in fact these had originated from Iran for shipment to Oman. East Wind Shipping was the agent of the owner of the vessel, not of ARADC.

(b) Separate adjudication proceedings were taken against the Master of the vessel and East Wind Shipping, but no adjudication proceedings were taken by the department against ARADC for violation of any provision of the Customs Act. The order of confiscation of the xylene was passed in proceedings against East Wind Shipping.

(c) ARADC was the only person who had turned up to claim ownership of the goods, but before passing the order of confiscation, no notice under section 180 of the Customs Act was ever issued to ARADC, or for that matter to Esfahan Petrochemical Company who, as per the department, was the actual owner of the goods.

(d) No issue is taken by the department nor has any question been raised in the Reference to the judgment of the Tribunal insofar as it has set-aside the order of confiscation of the goods. That much was acknowledged by Mr. Ali Almani, learned counsel for the Collector while making submissions.

Question (a): *Whether under section 194A of the Customs Act 1969 the CAT had jurisdiction to hear an appeal from and overturn the order dated 11.08.2021 passed by the Additional Collector under section 138 ?*

Question (d): *Whether the orders dated 11.08.2021 and 13.09.2021, passed under distinct provisions of the 1969 Act, could be challenged in a single consolidated appeal ?*

18. Questions (a) and (d) proposed by the Collector are essentially to the jurisdiction of the Customs Appellate Tribunal to pass an order for re-exporting goods under section 138 of the Customs Act. After going through the judgment of the Tribunal we find that the above questions as framed by the Collector do not entirely emanate from the underlying facts and said judgment. However, before we get to that, it is necessary to clarify the implication of an order declining re-export of goods under section 138 of the Customs Act.

19. Section 138 of the Customs Act and Rules 86 to 89 of the Custom Rules, 2001 deal with frustrated cargo[3] by providing that under certain circumstances the Additional Collector may, on an application by the person-in-charge of the conveyance which brought such goods or of the consignor of such goods, allow re-export of such goods without payment of duties chargeable thereon. While said provisions discuss the criteria for granting an application to re-export frustrated cargo, those do not deal with the cargo in the event it is found not to be frustrated cargo. That is so because in the latter scenario, and where there is a contest, an adjudication under section 179 of the Customs Act would eventually follow to determine the fate of the cargo, viz. to recover duty/taxes thereon and/or to confiscate them. That order of adjudication is then appealable under sections 193 and 194A of the Customs Act as the case may be. In other words, where an order declining an application under section 138 of the Customs Act is followed by an order under section 179 to deal with the same goods, the prior order under section 138 becomes insignificant as having served the purpose and it is the latter adjudication order that has to be reckoned with.

20. Looking at the matter from another perspective it can be said that because an order passed by the Additional Collector under

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

The Customs Rules, 2001:
86. Frustrated cargo will be such goods as are brought into a customs-station by reason of inadvertence or mis-direction or where the consignee is untraceable or has dishonored his commitments and the consignor wishes to have it re-shipped to him.
87. The master of the vessel or his authorized agent or the consignor of the goods himself or through his authorized agent shall apply in writing or electronically where Pakistan Customs Computerized system Customs Computerized System is operational to the Collector of Customs concerned for permission to re-export the frustrated cargo.
88. On receipt of an application, the Additional Collector of Customs shall satisfy himself with reference to the relevant import manifests and other documents that the goods are 'frustrated cargo' as provided in Section 138 of the Act.
89. If the Additional Collector of Customs is so satisfied, he would permit re-export of the frustrated cargo under Customs supervision without payment of duties (whether of import or export) chargeable thereon.

section 138 of the Customs Act is not an adjudication under section 179 thereof, that is why no appeal is provided against such an order under section 194A of the Customs Act. Therefore, we agree with Mr. Almani to the extent that section 194A does not envisage an appeal against an order passed under section 138 only. The argument of Mr. Shahab Imam was that any order passed by the Additional Collector can be appealed under sub-section (1)(d) of section 194A[4] because the word 'or' therein is disjunctive to separate an order of section 195 from an order of the Additional Collector. He submitted that otherwise there was no purpose of mentioning 'Additional Collector' in sub-section (1)(d) of section 194A as such officer is not empowered by section 195[5] to pass any order. But, if that argument is accepted and all orders passed by the Additional Collector are appealable under sub-section (1)(d) of section 194A, then sub-sections (1)(a) and (1)(ab) thereof would become surplus, an interpretation that should not be given to a statute. Though it is correct that section 195 by itself does not empower an officer below the rank of a Collector to pass an order thereunder, in our opinion, the inclusion of 'Additional Collector' in sub-section (1)(d) of section 194A is to cater to the scenario where the Board may have delegated the power of a Collector exercisable under section 195 to an Additional Collector by way of notification under section 5(1)(a). That is fortified by the fact

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[4] **194A. Appeals to the Appellate Tribunal.-** (1) Any person or an officer of Customs aggrieved by any of the following orders may appeal to the Appellate Tribunal against such orders:-

(a) a decision or order passed by an officer of Customs not below the rank of Additional Collector under section 179.
(ab) an order passed by the Collector (Appeals) under section 193;
(b) Omitted.
(c) an order passed under section 193, as it stood immediately before the appointed day;
(d) an order passed under section 195 by the Board or an officer of Customs not below the rank of an Additional Collector;
(e) an order passed in revision by the Director-General Customs Valuation under section 25D, provided that such appeal shall be heard by a special bench consisting of one technical member and one judicial member.

[5] **195. Power of Board or Chief Collector or Collector to pass certain orders,-(1)** The Board or the Chief Collector or the Collector of Customs may, within his jurisdiction, call for an examine the records of any proceedings under this Act for the purpose of satisfying itself or, as the case may be, himself as to the legality or propriety of any decision or order passed by a subordinate officer: ……..

that even section 193 envisages that an order under section 195 can be passed by an officer below the rank of a Collector. Again, that seems to cater to the power of the Board to delegate functions of a Collector to a Deputy Collector by way of notification under section 5(1)(a) of the Customs Act. Now, whether the power of the Collector under section 195, which is in the nature of a revisional power, can legally be delegated by the Board, is a different question not relevant here.

21. Having stated the legal position as above, we come back to the instant case. Here, ARADC's application under section 138 of the Customs Act was not declined on the ground that the goods were not frustrated cargo, but on the ground that as per the bill of lading seized from the vessel, it was Esfahan Petrochemical Company who was consignor of the goods and thus ARADC had no *locus standi* to make such application. Nonetheless, and eventually, that order dated 11-08-2021 was over-taken by an order of confiscation of those very goods *vide* Order-in-Original dated 13-09-2021, *albeit* passed in proceedings against East Wind Shipping. It is not disputed that the latter order was appealable and was appealed by ARADC before the Tribunal under section 194A of the Customs Act.

22. It is correct that in filing appeal before the Tribunal against the Order-in-Original dated 13-09-2021, ARADC had also made a prayer for setting-aside the order dated 11-08-2021 whereby its application for re-export under section 138 was declined. However, from the memo of appeal it appears that such a prayer was made only by way of consequential relief and the form of appeal remained as one from the Order-in-Original dated 13-09-2021. There does not appear to be an objection taken to the form of the appeal either by the Registrar of the Tribunal or by the Collector before the Tribunal. In any case, a perusal of the judgment of the Tribunal shows that it did not sit in appeal over the order dated 11-08-2021 passed under section 138 of the Customs Act. The opening recital of the judgment of the Tribunal manifests that it was deciding the appeal only against the Order-in-Original dated 13-09-2021. Though it is correct that in doing so the

Tribunal has also passed an order for re-exporting the goods, but such order was apparently made to deal with the goods as a consequence of having set-aside the order of confiscation of such goods and after concluding that ARADC was consignor of the goods.

23. In our view, where the Tribunal seized of an appeal against the confiscation of goods decides to set-aside such confiscation, then it also has the power to pass a consequential order to decide the fate of those goods, which order may be a direction to re-export the goods under section 138 of the Customs Act. As already discussed above, any previous order passed by the Additional Collector to decline re-export under section 138 was neither an adjudication under section 179, nor did it continue to hold the field, and thus did not come in the way of the Tribunal for passing an independent order for re-exporting the goods after being satisfied that the goods were frustrated cargo. In our view, the jurisdiction of the Tribunal to pass such a consequential order is implicit in section 194B[6] of the Customs Act when it provides that the tribunal may "pass such orders thereon as it thinks fit confirming, modifying or annulling the decision or order appealed against."

Question (b): *Whether an order of re-export of consignment under section 138 of the 1969 Act can be passed in a case of mis-declaration ?*

24. Regards the question proposed above, learned counsel for the Collector relied on the case of *Collector of Customs, Karachi v. Mazhar-ul-Islam* (2011 PTD 2577) to submit that section 138 cannot be invoked to re-export goods where the goods are imported by way of a mis-declaration under section 32(1) of the Customs Act. However, admittedly, there was never any charge or finding of mis-declaration against ARADC. In fact, no show-cause notice was ever issued to ARADC for violation of any provision of the Customs

[6] 194B. **Orders of Appellate Tribunal:-** (1) The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit confirming, modifying or annulling the decision or order appealed against. The Appellate Tribunal may record additional evidence and decide the case but shall not remand the case for recording the additional evidence: …….

Act. Though a show-cause notice was issued to East Wind Shipping for making mis-declarations in the IGM, even that did not allege the offence of section 32(1) of the Customs Act nor the Order-in-Original dated 13-09-2021 that was passed thereon. From the judgment of the Tribunal it does not appear that section 32(1) of the Customs Act had ever been urged by the Collector before the Tribunal. Therefore, the above question (b) posed by the Collector for our consideration does not arise from the judgment of the Tribunal. In any case, we do not see the purpose of framing such question when the Collector does not take issue to the Tribunal's order for setting aside the order of confiscation of goods.

Question (c): Whether the CAT could have treated the Respondent No.1 as consignor of the subject consignment in the absence of adjudication and recording of evidence ?

25. Admittedly, the goods in question, xylene, was not a prohibited item under the Import Policy Order, 2020. The central question before the Tribunal was whether ARADC was the consignor of those goods, for once that question was answered in the affirmative then it followed that (a) ARADC was eligible to apply for re-export of the goods under section 138 of the Customs Act; (b) in circumstances where the consignees did not lay claim to the goods, the order of confiscation of such goods without notice to ARADC under section 180 of the Customs Act was unlawful; and (c) in such circumstances the goods qualified as frustrated cargo within the meaning of section 138 of the Customs Act. Undeniably, the question whether ARADC was consignor of the xylene was a question of fact that rested with the Tribunal as the final arbiter of facts.

26. A perusal of the Tribunal's judgment shows that the contention that the Tribunal had simply 'treated' ARADC as the consignor without any evidence, is not correct. The Tribunal had given that finding on the basis of documentary evidence before it. Therefore, it is apparent that question (c) as so framed by the Collector essentially seeks reappraisal of a finding of fact arrived by the Tribunal, which

exercise is beyond the scope of a Reference. When confronted with that, learned counsel for the Collector submitted that said question is essentially to determine whether the Tribunal committed a mis-reading or non-reading of the evidence, which aspect remains a question of law as held in *Pakistan Match Industries (Pvt.) Ltd. v. Assistant Collector, Sales Tax* (2019 SCMR 906). Therefore, we proceed to examine that aspect of the question.

27. To conclude that ARADC was the consignor of the xylene, the learned Tribunal had relied upon the sales contract dated 19-01-2021 between ARADC and SinoAsia FZE of UAE for the supply of said xylene, the latter entity also being the charterer of the vessel; the letter dated 12-09-2021 issued by SuperAsia confirming that ARADC was consignor of said goods; the original bills of lading showing ARADC as consignor; and commercial invoices issued by ARADC to importers/consignees of said goods. These documents had been substantiated by the fact that the importers/consignees mentioned in the bills of lading had acknowledged to the department that they had entered into contracts with ARADC and opened letters of credit for the shipment of said xylene, though those importers had subsequently cancelled those contracts and did not lay claim to the goods on learning that the goods had come in issue with the department.

28. Learned counsel for the Collector submitted that the non-reading of evidence by the Tribunal was not taking into account the admission of the Master of the vessel and the bill of lading seized from the vessel which showed that the consignor of the goods was one Esfahan Petrochemical Company and not ARADC. But then, admittedly, no proceedings had ever been taken by the department against ARADC to confront it with that admission/document. The Master of the vessel was allowed to sail the same day he made the so called admission, and no attempt was made by the department to verify the seized bill of lading from Esfahan Petrochemical Company who had also not turned up to lay claim to the xylene. Learned

counsel for the Collector had then made a submission for remanding the matter to the Tribunal for additional evidence. Though that would amount to give the department an opportunity to fill lacunae left by them, in any case we do not see what that would achieve when the department had never taken any adjudication proceedings against ARADC. It was held by a learned Division Bench of this Court in *Pak Suzuki Motors Co. Ltd. v. Collector of Customs, Karachi* (PTCL 2007 CL. 78) that even where the officer of Customs or the Tribunal does not decide a question of fact, the High Court will not in the exercise of advisory jurisdiction give an opinion on that question of fact for the first time, and will simply observe that it was for the Tribunal to have decided the same. For said reasons, we hold that learned counsel for the Collector is unable to demonstrate that the judgment of the Tribunal suffers from any mis-reading or non-reading of evidence.

29. After the foregoing discussion, the questions proposed first above in the Reference are addressed as follows:

(i) Questions (a) and (d) are answered against the Collector of Customs as follows:

Section 194A of the Customs Act, 1969 does not envisage an appeal from an order passed simpliciter under section 138 of the Customs Act. However, in the case at hand the Tribunal did not sit in appeal over any such order. Rather the order passed by the Tribunal for the re-export of goods under section 138 of the Customs Act, was passed independently as a consequential order which is within the Tribunal's jurisdiction as discussed in paras 22 and 23 above.

(ii) Questions (b) is answered against the Collector of Customs as per para 24 above.

(iii) Regards question (c), the question whether ARADC was consignor of the goods was a question of fact that rested with the Tribunal as the final arbiter of facts. No mis-reading or non-reading of evidence was demonstrated before us so as to justify any interference. The question is therefore answered against the Collector of Customs in terms of paras 26 to 28 above.

Consequently, C.P. No.D-7423/2021 is allowed by directing the Respondents therein to implement the judgment of the Customs Appellate Tribunal dated 09-11-2021 passed in Customs Appeal No. K-7545/2021 in letter and spirit.

A copy of this judgment under seal of the Court be sent to the Customs Appellate Tribunal as per section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Karachi
Dated: ___-04-2022