

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SCRA No.47 of 2022

Date	Order with signature of Judge
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1. For hearing of CMA No.231/2022
2. For regular hearing

29.2.2024

Mr. Khalid Mehmood Rajpar advocate for the Applicant
Mr. Muhammad Afzal Bhatti advocate for Respondent No.1

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant / Department has impugned judgment dated 13.10.2021 passed in Customs Appeal No.K-1450 of 2017, proposing the following questions of law: -

1. *Whether keeping in view of the facts and circumstances of the case learned Appellate Tribunal has erred in law to understand that the Respondent No.1 (being clearing agent) has failed to discharge his statutory responsibilities as envisaged under Rule 101 of Customs Rules 2001 and made an untrue statement while filing Goods Declaration on behalf of the importer through WeBOC System under Section 79(1) of the Customs Act, 1969, within the mis-chiefs of Section 32(1) & (2) of the Customs Act, 1969?*
2. *Whether on the facts and in the circumstances of the case, the learned Appellate Tribunal being the last fact finding forum in the hierarchy of customs has failed to pass a speaking and reasoned judgment as required under Section 24-A of the General Clauses Act, 1897?*
3. *Whether the impugned judgment passed by the learned Customs Appellate Tribunal based on misreading / non-reading of evidence, relevant provisions of the Customs Act, 1969 and mis-placed judgment involving distinguishable facts is sustainable under the law?*

Heard learned counsel for the parties and perused the record. It appears that a show cause notice was issued against the importer and it was alleged that various documents including import invoice submitted by the said importer were false and thereafter proceedings were initiated for short recovery of customs duty. The show cause notice has been issued in terms of Section 32 and other provisions of the Customs Act, 1969, whereas in the entire show cause notice insofar as the present respondent, being the Customs Agent, nothing has been directly alleged against him. Subsequently,

Order-in-Original has been passed and the findings / concluding paragraph of the Order-in-Original reads as under: -

“15. The above stated facts and legal position leads me to conclude that the charges leveled against the importer and clearing agents under the various provisions of Customs Act, 1969, Sales Tax Act, 1990 and Income Tax Ordinance, 2001 are established beyond any shadow of doubt, I, therefore, order the respondent importer M/s Zeal Pak Cement Factory Limited Karachi to deposit the evaded amount of duties and taxes to the tune of “Rs.47.304 Million” into the Government treasury henceforth. A penalty of “Rs.3 Million (Rupees Three Million)” is also imposed on the respondent importer for the violation of provisions of law as mentioned in the Show Cause notice. A penalty of “Rs.500,000 (Five Hundred Thousand)” is also imposed on the clearing agents M/s International Impex under relevant provisions of the law as indicated in the show cause notice. Further, necessary action for the recovery of duties, taxes and penalty may be taken by the relevant department accordingly.”

From perusal of the aforesaid findings of the adjudicating authority, it reflects that the authority has not even bothered to even mention the provision of law under which the penalty has been imposed upon the present Respondent. At the same time there is no conclusive finding about the role of the contesting Respondent as to any collusion or connivance on his part insofar as the allegations contained in the show cause notice are concerned. In the show cause notice it was alleged that the Importer had provided some forged invoices as per investigation from the port of shipment; however, there is nothing in the show cause notice; nor in the Order in Original as to what role was played by the present Respondent in such alleged act. In that case no penalty could have been levied upon the contesting Respondent and the Tribunal was fully justified in remitting the same. If the custom agent is to be held liable for the acts of the importer, then there must be a clear finding to a certain degree based upon some admissible evidence which is missing in the instant matter. To hold a custom agent liable for the act of an importer, more specifically in declaring any incorrect value of the goods, there has to be some cogent and acceptable material / evidence on record, before a penalty could be imposed. Mere

allegation as to connivance or collusion does not suffice. It may also be noted that in the proposed Question No.1, there is some mention of Rule 101 of the Customs Rules 2001, however, it is an admitted fact that neither in the show cause notice nor otherwise any action was ever initiated against the contesting Respondent for having violated the said Rule. Per settled law no penalty can be sustained / imposed until a proper show cause notice to that effect along with the relevant provision of law has been issued to a person. To hold the clearing agent liable for the act of commissions and omissions on the part of the importer will require a clear findings based upon legally acceptable evidence of his being an active and conscious party to the manipulation¹. In normal course of his business a Clearing Agent files a bill based upon the documents and information provided by the importer². He cannot be presumed to be privy to any arrangement, which the importer may have coined or had intended in his mind³. For that purpose, some evidence of his direct involvement will have to be brought on record.

In view of the above, we do not see any reason to interfere with the order passed by the Tribunal. Only Question No.1 is relevant and is answered in negative; against the Applicant and in favour of the Respondent. As a consequence, thereof, this Reference Application is dismissed. Let copy of this order be issued to the Customs Tribunal as required under Section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Zahid*

¹ Ports Ways Custom House Agent V. Collector of Customs (2002 Y L R 2651).

² ibid

³ Ports Ways Custom House Agent V. Collector of Customs (2002 Y L R 2651).