

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-2104, D-2345, D-2353, D-2354, D-2357,
D-2361, D-2717, D-2721 of 2012

Saira Bano and other petitioners in above petitions

Versus

Chairman NAB

BEFORE:

Mr. Justice Sajjad Ali Shah
Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 07.08.2012

Petitioners: Through Mr. Khalid Jawed Khan, Mr. Habib Ahmed, Mr. Shakeel Ahmed, Mr. Aqeel Ahmed Advocates.

Respondent: Through Mr. Noor Ahmed Dayo, Senior Prosecutor NAB.

O R D E R

Mohammad Shafi Siddiqui, J.- These are eight constitution petitions seeking bail in respect of inquiry initiated by NAB relating to alleged pilferage of ISAF-NATO containers. Out of these seven petitions i.e. 2353, 2354, 2357, 2361, 2717, 2345 and 2104 of 2012 are filed by and on behalf of clearing agents whereas CP No.D-2721 of 2012 is filed by the principal appraiser, and his son Saeed Farooqui.

In brief the case involve the issue of Afghan Transit Trade whereby it has been reported that a number of consignments imported under Afghan Transit Trade Policy have not reached the destination.

On behalf of the clearing agents, counsels namely M/s Habib Ahmed, Shakil Ahmed and Aqeel Ahmed argued the case. They have restricted their arguments towards the fact that these clearing agents

have no role in the alleged offence as the consignment was never released to these clearing agents nor in terms of CGO 4/07 or public notice No.16/2000 they have any role to play.

Learned counsel Mr. Khalid Jawed Khan in CP No.D-2721 of 2012 which is filed by Sardar Amin Farooqui, principal appraiser and his son, submitted that the petitioner No.1 is dragged and implicated in the proceedings relating to the pilferage of ISAF/NATO containers and that he has no role or connection whatsoever yet he was arrested by the respondent No.2 on 14.6.2012 without any reason or justification. He submitted that pursuant to media report the Hon'ble Supreme Court was pleased to take suo-moto action whereby the Federal Tax Ombudsman vide order dated 30.09.2010 was asked to conduct an inquiry and submit report. In terms of the alleged report, it was notified that huge numbers of containers containing Afghan Transit Goods have been pilfered inside the territory of Pakistan. In compliance of another order of the Hon'ble Supreme Court dated 28.03.2012 an inquiry was initiated by the respondent No.2 and the last report submitted by the later was dated 15.5.2012 whereby the reconciliated figure of missing containers mentioned initially by FTO were said to be exaggerated and only 13 clearing agents having 777 containers have been declared as suspicious. The Hon'ble Supreme Court expressed dissatisfaction with the report dated 15.5.2012 and passed order dated 11.6.2012. Pursuant to the orders of the Hon'ble Supreme Court a meeting between the officials of the respondents was arranged and delinquent individuals were to be nominated by the respondent No.1. The purpose of the meeting was to acquire substantial meaningful evidence against the culprits who were involved in the scam of missing containers. Pursuant to this Chairman of respondent No.2 issued warrants of arrest against the petitioner in order to show the progress. It is submitted by the learned counsel that no

reference till date has been filed against any of the accused and that there is absolutely no evidence that the missing containers were processed by the petitioners during the period from 2007 to 2010. Learned counsel further submitted that there is no evidence or material to suggest that a large number of containers were cleared on fake documents. Per learned counsel legally the functions of the appraiser and/or principal appraiser are limited to the processing of documents as presented to them. They have no physical control over the goods nor have any role in the inspection and for sealing of the containers and eventually for its delivery to the carrier which may be NLC or Railway against Trip Detail Report (TDR).

Per learned counsel different stakeholders and state organs are associated with this process which includes importers, clearing agents, terminal operators, preventive staff, the designated carrier i.e. Railway and NLC or Hired Mechanical Transport. These carriers are responsible for safe transport and arrival of cargo at the NLC station at Amangarh or Chaman. The working of the Afghan Transit Group of MCC (Appraisalment) is very limited which was ultimately handed over to the preventive collectorate. Learned counsel submitted that this is a case of further inquiry and the main accused i.e. the officials of the NLC who are the “bonded carrier” have not been investigated at all and their version is believed as gospel truth. Learned counsel submitted that initially the exaggerated figure of missing containers were shown as 28802 out of which 19593 were carried away by NLC who verified 13950 and rest of 5643 are in process of verification. As far as rest of the containers are concerned the same were carried away by the Railway to which there is no issue at all. Learned counsel submitted that it is not a case where the petitioners could be saddled with the criminal liability.

The learned Senior Prosecutor NAB has opposed the petitions and argued that the clearing agents are involved in clearance of the goods in connivance with the principal appraiser and have filed goods declaration on the basis of false and fabricated documents i.e. 'Jawaznama' etc. which was duly verified by the Afghan Embassy/ consulate. Learned Senior Prosecutor submitted that different organizations have specific roles and responsibilities with regard to Afghan Transit and submitted that as per section 129 of the Customs Act the principal appraiser is the appropriate officer who allow the goods to be transited. He stated that the said principle officers has to ensure that Afghan Transit Trade Invoice in triplicate are dispatched to Exit Collectorate and same are received back as Cross-Border Certificate from the respective collectorate within 45 days. Learned Senior Prosecutor submitted that in many cases the Afghan Transit Trade invoices are not received back from respective Exit Collectorate within specified period, which prove criminal/illegal involvement of the petitioners.

We have heard the arguments of the learned counsels and have gone through the material available on record. It appears that the core issue that is involved is pilferage of the containers under the garb of Afghan Transit Trade controlled through Afghan Transit Trade Agreement 1965 (now APTTA 2010). The issue revolves around persons responsible for verifying the documents and persons responsible to "carry" the goods meant for Afghan Transit Trade to its ultimate destination. In this connection the most important and significant documents are public notice No.16/2000(A) dated 30.09.2000 and CGO 4/07 dated 31.03.2007. These documents primarily describe the role of every person who is involved in the processing and transiting of the containers to its ultimate destination. The process starts from the manifestation of Bill of Entry. After the initial process of manifestation, the processing of the

documents starts and the principal officer (Processing) scrutinizes the bill of entry in the light of documents produced. The following five documents were required to be produced before the Appraiser (Processing) transit group:-

- a) Remaining set of the bill of entry.
- b) Original detailed packing list/weight list
- c) Original invoice
- d) Original B/L
- e) Jawaznama

This public notice referred above also deals with the detachment of the documents and examination of the goods. After the examination of the goods the process of loading starts. The process of loading, as reflected in the public notice, is as under:-

“5. LOADING

After completion of the bill of entry, the importer or his clearing agent will approach the concerned Senior Preventive Officer (SPO) for “Allow loading” of the goods in railway wagon. The SPO will enter the request in the internal delivery register maintenance in the office of the SPO. The SPO will then issue a “Loading Slip” in duplicate and affix the “Allow Loading Stamp” on reverse side of the duplicate copy of the bill of entry and will depute a Preventive Officer to supervise the loading. The goods will be loaded on the wagon in the presence of the Preventive Officer and the representative of the KPT, Pakistan Railway and the importer/clearing agent.

The loaded wagon will be sealed by the authorized security agency i.e. M/s Brinks, the preventive seal and Railway seal. The A.O. (Examination), preventive officer and the representative of Pakistan Railways will sign the ATTI, after indicating the Railway receipt (R/R) No., the Railway Wagon No., and the seal Number thereon. The representative of the authorized security agency will issue a sealing certificate in quadruplicate also indicating the relevant particulars like bill of entry No and date, seal No. Railway wagon No etc. The original certificate shall be retained by the security agency, the duplicate will be given to the transit section for record, the triplicate will be meant for carrier, and the fourth copy will be dispatched to the Customs Officer at the destination for verification.

After completion of the above formalities, the Preventive staff shall return the duplicate copy of bill of entry to the Afghan Transit Group.”

Thus, in terms of this (loading) it is a senior preventive officer who appears to be responsible for allowing loading of the goods in the bonded carrier. After loading of the carrier the loaded wagon was to be sealed by the authorized security agency i.e. M/s Brinks, the preventive seal and the railway seal. Thus in the entire process of loading the clearing agents and the principal appraiser who have filed these petitions have not been prescribed any role. When confronted with the learned Prosecutor NAB we were informed that neither the bonded carriers such as NLC and Railways, as the case may be, were investigated nor the preventive officers who have specific role in the loading of the consignment were questioned whereas they have roped all those persons who prima facie are neither involved nor could possibly play any part therein. Moreover even after investigation nothing came out in evidence to rope them in and at the moment all of them are in jail custody.

As regards CGO 4/07 dated 31.03.2007 its relevant Chapter II and III deals with “safe transportation” and “sealing” at focal points (entry) of containers transported by road for transit. For the benefit the relevant part of Chapter II and III of CGO 4/07 are reproduced as under:-

“SEALING AT FOCAL POINTS (ENTRY) OF CONTAINERS UNDER SAFE TRANSPORTATION SCHEME.

- I. The Customs Agent/carrier will lodge the ST application in the Customer Facilitation Center or electronically, indicating location of the container. After getting deliver of the container, the Customs Agent/carrier will load the container on the listed Transport Unit for scanning, wherever applicable.*
- II. After scanning, the Transport Unit will move to the designated PCCSS Focal Point Entry where the PCCSS officer will enter the ST number in the computer for verifying the container number and enter the Transport Unit No.*

- III. *In case the Transport Unit is listed, the PCCSS officer will take the designated seal and check it for any defect. The bar code on the seal will be scanned by using the bar code reader and in case bar code is accepted, Transport Note (single copy) in Form-A will be printed. In case the bar code is not validated, the defective seal will be returned to the box and a new seal number will be issued through the computer.*
- IV. *The PCCSS officer will place the seal on the slot of the door and the Transport Note (Form-A) will be handed over to the driver/supervisor of the Transport Unit to be carried with the Transport Unit.*
- V. *In case the particulars of the Transport Unit do not match, the PCCSS officer will seek explanation from the Customs Agent/carrier and may allow carrier/agent to substitute the non-listed unit with a listed Transport Unit in case satisfied with the explanation. The PCCSS officer will also send alert to Incharge PCCSS. If not satisfied with the explanation, the PCCSS officer will send irregularity report through computer generated e-mail to the carrier, concerned offices and also the licensing authority of bonded carriers for investigation and taking penal action as deemed appropriate.*
- VI. *In case the Transport Unit meets an accident en route or there is sufficient ground to belief that there is pilferage, replacement or substitution of goods, the driver/carrier's agent, or any enforcement unit of Customs, or the Collectorate of jurisdiction, or any other person will inform the Incharge PCCS or special Checking Squads or any focal point. After checking veracity of the information, the Special Checking Squads or focal point, as the case may be, will inform the Incharge PCCSS through fax on Form D and also on line immediately. The Incharge PCCSS will immediately record the discrepancy in register Form-C and may order stoppage of such Transport Unit and/or order any such action as deemed appropriate.*

“SEALING AT FOCAL POINTS (ENTRY OF CONTAINERS TRANSPORTED BY ROAD FOR TRANSIT.

- I. *The Customs Agent/carrier will lodge the ATT application in the Customer Facilitation Centre or electronically, indicating locaing of the continer. After getting deliver of the container, the Customs Agent/carrier will load the container on the listed Transport Unit for scanning, wherever applicable.*
- II. *After scanning, the Transport Unit will move to the designated PCCSS Focal Point Entry where the PCCSS officer will enter the ATT Application/GD number in the computer for verifying the container number and enter the Transport Unit No.*
- III. *In case the Transport Unit is listed, the PCCSS officer will take the designated seal and check it for any defect. The*

bar code on the seal will be scanned by using the bar code reader and in case bar code is accepted, Transport Note (single copy) in Form-A will be printed. In case the bar code is not validated, the defective seal will be returned to the box and a new seal number will be issued through the computer.

- IV. *The PCCSS officer will place the seal on the slot of the door and the Transport Note (Form-A) will be handed over to the driver/supervisor of the Transport Unit to be carried with the Transport Unit.*
- V. *In case the particulars of the Transport Unit do not match, the PCCSS officer will seek explanation from the Customs Agent/ carrier and may allow carrier/agent to substitute the non-listed unit with a listed Transport Unit in case satisfied with the explanation. The PCCSS officer will also send alert to Incharge PCCSS. If not satisfied with the explanation, the PLCCSS officer will sent irregularity report through computer generated e-mail to the carrier, concerned offices and also the licensing authority of bonded carriers for investigation and taking penal action as deemed appropriate.*
- VI. *In case the Transport Unit meets an accident en route or there is sufficient ground to believe that there is pilferage, replacement or substitution of goods, the driver/carrier's agent, or any enforcement unit of Customs, or the Collectorate of jurisdiction, or any other person will inform the Incharge PCCSS, or Special Checking Squads or any focal point. After checking veracity of the information, the Special Checking Squads or focal point, as the case may be, will inform the Incharge PCCSS through fax on Form D and also on line immediately. The Incharge PCCSS will immediately record the discrepancy in register Form-C and may order stoppage of such Transport Unit and/or order any such action as deemed appropriate."*

Thus in this foolproof mechanism prima facie there is no role of either clearing agent or Principal Appraiser. Apparently they never had the physical control over the goods nor had any role in the sealing of containers and the delivery to bonded carrier or their authorized carrier against Trip Detail Report (TDR) such as NLC or Pakistan Railways.

Learned senior Prosecutor NAB has also referred to Sections 129, 207, 208 and 209 of the Customs Act, and has argued that under these provisions the clearing agents and principal appraisers are primarily responsible for the transition of the containers and their pilferage, which for the sake of convenience are reproduced hereunder:-

“129 Transit of goods across Pakistan to a foreign territory.—Where any goods are entered for transit across Pakistan to a destination outside Pakistan, the appropriate officer may, subject to the provisions of the rules, allow the goods to be so transited without payment of the duties which would otherwise be chargeable on such goods.

Provided that the Federal Government may, by notification in the official Gazette, prohibit the bringing into Pakistan by sea, land or air in transit to a foreign territory any goods or class of goods.”

207 Custom-house agents to be licensed.—No person shall act on behalf of any principal for the transaction of any business relating to the entrance or departure of any conveyance or any customs clearance related activity or the import or export of goods or baggage at any customs station unless such person holds a licence granted in this behalf in accordance with the rules as a customs agent.

208. Person to produce authority if required.—(1) When any person licensed under section 207 applies to any officer of Customs for permission to transact any specified business with him on behalf of any principal, such officer may require the applicant to produce a written authority from the principal on whose behalf such business is to be transacted, and in default of the production of such authority refuse such permission.

(2) Where the principal chooses to transact business directly without using an agent licensed under section 207, he may do so himself or may authorize an employee or representative that may transact business generally at the customs-port, airport or land customs-station or custom-house for such principal.

Provided that the appropriate officer may refuse to recognize such an employee or representative unless such a person produces an authority in writing duly signed by the principal.

209. Liability of principal and agent.—(1) Subject to the provisions of section 207 and 208, anything which the principal is required or empowered to do under this Act may be done by any person expressly authorized by the principal for the purpose.

(2) Where this Act requires anything to be done by the principal and if any such thing is done, by an employee or representative expressly authorized by the principal under sub-section (2) of section 208, unless the contrary is proved, shall be deemed to have been done with the knowledge and consent of such principal so that in any proceedings under this Act, the principal shall be liable as if the thing had been done by himself.

(3) when any customs agent is expressly authorized by the principal to be his agent under sub-section (1) of section 208 in respect of such goods for all or any of the purposes of this Act, such agent shall, without prejudice to

the liability of the principal, be deemed to be the principal of such goods for such purposes:

Provided that where any duty is not levied or is short-levied or erroneously refunded on account of any reason other than willful act, negligence or default of the agent, such duty shall not be recovered from the agent.”

A bare reading of the aforesaid provisions clearly indicates that the same are not at all attracted as the same pertains to the powers of clearing agents that in the absence of principal an agent is required to do under the Customs Act and section 129 permits transition of goods across Pakistan where goods are entered for transit in Pakistan.

It may also be observed that the learned Senior Prosecutor NAB as well as the I/O of the case present in persons has categorically stated that the petitioners are in jail custody and they are no more required for the purpose of investigation. So also it is admitted by them that the case against them is based on the documentary evidence, which is already with the NAB and there is no probability of the same being tampered.

Thus in view of the aforesaid fact and circumstances, we are of the view that the case is of further inquiry. The co-accused such as representatives of NLC and Pakistan Railways and others have not been examined/investigated at all. The applicants/ petitioners are no more required for investigation and are at the moment in jail custody.

We therefore allow the petitions to the extent of grant of bail only subject to their furnishing surety in the sum of Rs.2 Million each with P.R. bond in the like amount to the satisfaction of the Nazir of this Court. However, they shall cooperate with the prosecution.

JUDGE

JUDGE