

Stereo. H C J D A-38.
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Customs Reference No.34648 of 2024

Jahanzaib & another

Versus

**Additional Collector of Customs (Adjudication), Collectorate of
Adjudication, Dry Port, Faisalabad & another**

JUDGMENT

Date of hearing: 12.12.2024.
Applicants by: Mian Abdul Salam Sajid, Advocate.
Respondents by: Mian Muhammad Ashfaq Hussain,
Advocate (for department).

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant Reference Application under Section 196 of the Customs Act, 1969 (“**the Act of 1969**”), following questions of law, asserted to have arisen out of impugned judgment dated 30.01.2024, passed by learned Customs Appellate Tribunal, Bench-I, Lahore (“**Appellate Tribunal**”), have been pressed and argued for our opinion:-

1. Whether the learned Tribunal has erred in law by upholding the confiscation of the applicants’ lawfully registered vehicle without considering that neither the vehicle was previously used in smuggling activities nor any false cavity was found therein, as required by clause (b) of the Preamble of SRO 499(I)2009 dated 13.06.2009?
2. Whether the learned Tribunal has failed to appreciate that clause (f) of SRO 499(I)2009 dated 13.06.2009 expressly empowers the adjudication authority / learned Tribunal to redeem the vehicle not covered under clause (b) of the preamble of said notification found carrying goods under 2(s) of the Customs Act, 1969?
3. Whether the learned Tribunal has passed the impugned order in utter violation of judgments / orders passed by this Hon’ble Court reported as **2010 PTD 2015 (DB)**, **2016 PTD 2388 Peshawar (DB)**?

2. Brief facts as narrated in the statement of the case are that on 23.02.2023, the staff of respondent-department, on information, intercepted Oil Tanker bearing Registration No.FDS-1057 on Vehari Road near Vehari City, loaded with 48,000 liters of High Speed Diesel Oil, however, the driver escaped from the spot while leaving the vehicle unlocked. Upon thorough search of the vehicle, neither any document was found inside the driver's cabin nor anyone turned up to claim ownership or to produce any document showing legal import / lawful procurement of loaded goods i.e. HSD Oil weighing 48,000 liters (approx.), whereof the unknown person(s) and whosoever claims the ownership of the seized goods and carrier vehicle at any stage or those who will be endorsed by the possession-holder/ owner through legal documents, were charged with the violation of Sections 2(s), 16, 18, 156(2) & 157(1)(2) of the Customs Act, 1969 and SRO 566(I)/2005 dated 06.06.2005 read with Section 3(1) of the Import & Export (Control) Act, 1950 and Section 3 of the Sales Tax Act, 1990, Section 148 of the Income Tax Ordinance, 2001 punishable under clause 89 of Section 156(1) & 157(1) & (2) of the Customs Act, 1969 read with Section 3(3) of the Act of 1950 *ibid* further read with SRO 499(I)/2009 dated 13.06.2009. Accordingly, a show cause notice was issued on 05.04.2023, which culminated in passing of order-in-original dated 27.04.2023 for outright confiscation of the seized oil/goods and the vehicle. Feeling aggrieved, applicants filed appeal before learned Appellate Tribunal, which was dismissed vide impugned judgment dated 30.01.2024. Hence, instant Reference Application.

3. Learned counsel for applicants submits that clause (f) of SRO 499(I)2009 dated 13.06.2009 expressly empowers the adjudication authority / learned Appellate Tribunal to redeem the vehicle not covered under clause (b) of the preamble of said notification found carrying goods under 2(s) of the Act of 1969. He adds that there is a slight difference between vehicle "liable to be confiscated" and

“shall be confiscated” which has been interpreted by another learned Bench of this Court in judgment reported as *Collector of Customs v. Customs Appellate Tribunal Bench-II, Lahore and others (2020 PTD 209)* which was upheld by a three-member Bench of the Hon’ble Supreme Court vide order dated 02.03.2021, passed in **C.A. 336/2020 to C.A. 345/2020 and C.P. 141 and 142 / 2020** titled *The Collector of Customs, Model Customs Collectorate, Multan v. Asmat Ullah Khan, etc.* In support of his contentions, he has further relied upon *Khan Wali v. The Collector MCC, Peshawar and 2 others (2016 PTD 2388)* and order dated 15.07.2015, passed by this Court in **Customs Reference No.52 of 2015** titled *Nazir Ahmed v. Chairman, Customs Appellate Tribunal, etc.*

4. Contrarily, learned Legal Advisor for respondent-department defends the impugned Appellate Tribunal’s judgment by contending that learned counsel for applicant has failed to point out any illegality or legal infirmity therein, thus, same is liable to be upheld. In support, he has referred to order dated 02.12.2021, passed by the Hon’ble Supreme Court in **Civil Petition No.1690-L/2020** titled *Director Intelligence & Investigation-Customs FBR, Faisalabad v. Muhammad Hashim, etc.* and order dated 29.09.2020, passed by another learned Bench of this Court in **Customs Reference No.45062 of 2020** titled *Director Intelligence and Investigation v. Muhammad Hashim, etc.*

5. Arguments heard. Available record perused.

6. The words “shall be liable to confiscation” as used in Section 157 of the Customs Act, 1969 are not synonymous to “shall be confiscated”, therefore, do not mean automatic confiscation. In the circumstances, learned Appellate Tribunal was not justified to deprive the applicants from the goods in question. They should have been given opportunity to produce evidence and their point of view should have been given due consideration, which is lacking in the instant case, as rightly held by the Hon’ble Supreme Court in case reported as *Haji Abdul Razzak v. Pakistan through Secretary,*

Ministry of Finance, Islamabad and another (PLD 1974 Supreme Court 5), relevant portion whereof is reproduced hereunder, for ready reference:-

"It appears to us that there is a great deal of force in the reasoning of the learned Judge in this case. If the words "liable to confiscation" give a discretion to the confiscating authority to deprive a person of his property, then it follows that this discretion must be exercised upon the principles of natural justice; that is to say, the persons sought to be deprived of the property must be given notice to show cause, they must be furnished with adequate opportunity of putting forward their point of view and the same must receive due consideration. Furthermore, according to one of the principles now well-accepted, no person should be deprived of his property by way of penalty unless it is clear that he is in some measure responsible for assisting or furthering the commission of the offence committed.

No innocent person should be unjustly punished or deprived of his property. This was the cardinal principle which was followed by the learned Judge of the Calcutta High Court in the last mentioned case. We too think that this was the correct principle upon which the authorities **should proceed.**"

7. The prime argument agitated before us is with regard to confiscation of vehicle under Section 157(2) of the Act of 1969. The words "shall be liable to confiscation" do not mean the same thing as the words "shall be confiscated". The plain meaning of the words "shall be liable to confiscation" are that the conveyance may be confiscated in a proper case, otherwise the legislature would have used the words "shall be confiscated". To make a thing liable to confiscation amounts to a declaration that the thing is available for confiscation. The use of the words "shall" here in the context only means that in a case the Court considers proper, it will have power to order the confiscation of the conveyance, as rightly held by another learned Bench of this Court in the judgment reported as Collector of Customs v. Customs Appellate Tribunal Bench-II, Lahore and others (2020 PTD 209) which was upheld by the Hon'ble Supreme Court vide order dated 02.03.2021, passed in

C.A. 336/2020 to C.A. 345/2020 and C.P. 141 and 142 / 2020
titled *The Collector of Customs, Model Customs Collectorate, Multan v. Asmat Ullah Khan, etc.*, consisting of a three-member Bench of the Hon'ble Supreme Court. The aforesaid order dated 02.03.2021 is reproduced hereunder:-

"Heard the learned counsel for the appellant and perused the record with his assistance, however, learned counsel has not been able to show us any defect or lacuna in the impugned orders, factual or otherwise. No case is made out for interfering with the impugned orders. The petitions are accordingly dismissed."

8. The phrase "liable to be confiscated" indicates a discretionary power vested in the authority to decide whether confiscation is warranted based on the facts and circumstances of the case. It does not impose a mandatory requirement but rather provides an option for the authority to consider. This phrase invokes the principle of proportionality, requiring the authority to weigh the severity of the offense, the intent, and any mitigating factors before deciding on confiscation. The exercise of discretion implies adherence to principles of natural justice, such as issuing a show cause notice, providing an opportunity to be heard, and ensuring fair adjudication. It allows authorities to evaluate the case, consider alternative penalties, or even waive confiscation if justified.

Whereas the phrase "shall be confiscated" denotes a mandatory requirement that leaves no room for discretion. Once the specified legal conditions are satisfied, confiscation becomes obligatory and must be carried out. This indicates that the legislature has already deemed confiscation proportional to the violation, removing the need for further evaluation by the authority. Since the action is mandatory, the opportunity to contest may be limited to challenging the grounds for the mandatory action, not the authority's discretion. This reflects a clear legislative intent to make confiscation compulsory under the specified circumstances.

The phrase “shall also be liable to confiscated” as provided in Section 157(2) of the Customs Act, 1969 does not mean that vehicle should be confiscated automatically. This discretion must be exercised upon the principles of natural justice. According to one of the principles now well-accepted, no person should be deprived of his property by way of penalty unless it is clear that he is responsible for assisting or furthering the commission of the offence committed and no innocent person should be unjustly punished or deprived of his property.

The phrase “shall be confiscated” means shall stand confiscated. Keeping in juxtaposition of both phrases with each other, the derivative conclusion is that Legislature has provided two different modes to be applied for confiscation in two different situations. The distinction between the two has been made in rule laid down in the case of Haji Abdul Razzak supra wherein, the phrase “liable to confiscation” has not been equated with the term “shall be confiscated”. In case where an article is made only liable to confiscation, a discretion is given but such discretion has to be exercised on sound judicial principles. Reliance is placed upon Haji Abdul Razzak v. Pakistan through Secretary, Ministry of Finance, Islamabad and another (PLD 1974 Supreme Court 5), Gulistan v. The State (1993 SCMR 316), Suleman v. The State [PLD 1962 (W.P.) Lahore 11], Hafiz Ullah v. The State (2003 P Cr. L J 436) and Collector of Customs v. Customs Appellate Tribunal Bench-II, Lahore and others (2020 PTD 209).

9. As regards the order dated 02.12.2021, passed by the Hon’ble Supreme Court in **Civil Petition No.1690-L/ 2020** supra, relied upon by learned Legal Advisor for respondent-department, which consists of a three-member Bench, relevant portion whereof is reproduced as under:-

“None present for the respondents. The question before us is limited to the issue as to whether a vessel carrying smuggled goods, in the present case smuggled diesel, can

be confiscated or not. The learned counsel in this regard refers to subsection 2 of section 157 of the Customs Act, 1969, which is very explicit on the point and reads as follows:

(2) Every conveyance of whatever kind used in the removal of any goods liable to confiscation under this Act shall also be liable to confiscation.

Provided that, where a conveyance liable to confiscation has been seized by an officer of customs, the [appropriate officer] may, in such circumstances as may be prescribed by rules, order its release, pending the adjudication of the case involving its confiscation if the owner of the conveyance furnishes him with a sufficient guarantee from a scheduled bank for the due production of the conveyance at any time and place it is required by the [appropriate officer] to be produced."

2. In view of the foregoing, the learned counsel, in the facts and circumstances of the case, is just and fair in contending that the subject vehicle which was admittedly carrying the smuggled diesel was lawfully confiscated. The petition is therefore converted into an appeal and is allowed."

It suffices to say that the Hon'ble Supreme Court has held in a number of esteemed judgments that a prior decision of the Court on identical facts and law binds the Court on the same points of law in a latter case. It is apparent that a contrary view was taken by the Hon'ble Supreme Court in order dated 02.12.2021 supra and in such a situation, the rule laid down in the case reported as Multiline Associates v. Ardesir Cowasjee and 2 others (PLD 1995 Supreme Court 423) is required to have been followed, relevant portion whereof is as under:-

"18. In such circumstances, legal position which emerges is that the second Division Bench of the High Court should not have given finding contrary to the findings of the 1st Division Bench of the same Court on the same point and should have adopted the correct method by making a request for constitution of a larger Bench, if a contrary view had to be taken. In support reference can be made to the cases of the Province of East Pakistan v Dr. Azizul Islam (PLD 1963 SC 296) and Sindheshwar Ganguly v. State of West Bengal (PLD 1958 SC (Ind.) 337), which is a case of Indian jurisdiction. We therefore, hold that the earlier judgment of equal Bench in the High Court of the same point is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of a larger Bench should have been made."

10. Any decision by a later Bench of the same strength that disregards prior rulings of benches of equal strength within the same Court will hold no precedential value. Reliance is placed upon *Qaiser and another v. The State (2022 SCMR 1641)* and *Hasnain Raza and another v. Lahore High Court, Lahore and others (PLD 2022 Supreme Court 7)*.

11. In our view, our answer to the proposed questions is in **affirmative** i.e. in favour of applicant and against the respondent-department.

This Reference Application is **decided** against the respondent-department.

12. Office shall send a copy of this judgment under seal of the Court to learned Appellate Tribunal as per Section 196 (5) of the Act of 1969.

(Rasaal Hasan Syed)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

Approved for Reporting

Judge

A.H.S.