

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE KHILJI ARIF HUSSAIN

CIVIL APPEAL NO.490 OF 2009

*(Against the judgment dated 5.12.2008
of the High Court of Sindh, Karachi
passed in Custom Reference Application
No.404/2007)*

Collector of Customs, Custom House, Karachi

...Appellant(s)

VERSUS

Syed Rehan Ahmed

...Respondent(s)

For the appellant(s): Raja Muhammad Iqbal, ASC

For the respondent(s): Ex-parte

Date of hearing: 10.11.2016

...
ORDER

MIAN SAQIB NISAR, J.- This appeal, by leave of the Court, involves the question as to whether a technical member of the Customs Appellate Tribunal (*Tribunal*), sitting singly, has the jurisdiction to decide matters involving questions of law.

2. The brief facts of the case are that the respondent imported goods from China consisting of 12 items at the invoiced value of US \$ 21,994.75 (C&F) and under self-assessment determined the liabilities of taxes and duties at Rs.316,987/-. After examination, the authorities found that the respondent had misdeclared the description, classification and value of the goods causing a potential revenue loss of Rs.558,460/-. A show cause notice was issued to the respondent and subsequently an order in original dated 4.2.2006 was passed confiscating the goods but with an option of redemption upon payment of fine by the respondent.

The respondent availed the option but also filed an appeal against the said order before the Collector (Appeals) who dismissed the same *vide* order dated 30.5.2006. Aggrieved, the respondent appealed before the Tribunal which (*appeal*) was accepted *vide* order dated 23.8.2007. Aggrieved, the appellant filed a reference before the learned High Court of Sindh which dismissed the same *vide* the impugned judgment holding that a technical member of a Customs Appellate Bench, sitting singly, does not have the jurisdiction to pass orders on matters involving questions of law. Thereafter, the appellant approached this Court and leave was granted on 6.5.2009 in the following terms:-

“This petition has been filed against the order dated 5-12-2008 passed by the High Court of Sindh, Karachi. Relevant para therefrom is reproduced herein below:-

“We are, therefore, of the considered opinion that the deletion of the explanation to subsection 3-A has empowered a Judicial Member sitting singly to hear a question of law but when the statute is interpreted as a whole the only interpretation which can be drawn is that the technical member sitting singly is not empowered to decide a matter involving a question of law. We would there, answer the common question in these reference applications in affirmative i.e. we hold that the member technical does not have the jurisdiction to adjudicate in matters involving questions of law.”

2. *Leave to appeal is granted, inter alia, to examine as to whether the learned High Court has rightly interpreted subsection 3-A of section 194-C of the Customs Act.”*

3. The sole attack of the learned counsel against the impugned judgment was that a member of the Tribunal can only decide a matter singly if he was previously a member of a Bench to which the case had been entrusted. In support of his argument, he relied upon the case reported as Director, Intelligence and Investigation (Customs and Excise), Faisalabad and another Vs. Bagh Ali (2010 PTD 1024).

4. Heard. Before interpret Section 194-C of the Customs Act, 1969 (*the Act*) which (*section*) is germane to the instant matter, it may be useful to briefly discuss the Tribunal in general. The Tribunal consisting of both judicial and technical members is to be constituted by the Federal Government under Section 194 of the Act. The requirements of becoming a judicial or technical member is provided in sub-sections (2) and (3) of Section 194, and according to sub-section (4), one of the members shall be appointed by the Federal Government as a Chairman of the Tribunal. Section 194-A of the Act provides the types of orders against which an appeal shall lie before the Tribunal, while Section 194-B stipulates, *inter alia*, the power to pass orders as the Tribunal may think fit, the time period for deciding an appeal before it and the power to rectify or amend orders made by it.

5. Adverting to Section 194-C of the Act, it is pertinent to mention at the very outset that sub-section (3) thereof was amended by the Finance Act, 2009 (*which received the Presidential assent on 30.6.2009*) after the impugned order was passed. Therefore, the instant case will be decided on the basis of the relevant law in force at that point in time which reads as follows:-

“194-C Procedure of Appellate Tribunal.– (1) The powers and functions of the Appellate Tribunal may be

exercised and discharged by Benches constituted by the Chairman from amongst the members thereof.

(2) Subject to the provisions contained in sub-sections (3) and (4), a Bench shall consist of one judicial member and one technical member.

(3) Every appeal against a decision or order deciding a case involving duty, tax, penalty or fine exceeding five million rupees shall be heard by a Special Bench constituted by the Chairman for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member:

Provided that the Chairman may, for reasons to be recorded in writing, constitute Benches including special Benches consisting of—

- (a) two or more technical members; or*
- (b) two or more judicial members:*

Provided further that any Bench referred to in clause (a) shall not hear the matters involving questions of law.¹

(3A) Notwithstanding anything contained in sub-sections (2) and (3), the Chairman may constitute as many Benches consisting of a single member as he may deem necessary to hear such cases or class of cases as the Federal Government may, by order in writing, specify.

(4) The Chairman or any other member of the Appellate Tribunal authorised, in this behalf by the Chairman may, sitting singly, dispose of any case which has been allotted to the bench of which he is a member where—

¹ Subsequently omitted by the Finance Act, 2009 (I of 2009).

- (a) the value of the goods confiscated without option
having been given to the owner of the goods to pay a
fine in lieu of confiscation under section 181; or*
- (b) [* * *]*
- (c) in any disputed case, the difference in duty or tax
involved or the duty or tax involved, or the amount of
fine or penalty involved
does not exceed five million rupees.*

- (5)*
- (6)*
- (7) ”*

Section 194-C(1) of the Act empowers the Chairman to constitute, from amongst the judicial and technical members, Benches which are to exercise and discharge the functions of the Tribunal. Section 194-C(2) of the Act provides that the Benches constituted by the Chairman are to consist of one judicial and one technical member, subject to sub-sections (3) and (4) of Section 194-C. According to Section 194-C(3) a Special Bench, consisting of at least two members of which one must be a judicial and the other a technical member, shall hear appeals against decisions or orders involving duty, tax, penalty or fine exceeding five million rupees. However the proviso to sub-section (3) stipulates that such Special Benches may consist of two or more technical or judicial members, the constitution of which (*Bench*) must be done by the Chairman with written reasons for doing so. Further, the second proviso to sub-section (3) (*which existed at the time of the impugned judgment*) states that if a Special Bench constituted under such sub-section consists of at least two technical members it shall not decide matters involving questions of law. Section 194-C(3A) then provides that in spite of sub-sections (2) and

(3), the Chairman may constitute Benches consisting of a single member to hear such cases or class or cases as the Federal Government may, by order in writing, specify. Finally, as per Section 194-C(4) the Chairman or any other member of the Tribunal authorized by the Chairman may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member, where the value of the goods confiscated without an option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 181 does not exceed five million rupees or in any disputed case, the difference in duty or tax, the duty or tax, or the amount of fine or penalty involved does not exceed five million rupees. In light of the above, there appears to be three types of Benches of the Tribunal that can decide appeals under Section 194-A of the Act:-

- (a) A Bench of two members, one judicial and one technical, constituted under Section 194-C(2) of the Act;
- (b) A Special Bench of at least two members constituted under Section 194-C(3) of the Act to decide every appeal against decisions or orders involving duty, tax, penalty or fine exceeding five million rupees. Such Benches may however consist of two more technical or judicial members if the Chairman so orders in writing *[clauses (a) and (b) respectively of Section 194-C(2) of the Act]*;
- (c) A Single Member Bench constituted under Section 194-C(3A) of the Act to hear cases or a class of cases as specified by the Federal Government in writing.

Section 194-C(4) provides for an exception, where the Chairman or any other member of the Tribunal authorized by the Chairman, may sit singly and decide a case which has been allotted to the Bench of which he is a member. The pre-requisite for this is that such member (*or Chairman*) must already be a member of a Bench constituted by the Chairman under sub-section (2) and the case must have been allotted to such Bench. But

such member (*or Chairman*) can only decide such cases sitting singly where: (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 181 does not exceed five million rupees; or (b) in any disputed case, the difference in duty or tax or the duty or tax involved or the amount of fine or penalty involved does not exceed five million rupees.

6. We would like to observe at this stage that the phrase “*any case which has been allotted to the bench of which he is a member*” appearing in Section 194-C(4) of the Act is of immense importance which clearly suggests that there must have existed a Bench constituted under Section 194-C(2) of the Act consisting of two members (*or Chairman and a member*), out of which the Chairman or a member authorised by the Chairman, may sit singly and dispose of a case already allotted to such Bench. To hold otherwise would be to render the aforesaid phrase redundant and superfluous. This is precisely why sub-section (2) of Section 194-C has been made subject to sub-section (4), the latter of which purports to create an exception to the former. Further, such decision by the Chairman to allow himself or any other member of a Bench to sit singly to dispose cases falling within the ambit of Section 194-C(4) should not be as a matter of course or right, rather should be done upon proper application of mind by the Chairman who shall himself make such decision, and not delegate it to any other officer to undertake as an administrative action. The Chairman is obliged to examine the circumstances warranting the decision of letting him or another member of a Bench to dispose of a matter sitting singly before taking such step. This is precisely what has been held by the learned Lahore High Court in the case of **Bagh Ali** (*supra*) as relied upon by the learned counsel which to our mind is good law.

7. Coming back to the proposition at hand, in order to answer the same, the legislative history of Section 194-C needs to be examined. Amongst other provisions, Section 194-C was introduced into the Act by the Finance Act, 1989 which read as follows:-

“194-C. Procedure of Appellate Tribunal.—*(1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the Chairman from amongst the members thereof.*

(2) Subject to the provisions contained in sub-sections (3) and (4), a Bench shall consist of one judicial member and one technical member.

(3) Every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment, shall be heard by a Special Bench constituted by the Chairman for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member.

(4) The Chairman or any other member of the Appellate Tribunal authorised in this behalf by the Chairman may, sitting singly, dispose of any case which has been allotted to the bench of which he is a member where—

- (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 181; or*
- (b) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the*

value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
(c) *the amount of fine or penalty involved;*

does not exceed one hundred thousand rupees.

- (5)
- (6)
- (7)
- (8) ”

Thereafter the Tax Laws (Amendment) Ordinance, 2001 (*Ordinance of 2001*) was promulgated which introduced the two provisos to sub-section (3) of Section 194-C as reproduced in the earlier portion of this opinion and inserted sub-section (3A) of Section 194-C which read as follows:-

“(3A) Notwithstanding anything contained in sub-sections (2) and (3), the Chairman may constitute as many Benches consisting of a single member as he may deem necessary to hear such cases or class of cases as the Federal Government may, by order in writing, specify.

Explanation:--For the purpose of this sub-section, the expression “cases” means the matters involving decisions other than decisions in relation to a question of law under this Act or the Central Excises Act, 1944 (I of 1944) or as the case may be, the Sale Tax Act, 1990.”

The effect of the amendments brought about by the Ordinance of 2001 and the intent of the legislature in doing so is clear from a bare reading of both amendments, in that the second proviso to Section 194-C(3)

prevented a Bench consisting of at least two technical members constituted under Section 194-C(3)(a) from hearing matters involving questions of law, and the explanation to Section 194-C(3A) clarified that Single Member Benches constituted under sub-section (3A) would not hear cases involving decisions relating to a question of law. In both the aforesaid situations, it appears that the legislature did not want questions of law to be decided by the respective Benches, i.e. either a Bench consisting of at least two technical members or a Single Member Bench. However the explanation to Section 194-C(3A) was subsequently omitted by the Finance Act, 2007² (*assented on 30.6.2007*), thereby leaving sub-section (3A) to stand alone. This amendment posed an interesting question, i.e. whether the presence of the second proviso to Section 194-C(3) barring a Special Bench consisting of at least two technical members from hearing cases involving a question of law meant that a Single Member Bench constituted under Section 194-C(3A) could not hear cases involving a question of law despite the omission of the explanation thereto? This was the precise conundrum faced by the learned High Court while passing the impugned judgment and the Court decided the aforementioned question in the affirmative by observing as follows:-

“...When reading the statute as a whole we are of the opinion that although prima facie it is seen that the deletion of explanation will empower both judicial member and technical member to decide questions of law sitting singly but after considering the second proviso to subsection 2 and trying to arrive at a harmonious interpretation the only interpretation which follows is that the intent of the legislature is that if Special Bench comprising of two or more technical members cannot hear a matter involving

² The Finance Act, 2007 also amended Section 194-C(3) to what it reads today, omitted clause (b) of Section 194-C(4) and substituted clause (c) of Section 194-C(4) to what it reads today.

question of law then it will be illogical and absurd to conclude that the legislature intended that a Technical Member sitting singly can hear a matter relating to a question of law and as the learned Amicus Curie has already opined that absurdity cannot be presumed in an interpretation.”

We find ourselves in disagreement with the learned High Court of Sindh. While there is no cavil that a statute must be harmoniously interpreted, that is only needed to be done where there is a conflict and in this case we do not find there to be any conflict for the reason that the scheme of Section 194-C itself postulates for three different types of Benches to be constituted under three different sub-sections, i.e. (2), (3) and (3A), all of which have their separate and distinct features. Therefore, the amendment brought about by the Finance Act, 2007 which omitted only the explanation to Section 194-C(3A) and not the second proviso to Section 194-C(3) was a clear indication that the legislature no longer wanted the Single Member Benches constituted under Section 194-C(3A) to be prevented from hearing cases that involved decisions in relation to a question of law, and the second proviso to Section 194-C(3) was left intact. If we were to accept the interpretation of the learned High Court, that would mean that the amendment brought about by the Finance Act, 2007 which omitted only the explanation to Section 194-C(3A) would be rendered absolutely nugatory and redundant. This is not something we are willing to do. Furthermore, Section 194-C(3A) begins with the phrase “*notwithstanding anything contained in sub-sections (2) and (3)...*” and thus it is a non-obstante clause. This means that sub-section (3A) is independent of sub-sections (2) and (3), making the former prevail even if the latter provide anything to the contrary. It is worthy to note that as of

30.6.2009, the second proviso to Section 194-C(3) stands omitted by virtue of the Finance Act, 2009.

8. Since the learned High Court only decided the question of law and fixed all the independent cases for *katcha peshi* to be decided on the facts of each case, we have refrained from expressing our opinion on the facts of the instant case. In light of the above, this appeal is allowed and the impugned judgment is set aside.

JUDGE

JUDGE

JUDGE

Announced in open Court
on 23.11.2016 at Islamabad
Approved For Reporting
Ghulam Raza/*