

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Mushir Alam
Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

Civil Petitions for leave to Appeal No.549-P of 2015, 141-P & 142-P of 2017

Against the judgment dated 10.07.2015 passed by the Peshawar High Court, Peshawar in W.P No.1283-P/2015 and against the common Judgment dated 21.9.2015 passed in W.P No.3685-P/2015 and in Review Petition No.160-P of 2015 (arising out of W.P No.1283-P/15) respectively).

M/s Bara Ghee Mills (Pvt.) Ltd.
M/s Bilour Industries (Pvt.) Ltd.
M/s Bara Ghee Mills (Pvt.) Ltd.

in CPLA No.549-P/15

in CPLA No.141-P/17

in CPLA No.142-P/17

Petitioner(s)

VERSUS

The Assistant Collector Customs & 04 others
(all cases)

Respondent(s)

For the Petitioner(s):

Mr. Isaac Ali Qazi, ASC

For FBR:

(on Court's call)

Hafiz Ahsan Ahmed Khokar, ASC

Date of Hearing:

06.04.2017

JUDGEMENT

Mushir Alam, J.- In brief, both the Petitioners, who are manufactures of Ghee and Oil, initially challenged the restriction on the export of their products to Afghanistan and other Central Asian countries in terms of *sub-rule (6) of Rule 15 of the Manufacturing In Bond Rules, 1997, dated 6.11.1997 (abbreviated as MIB Rules)*, through Writ Petitions, in Peshawar High Court, which were dismissed vide consolidated Judgment dated 3.5.2001 (since reported as Messrs Shahzad Ghee Mills Ltd., Swabi versus Pakistan, through Secretary, Finance, Government of Pakistan, Islamabad and 6 others **2001 CLC 1942**). It was held that the impugned restrictions is not in terms of *MIB Rules* but, in terms of *Para 8 of the Export Policy Order 2000* made under *Import and Export (Control) Act, 1950*; while dismissing the writ petitions it was further directed that:-

“Interim order dated 31.08.2000 and all other interim orders passed by this Court in this writ petition or in the connected writ Petitions shall stand with drawn.

However, the Petitioners who have exported their manufactured goods to Afghanistan via land route under the orders of this (i.e. High Court) upto date, the respondents would be entitled to claim all Government dues leviable on such goods and shall recover them in accordance with law”.

2. The Petitioners herein challenged the above noted judgment through Civil Appeals No.1137 of 2001 and 1134 of 2001 respectively before this Court, which were also dismissed on 06.02.2014 along with other connected Civil Appeals. Petitioners filed Civil Review Petitions against said judgment, which too were dismissed.

3. The proceedings for the recovery of customs duties and other leviable government dues were stayed at the motion of the Petitioners in earlier round of the proceedings. Consequent upon the dismissal of the above noted Civil Appeals on 06.02.2014 and vacation of interim injunctive orders the respondents resumed the recovery proceedings, as directed by the learned Bench of the High Court as reproduced in paragraph preceding above.

4. The petitioner *Bara Ghee Mills (Pvt.) Ltd;* through W.P No. 2205-P of 2014, and *Bilour Industries Pvt. Ltd.* through W.P No.3685-P of 2015, challenged the resumption of recovery of government dues proceedings, which were dismissed on 30.10.2014 and 21.9.2016 respectively.

5. *Writ Petition No.2205 of 2014 [filed by Bara Ghee Mills (Pvt.) Ltd.]* was essentially dismissed on the ground *inter-alia* that alternate remedy is available to the Petitioner under *Rule 142 of the Customs Rules, 2001*. Consequently the Petitioner challenged the recovery proceedings in terms of Rule 142 of the Customs Rules, 2001 before the Deputy Collector Customs (Recovery), which was dismissed, vide order in original dated 10.4.2015, *inter-alia* holding as follows:-

“The Chargeability of duty and taxes on the goods imported into and exported under the scheme enunciated in the Manufacturing-in-Bond Rules was never objected to during litigation before the High Court or the Supreme Court.

The recovery proceedings were suspended in compliance of the orders of the superior courts where the matter remained sub-judice and as soon as the courts orders attained finality, the proceedings so suspended were resumed and there is no question of time limitation in the instant case.”

6. *Bara Ghee Mills (Pvt.) Ltd.* once again challenged the above order through *W.P No.1283 of 2015*, which was dismissed vide impugned Judgment dated 10.7.2015. It was assailed in Review Petition No.160 of 2015 before the very Bench of the Peshawar High Court. The Judgment dated 10.7.2015 rendered in *W.P No.1283 of 2015* is subject matter of *CPLA No.549-P of 2015*, and the judgment dated 21.9.2016 in (Review Petition No.160 of 2015) is challenged through *CPLA No.142-P of 2017*, which is also barred by 121 days.

7. Learned ASC for the Petitioners argued that, the impugned demand has been raised without any show cause notice and adjudication. Secondly; demand is barred by limitation; subject goods were exported via land route during the period from 20.03.2001 to 30.05.2001 and the limitation to raise demand under Section 32 read with section 211 of the Customs Act, 1969 is 5 years, where as impugned demand has been raised in 2014, thus barred by time.

8. We have heard the arguments and perused the record. Attending to *CPLA No.549 of 2015* (*Bara Ghee Mills Pvt. Ltd.*). It may be observed that elaborate procedure for the recovery and remedy against the recovery of the government dues, is provided for under Chapter XI of the Customs Rules 2001. Appeals and Revisions against the Orders of adjudicating Authority/Forum/Tribunals are catered for under Chapter XIX of the Customs Act, 1969 which proceedings culminate in the High Court in its referral jurisdiction under Section 196 of the Customs Act, 1969. It is settled position in law that *“where an exclusive Tribunal or a regular Court has jurisdiction in a matter but the legislation, creating such Court or forum or conferring jurisdiction on the same, also ends up by providing appellate or revisional jurisdiction to the High Court it self. Obvious example could be Civil and Criminal Proceedings, emanating under the Code of Civil and Criminal procedure, Income Tax Reference, Customs Appeals etc. In such matters, where the High Court itself is the repository of ultimate appellate, revisional or referral powers conferred by special relevant statute, it is rarest of case that the High Court may be persuaded to entertain a Constitution remedy in preference to its own appellate, revisional or referral dispensation arising in course of time”* (*See Khalid Mehmood versus Collector of Customs, Customs House, Lahore (1999 SCMR 1881 @ 1887)*). Learned Counsel for the Petitioners was not able to point out any exception, to directly invoke the writ jurisdiction of the High Court against the Order, when complete hierarchy to challenge

order dated 10.4.2015 recorded by the *Deputy Collector Customs (Recovery)*, leading to High Court was available, approaching High Court directly, bypassing all such forum is not approved.

9. We have, also examined the application under section 142 of the Customs Rules, 2001 (@ 145 of the paper book), challenging the resumption of recovery proceedings which was essentially on the ground *inter alia* (para 5(iii) thereof) that “*once goods exported under the provisions of Customs Act, 1969 ‘no duty and tax can be levied thereon nor can be demanded’. Beside demand is made without adjudication and being barred by time*”.

10. It is matter of record, that earlier, Petitioners were denied export of goods to Afghanistan via land route, without payment of leviable Custom duties and taxes, whereupon the Petitioner filed W.P No.345 of 2001 and obtained interim order for the export of its goods via land route till final decision, As noted above the writ petition was dismissed, and so also interim order was vacated with directions to the Respondents to recover the government dues. Accordingly; after the dismissal of Civil Appeals by this Court, demand notices stood revived, as observed by the *Deputy Collector (Recovery Officer)*, in the impugned order passed on application under Rule 142 of the Rules, 2001 that the impugned demand is not based on any eventuality within the contemplation of Section 32(2)(3) of the Customs Act, 1969, that may call for adjudication and or question of limitation may occur.

11. Learned Counsel for the Petitioners was not able to demonstrate that the impugned demand for the recovery of government dues is based on short levy or for the recovery of erroneously refunded duties for the reasons of any untrue statement, inadvertence error etc. or by reason of some collusion with the officers of the customs, in which case, such duties could only be retrieved after due notice within three years from the date of occurrence of eventualities postulated in subsection (5) of Section 32 of the Customs Act, 1969.

12. In terms of Rule 135 of Customs Rules of 2001, where the government dues are outstanding, the refereeing authority, issues a demand notice as prescribed, to the recovery officer certifying that all other formalities under the Act have been completed and there exists no bar or **stay order** against the proposed recovery. As noted above bar of injunctive order, against recovery of government was vacated, when the

writ petitions filed by the Petitioners were initially dismissed on 3.5.2001 and finally when the Civil Appeals were dismissed on 06.02.2014 followed by dismissal of Review Petitions by this Court.

13. From the Record it appears that other similarly placed exporters of Cooking Oil and Ghee, have already deposited the amount of government dues on dismissal of their Civil Appeals by this Court, as reflected from the paragraph 8 of the Orders of the Deputy Collectors Customs (Recovery) dated 10.4.2015.

14. Plea of the Petitioners that subject consignment was exported to Afghanistan during the period from 20.03.2001 to 30.05.2001, any demand for payment of government dues made beyond three years as provided under sub-section (3) of Section 32 of the Customs Act and or beyond 5 years during which period the Petitioners were required to maintain of import and export transaction under Section 211(3) thereof is barred. Contentions are preposterous, it is true that demand for the recovery of duty and or charge leviable but could not be levied, or short levied for the reasons of untrue declaration and or collusion, could be raised within 5 years from the date of such detection of untrue declaration or collusion and or within 3 years from the date of any inadvertent error and or misconstruction of amount of duty; which is short levied and or refunded. Instant claims and demand of recovery of 'government dues' does not fall either under section 32 nor, under section 211 of the Customs Act 1969, but is based on demand served under section 202 of the Act, 1969 for payment of the amount of government dues which were payable by the Petitioners on account of export of the good via land route.

15. Suffice to say that the recovery/demand notices were already in the field, which were stayed in the first round of litigation as noted above. "Government dues" as defined under Rule 133 (vi) of the Customs Rules, 2001 "means any recoverable amount of customs duty or any tax, duty or other levy being collected in the same manner as customs-duty, an adjudged penalty or fine or any amount unpaid which may be payable under any bond or instrument executed under the Act or such other law or the rules made there under" Chapter XI of the Customs Rules, 2001 read with Section 202 of the Customs Act, 1969 lays down the mechanism and procedure for the recovery of the same. Resumption of recovery proceedings, which were earlier stayed in judicial proceedings,

would not be hit by limitation, as for the recovery of “governmental dues” under section 202 of the Act 1969, no limitation is provided. In case Petitioners had any reservation as to calculation and or determination of such dues and or liabilities, at the time it was initially raised, host of domestic remedies and forum under the Customs Act, 1969 read with Customs Rules of 2001 culminating in referral jurisdiction of the High Court could have been availed, which were never availed and now it cannot be questioned in writ Jurisdiction under Article 199 of the Constitution of Pakistan, 1973. (One may see *Messrs Paramount Spinning Mills Ltd versus Customs, Sales Tax and Central Excise Appellate Tribunal and another* **2012 SCMR 1860**).

16. Writ Petition No.3685 of 2015 filed by the petitioners before Peshawar High Court were rightly declined on the ground that the petitioners have alternate remedy by way of an “*Application for the Determination of the dispute*” under rule 142 of the customs Rule 2001, which remedy was availed by the petitioners in CPLA No.141-P of 2017 (*Bilour Industries (Pvt.) Ltd.*); was rightly declined as the “demanded duties” raised by the Respondents were already adjusted at the request dated 27.03.2014 of the petitioners (@ page 118 of CPLA No.141-P of 2017), therefore, in view of foregoing petitioners were not able to make out any case for interference. Accordingly, leave is declined and Petitions are dismissed.

Judge

Judge

Judge

ISLAMABAD, THE
6th of April, 2017
arshed

Approved for Reporting