HCJD/C-121

ORDER SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

I.C.A. No. 950/2013

Federal Board of Revenue & another
Versus
Khawaja Saad Saleem

Appellants by: -	**Mr Athar Minallah**
Respondent by: -	**Syed Javaid Akbar Shah, Advocate**
Date of decision:-	**21-04-2014**

Riaz Ahmad Khan J:- Through the present appeal, the appellants have called in question judgment dated 19-06-2013, passed by the learned Judge in Chamber, by virtue of which W.P. No. 1476 of 2013, was accepted.

2. Brief facts of the case are that the Government of Pakistan, Ministry of Finance & Revenue issued S.R.O. No. 172(I)/2013 on 05-03-2013, which is reproduced as under:-

NOTIFICATION
(CUSTOMS)

S.R.O. 172 (I)/2013.- In exercise of powers conferred by sections 19 and 181 of the Customs Act, 1969 (IV of 1969), clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990 and sub-section (1) of section 53 and section 148 read with the Second Schedule to the Income Tax Ordinance, 2001 (XLIX of 2001), and in exception to clause (a) of Notification No.S.R.O.499(I)/2009, dated the 13th June, 2009, the Federal Government is pleased to direct that smuggled or non-duty paid motor vehicles, having non-tampered engine or chassis numbers, which have been seized or voluntarily presented to Customs on or before the 31st March, 2013, shall be allowed release on payment of

redemption fine along with duty and taxes as under, namely:-

(i) for vehicles of PCT heading 87.03 falling under Notification No. SRO 577(I)/2005, dated the 6th June, 2005, duty and taxes shall be calculated in US Dollar by allowing depreciation @1% per month calculated from the 1st day of January subsequent to the year of manufacture as provided in CGO No. 14/2005 dated the 6th June, 2005, with a maximum depreciation up to 60%;

(ii) for all other vehicles, duty and taxes shall be calculated on depreciated C and F value @ 1% per month calculated from the 1st day of January subsequent to the year of manufacture as provided in CGO No. 14/2005, dated the 6th June, 2005 upto a maximum depreciation of 72%;

(iii) [1][for the vehicles covered under Notification No. S.R.O. 577(I)/2005 dated the 6th June, 2005 above five years of age, further reduction in the duty and taxes assessed at the end of five years shall be allowed at the rate of five per cent per year for subsequent years, subject to the minimum total amount of duty and taxes equal to five hundred US dollars (or equivalent amount in Pak rupees); and

(iv) for all other vehicles above six years of age, further reduction in the duty and taxes assessed at the end of six years shall be allowed at the rate of five per cent per year for subsequent years subject to the minimum total amount of duty and taxes equal to rupees one hundred thousand.]

2. The redemption fine shall be chargeable to 1% of the payable duty and taxes, provided that the customs-duty and other taxes along with redemption fine so levied thereon are paid on or before the 31st March, 2013.

3. The concessions under this notification shall not be applicable to vehicles,-

(a) imported via normal channels through a Customs station in violation of Import Policy Order; and
(b) which have since been auctioned.

3. The said Notification was afterwards amended through another Notification dated 8th March, 2013. The amendment was to the following effect:-

In the aforesaid notification, for sub-paragraphs (iii) and (iv), the following shall be substituted, namely,-

"(iii) for the vehicles covered under Notification No. S.R.O. 577(I)/2005 dated the 6th June, 2005 above five years of age, further reduction in the duty and taxes assessed at the end of five years shall be allowed at the rate of five per cent per year for subsequent years, subject to the minimum total amount of duty and taxes equal to five hundred US dollars (or equivalent amount in Pak rupees); and

(iv) for all other vehicles above six years of age, further reduction in the duty and taxes assessed at the end of six years shall be allowed at the rate of five per cent per year for subsequent years subject to the minimum total amount of duty and taxes equal to rupees one hundred thousand".

4. By virtue of another Notification dated 2nd April, 2013, first Notification i.e. S.R.O. 172(I)/2013 was further amended and the last date i.e. 31st March was substituted as 6th April.

5. Through the aforementioned Notifications, Amnesty Scheme was introduced and by virtue of this scheme, non-duty

paid vehicles could be registered on payment of redemption fine alongwith custom duty.

6. The petitioner, presently respondent in this appeal, under the public interest litigation filed W.P. No. 1476/2013 with the prayer that the aforementioned Notification be declared as illegal and unconstitutional, being ultra vires, discriminatory and based on malafides. It was further prayed that the respondents be restrained from acting upon S.R.O. and introducing, allowing or implementing such schemes in future. It was lastly prayed that all the vehicles which were legalized by payment of concessional duty/tax/fine under the Amnesty Scheme be seized and treat them according to applicable law and procedure by either confiscating them or subjecting them to payment of normal duty prescribed by law. The said writ petition was contested by the present appellant, however, learned Judge in Chamber vide judgment dated 19-06-2013 accepted the writ petition and declared the impugned S.R.O. as illegal, unconstitutional, void ab initio, besides the dictums laid down by the Hon'ble Supreme Court, discriminatory, cryptic device to protect criminal act, therefore, same was set aside with the following directions:-

i. All cars registered under the Amnesty Scheme must be ceased and reverted back to pre-SRO position.

ii. Corrupt customs/government officials must be uprooted and legal action by way of initiating criminal proceedings to be

investigated by FIA against all Government officials including Chairman FBR involved in introducing, approving and executing Amnesty scheme.

iii. A committee may be established to examine the corrupt practices and suggest a code of ethics to be strictly complied with by all Government departments, so that against the cancer of commerce i.e corruption law must strike hard at it.

iv. Vehicles smuggled after announcement of scheme be confiscated forthwith and entry of those vehicles which have still not been brought to Pakistan be banned and if brought be confiscated and auctioned in according with law. All vehicles above the age of three years may also be confiscated.

v. Tighter border controls must be placed to ensure that smuggling is prevented and all violators severely punished.

vi. In these peculiar condition and the economy, it is directed that in future no government department be allowed to import luxury vehicles and all the departments may be directed to use the locally manufactured vehicles, but in order to improve the standard of manufacturing/assembling of vehicles in Pakistan, some remedial steps may be taken. There should be a complete ban on Government, Semi Government Departments, Statutory bodies/organizations and corporations to import any kind of luxury vehicle on any pretext whatsoever. However, Jeeps (SUVs) like vehicles used for defence purpose and for law enforcement agencies, are exempted from this direction.

7. Feeling aggrieved of the same, Federal Board of Revenue and Federation of Pakistan through Secretary, Ministry of Finance and Revenue filed the present appeal.

8. Learned counsel for the appellant submitted that the impugned S.R.O. No. 172, was issued on 5th March, 2013. Facility under this S.R.O. could be availed up to 31st March, 2013, though initially the date given in the S.R.O. was 31st March, 2013, however, subsequently it was amended vide S.R.O. No. 185. As such, the last date for availing the facility under the impugned S.R.O. was 6th April, 2013, whereas the writ petition was also filed on 06th April, 2013. It obviously means that the writ petitioner had been waiting for the time, so that the people could avail the facility and thereafter filed the writ petition. Learned counsel further submitted that during this period, 50901 vehicles were released through this facility and the Government had realized Rs. 15,837.974 million. The said act of the petitioner/respondent was reflective of the malice and also showed that the writ petitioner had not come to the Court with clean hands. Learned counsel further submitted that infact the Government had introduced the scheme for the reason that in the country, number of unregistered vehicles had increased and the Government was not in a position to seize all these smuggled or unregistered vehicles. People used to commit crime in these vehicles and as a result, the rate of crime had increased, so in the said background, the Government introduced this scheme. It was further submitted

that the introduction of scheme was entirely a policy matter and policy introduced by the Government could not be challenged through the writ petition. Challenging the Policy amounted to interference in the trichotomy of power, as the executive authority of the Government could not be taken over by the Courts in exercise of judicial powers. Learned counsel further submitted that the said Policy was not violative of any article of the Constitution. There was no malice on the part of Government or any official of the Government and on the basis of whimsical grounds, the same could not be struck down. It was further submitted that the learned Judge in Chamber had infact substituted policy of the Government and as such, had gone outside the ambit of writ jurisdiction. The Courts have no right to give policies, although, power of the Court to scrutinize policy at the touchstone of fundamental rights, cannot be denied. Since there was no violation of any fundamental right, therefore, the impugned judgment was void and liable to be set aside. Learned counsel for the appellant in support of his contention referred to PLD 2005 Lahore 428, titled as "Syeda Shazia Irshad Bokhari Vs. Government of Punjab through Secretary Health and another, PLD 2013 Sindh 236, titled as "Salahuddin Dharaj Vs. Province of Sindh through Secretary, Local Government Department and 4 others", 2011 SCMR 1602 titled as "Punjab Public Service Commission and another Vs. Mst. Aisha Nawaz and others", 2013 SCMR 1687, Secretary Economic Affairs Division, Islamabad and others Vs. Anwarul

Haq Ahmed and others, 2013 SCMR 1749, titled as "Dossani Travels Pvt. Ltd. and 4 others Vs. Messrs Travelling Shop (Pvt.) Ltd and Others, PLD 2006 S.C. 697, titled as "Wattan Party through President Vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others".

9. On the other hand, learned counsel for respondent submitted that in case of unregistered vehicles, the vehicle was to be confiscated and by introducing Amnesty Scheme, the Government exchequer was deprived of huge amount of money, because if the vehicles had been confiscated and put to auction, the Government could get huge amount. It was further submitted that the Amnesty Scheme was infact violative of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, as it was discriminatory in nature and was for the benefit of certain individuals. It was furthers submitted that the Policy amounted to benefiting the criminals, who are smuggling vehicles into Pakistan, but instead of punishing them, they were being awarded. The Policy as such was bad in law.

10. We have heard learned counsel for the parties and have also perused the record.

11. There is no denial of the fact that the Government had the authority to issue the impugned Notification under the law mentioned in the S.R.O., so authority of the Government to issue the Notification is not disputed. It is established principle of law that the High Court had only jurisdiction to interpret the

law, but had no authority to take the role of policymaker. In judgment reported as 2006 SCMR 1427, titled as "*Zafar Iqbal and another Vs. Director, Secondary Education, Multan Division and 3 others*", it was held that "*Government was always empowered to change promotion policy and domain of Government to prescribe qualification for a particular post through amendment in relevant rules was not challengeable*."

12. Similarly, in judgment reported as PLD 2006 SC 697, titled as *"Wattan Party through President Vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others*", it was held that the Supreme Court, normally in exercise of powers of judicial review will not scrutinize the policy decision or substitute its own decision in such matter unless Policy itself is shown to be against the Constitution or law.

13. In the present case, the Policy was introduced by the Government and since the Government had the authority, therefore, no action can be ordered against the authority, who had issued the Notification. Furthermore, the Policy could not be substituted and the substitution of Policy and introducing new Policy, is totally uncalled for and totally illegal. The said Policy though could be scrutinized at the touchstone of provisions of the Constitution. Since learned counsel for the appellant submitted that the Policy was violative of Article 25 of the Constitution, therefore, the same is required to be

considered. For the sake of convenience, Article 25 is reproduced hereunder:-

> **25. Equality of citizens** (1) All citizens are equal before law and are entitled to equal protection of law.
>
> (2) There shall be no discrimination on the basis of sex
>
> (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

14. In this respect, contention of learned counsel for the appellant is that the general public was discriminated against the people who had benefited from the said scheme. As such, the Policy was based on discrimination. Contention of learned counsel for the petitioner/respondent is not correct. In judgment reported as 2013 SCMR 1687 titled as "*Secretary Economic Affairs Division, Islamabad and others Vs. Anwar-ul-Haq Ahmed and others*", hon'ble Supreme Court held as follows:-

> *"It is well settled that equality clause does not prohibit classification for those differently circumstanced provided a rational standard is laid down. The doctrine of reasonable classification is founded on the assumption that the State has to perform multifarious activities and deal with a vast number of problems. The protection of Article 25 of the Constitution can be denied in peculiar circumstances of the case on basis of reasonable classification founded on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out. The differentia, however, must have rational nexus to the object sought to be achieved by such classification."*

15. Similarly, in judgment reported as 1991 SCMR 1041, titled as "*I.A. Sharwani and others Vs. Government of Pakistan through Secretary, Finance Division, Islamabad and others*" it was held that under Article 25 of the Constitution, reasonable classification could be made. However, the Hon'ble Supreme Court enunciated the following principles with regard to equal protection of law and reasonableness of classification:

> *(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;*
>
> *(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;*
>
> *(iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;*
>
> *(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances may be unreasonable in the other set of circumstances;*
>
> *(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion .from the mischief of Article 25;*
>
> *(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;*

(vii) that in order to make a classification reasonable, it should be based--

> *(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;*
>
> *(b) that the differentia must have rational nexus to the object sought to be achieved by such classification.*

Principles as to classification are as under:

> *(a) A law may be constitutional even though it relates to a single individual ~ if, on account of some special circumstances, or reasons applicable to him and not applicable to others, that single individual may be created as a class by himself.*
>
> *(b) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear- transgression of the constitutional principles. The person, therefore, who pleads that Article 25, has been violated, must make out that not only has he been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made. However, it is extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of facts by raising a presumption. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact;*
>
> *(c) it must be presumed that the Legislature understands and correctly appreciates the needs of*

its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds;

(d) the Legislature is free to recognize the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest;

(e) in order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;

(f) while good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation;

(g) a classification need not be scientifically perfect or logically complete;

(h) the validity of a rule has to be judged by assessing its overall effect and not by picking up exceptional cases. What the Court has to see is whether the classification made is a just one taking all aspects into consideration.

16. Keeping in view the aforementioned judgment of hon'ble Supreme Court of Pakistan, it is clear that no doubt

under Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, all people are equal before law, however, Government can make reasonable classification. The principles of making those classification, have already been given by the Hon'ble Supreme Court of Pakistan. As far as present case is concerned, the Amnesty Scheme was not for a particular set of society, rather it was for general public. Discrimination could be taken into consideration if it was provided in the Policy that the Policy would be applicable to such and such class of people and would not be applicable to such and such class of people. There is no differentiation and it was applicable to all people in the same manner, therefore, it cannot be said that the Policy itself was discriminatory. The argument that against the general public, it was discriminatory, was not correct because the Government had the authority to make classification. The people who had no such vehicle, which were unregistered and regarding which no duty was paid, obviously were not discriminated against those who had such vehicles.

17. Argument that the Government could get much more amount by confiscating and putting into auction the vehicles confiscated, is only a presumptive argument. If the Government could confiscate all these vehicles and put to auction, there was no need for introduction of this Policy.

18. In view of aforementioned discussion, we are of the considered view that there was no discrimination in the impugned Policy.

19. It is also to be kept in view that all those person who availed the facility under the Policy were not the people who had actually smuggled the vehicles, rather these vehicles must had changed many hands. In addition to that, the Policy had been acted upon. The amount had been realized. The last date of the Policy had already passed, so the Policy has become a past and closed transaction. Even the writ petition was filed after the expiry of last date of the Policy and after implementation of the Policy. So in the above scenario, the impugned order of getting back the vehicles and returning amount to the public was not possible.

20. In the above said circumstances, we are left with no other option but to accept this appeal. Accordingly, this appeal is accepted and the impugned judgment is set aside. Parties are left to bear their own costs.

(NOOR-UL-HAQ N. QURESHI)
Judge

(RIAZ AHMAD KHAN)
Judge

APPROVED FOR REPORTING.

Wajid