

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No. 3723 of 2013

NAIMAT ALI
VS
CUSTOMS COLLECTOR, ETC.

Petitioner's : Mr. Younis Khan, Advocate.

Respondent's : Qazi Ghulam Dastgir, Advocate.
Mr. Tariq Mahmood, Inspector Custom.

Date of hearing : 16.02.2021.

LUBNA SALEEM PERVEZ J. Petitioner [Niamat Ali] has invoked the constitutional jurisdiction of this court by way of filing instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 with the following prayer:-

“It is therefore, magnanimously be prayed that by accepting instant writ petition, the respondents may very kindly be directed to handover the vehicle mentioned in Para-2 of writ petition of the petitioner, in the interest of justice.

Any other relief, which this Honourable Court deems fit and proper may also be granted to the petitioner, in the interest of justice.

2. Brief facts necessary for disposal of the case are that the petitioner purchased Mitsubishi Pajero Station Wagon, Model 1996, bearing Registration No. WAA-202 Sibi, chassis No. V45-4003781, Engine No. 6G74(3497 CC), which was detained and seized by the Customs Authorities under Section 17 of the Customs Act, 1969, alleging the petitioner to be not the real owner of the vehicle and confiscated the seized vehicle on 11.01.2012 in terms of Section 168 read with Sections 2(s) & 16 of the Customs Act, 1969 as well as Section 3(1)(3) of the Import & Export (Control) Act, 1950, punishable under Clause (89) & (90) of Section 156(1) of the Act, 1969 and SRO 499(1)/2009 dated 13.06.2009. It is contended by the petitioner that despite providing all the original documents regarding purchase of the vehicle the illegal action of confiscating the vehicle

was taken by the Customs Authorities. The adjudicating authority, vide Order in Original No. 08/2012 dated 06.12.2011 (**the ONO**) upheld the charges leveled by the Custom Authorities against the petitioner and subsequently the Collector Appeals, vide Customs Order in Appeal No. 108/2002 dated 09.10.2012 (**the Appellate Order**) upheld the decision, vide ONO dated 06.12.2011. The petitioner assailed the Appellate order by filing appeal before Customs Appellate Tribunal, Islamabad (**the Tribunal**), whereby, the appeal was accepted, vide Appeal No. 37/CU/IB/2013 dated 29.03.2013 on the ground of having availed the amnesty scheme announced for non-custom paid vehicle, vide SRO 172(I)/2013 dated 05.03.2013 amended vide SRO 185(I)/2013 dated 08.03.2013 after payment of custom duties and taxes in respect of the subject vehicle. The Tribunal, after recording “no objection” of the Departmental Representative namely Agha Sabir Hussain, Senior I.O, directed the release of the subject vehicle to the petitioner. Thereafter, the petitioner through application dated 30.03.2013 along with evidence of payment of duties and taxes and judgment of the Tribunal dated 29.03.2013, requested the Deputy Director Customs Intelligence for release of the subject vehicle. When no heed was paid to the application of the petitioner dated 30.03.2013, the petitioner filed the present petition before this Court on 28.09.2013, seeking directions for release of his vehicle.

3. Learned counsel for the petitioner submitted that during the pendency of this petition, the petitioner came to know that the vehicle has been auctioned by the respondents on 15.02.2012 but the representative namely Agha Sabir Hussain, who was appearing in adjudicating proceedings as well as in the appellate proceedings before Collector Appeals on 09.10.2012 and the Customs Appellate Tribunal on 29.03.2013, concealed the fact of auction of the vehicle from the Court and even he gave “no objection” for the release of the vehicle as the duties and taxes were paid by the petitioner under the amnesty scheme. He submitted that no notice, whatsoever, was served on the petitioner before the auction of the vehicle which is violation of law provided in Customs Act, 1969 and Customs Rules 2002. He submitted that the respondents have received custom duties and other taxes relating to the subject vehicle twice, first from the petitioner under the amnesty scheme and second at the time of auction of the

vehicle from the purchaser. He further submitted that since, the vehicle has been auctioned way back in 2012, the petitioner is, therefore, entitled to receive the sale proceeds along with duties and taxes being part of the sale proceeds and prayed for issuance of direction in this regard.

4. On the other hand, learned counsel for the respondent submitted that the vehicle of the petitioner was auctioned after the issuance of ONO wherein the petitioner could not establish himself to be the *bonafide* owner / purchaser of the subject vehicle; that since, it was established that the subject vehicle is a smuggled one and non-duty paid vehicle, therefore, auction was ordered and before commencing auction proceedings notice dated 18.01.2012 was issued to the petitioner as well as the other owners in accordance with law so as to inform them regarding auction of the vehicle, however, the notices were received back un-served.

5. Representative of the Directorate General Intelligence and Investigation, FBR, appearing along with the record of auction, submitted that the departmental representative, Agha Sabir Hussain has expired and he is unable to give statement as to why late representative has concealed the fact of auction of the vehicle from the Courts. He further submitted that the appeal before the Customs Appellate Tribunal was filed with a considerable delay as the appeal was filed by the petitioner on 29.03.2013 which was fixed for hearing on the same day and order was also passed on the same day, and submitted that the delay was unlawfully condoned by the learned Customs Appellate Tribunal and order of the Appellate Tribunal is not sustainable. Learned counsel for the respondent contended that as the vehicle has been auctioned long ago, therefore, the petitioner can only claim the amount of sale proceeds of the subject vehicle.

6. Arguments of the learned counsel for the rival parties have been heard and relevant record has also been perused.

7. Record appended with the petition as well as produced by Mr. Tariq Mehmood, Inspector Customs has been perused which transpired that the vehicle Mitsubishi Pajero Station Wagon, Model 1996, bearing Registration No. WAA-202 Sibi, chassis No. V45-4003781, Engine No. 6G74(3497 CC) was auctioned on 15.02.2012 i.e. soon after the case of the petitioner was dismissed by the adjudication officer vide ONO dated 06.12.2011, but the departmental

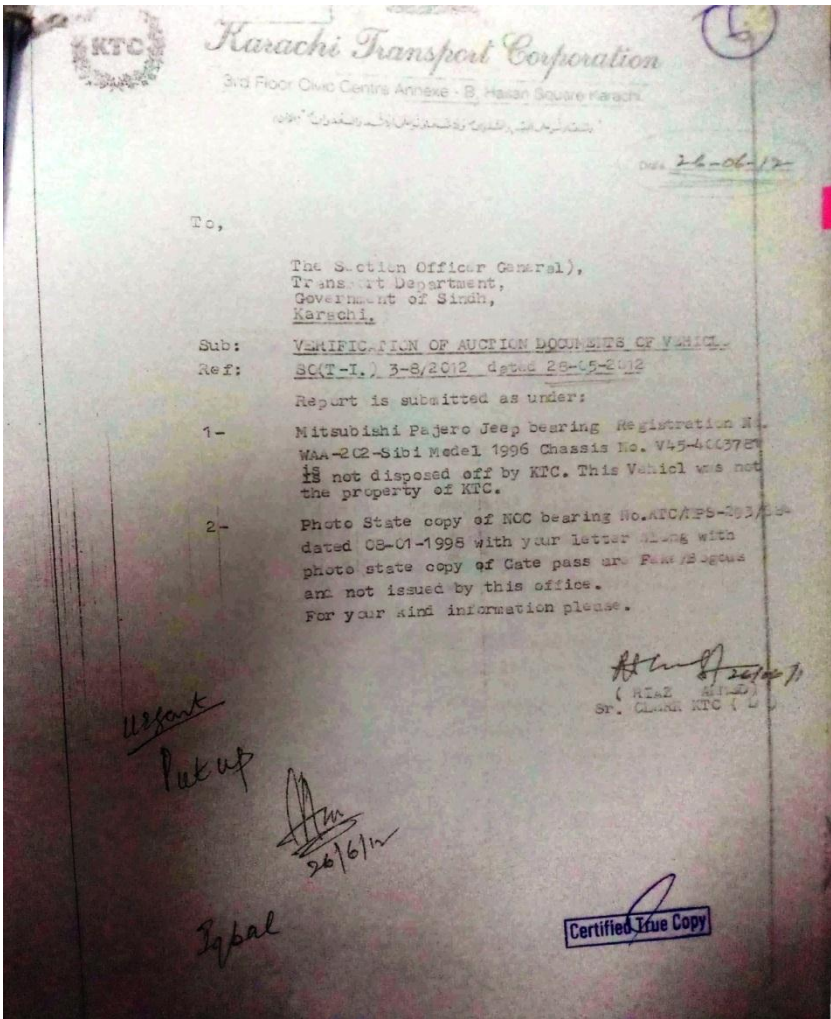
representative namely Agha Sabir Hussain, Senior I.O (since deceased) who was representing the customs authorities up to the stage of Tribunal had concealed the fact regarding auction of the vehicle from both the Appellate Authorities.

8. Deputy Director, Intelligence & Investigation, Customs Rawalpindi on 17.07.2020 filed C.M.No. 1856/2020 in the instant writ petition to place on record certain documents such as the auction certificate dated 20.02.2012, verification of auction document of vehicle dated 26.06.2012 along with covering letter of Transport Department, Government of Sindh dated 02nd June, 2012 and order dated 03.12.2014, passed by the learned Tribunal in C.M No. 07/2013. From the perusal of the said documents what emerged out is that an application bearing C.M No. 07/2013 in Custom Appeal No. 37/CU/IB/2013 for rectification was filed by Additional Director on 01.07.2013, vide which it was communicated to the Tribunal that the subject vehicle has been disposed of through auction on 15.02.2012 and, as such, amnesty scheme announced, vide notification bearing SRO No. 172(I)/2013 dated 05.03.2013 was not applicable to the case of the petitioner. The learned Tribunal, vide judgment dated 03.12.2014 disposed of the rectification application in the following manner:-

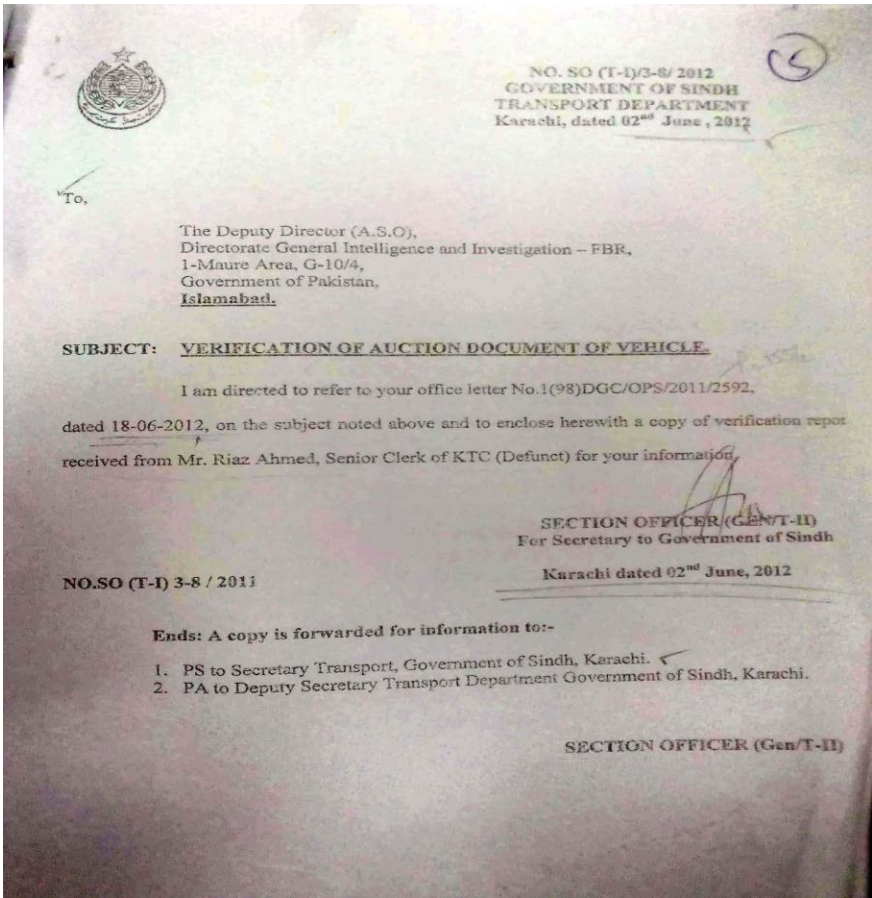
“Keeping in view the above mentioned four submissions of application, the prayer of the applicant cannot be defined as rectification of order. However, in the interest of justice and invoking the powers under sub-section (2) of Section 194-B of the Customs Act, 1969, it is ordered that impugned order No. 165/2012 dated 05.09.2012 mentioned in paragraph No. 4 of judgment dated 29.03.2013 may be read as “108/2012 dated 09.10.2012. The upshot of all above discussion is that the application is partly accepted up to this extent only.”

9. The other documents placed on record through C.M No. 1856/2020 have also been scrutinized and it transpired that after the auction of the vehicle on 15.02.2012, the Deputy Director, ASO, Directorate General Intelligence & Investigation-FBR (DD, I&I-FBR) initiated verification of the auction document of the vehicle from Transport Department, Government of Sindh, vide letter dated 18.06.2012 in response to which the said department, vide covering letter dated 02.06.2012 forwarded a photocopy of letter dated 26.06.2012, issued under the signature of one Riaz Ahmed, Senior Clerk KTC (defunct) according to which the vehicle was not the property of KTC and that the NOC dated 08.01.1998 and the gate pass were fake and bogus. It is pertinent to mention here that the transport department, Government of Sindh surprisingly obtained a letter dated 26.06.2012 signed by the Senior Clerk of Karachi Transport Corporation,

(which corporation stood dissolved way back in 1997) and forwarded the same to the Deputy Director, I&I-FBR on 02nd June, 2012. For ready reference scanned image of the said letter is placed below:-



Scanned image of letter dated 02.06.2012 is also given as under:-



This indicates the panic and confusion of the Respondent and it is clear that the move has been made to cover the illegal action of disposing of the vehicle of the petitioner and concealing its auction from the Appellate Court as well as from this Court as the fact of auction of the subject vehicle was not disclosed while filing report and parawise comments by the respondent on 17.10.2014 in response to this petition and this fact was subsequently communicated to this Court through C.M No.1856/2020 dated 17.07.2020.

10. The above documented facts are evidence of malafides, illegal and unlawful action of proceeding for auctioning the subject vehicle without necessary intimation to the petitioner who, by exercising his right, had assailed the ONO by filing appeal before the Collector of Customs Appeals which at the time of auction was pending decision. The appeal is a substantive statutory right granted to the aggrieved person to assail any order before appellate forums, which in his opinion is perverse, prejudicial to his rights and interest and would adversely affect his person or property. The hierarchy of appeal provided under the Customs Act, 1969 is Collector of Customs Appeal, vide Section 193 where the Order in Originals passed by adjudicating authorities are challenged and thereafter, against the appellate orders, the second appeal has been provided before the Customs Appellate Tribunal under section 194-A. The next forum under the Customs Act, 1969 is Reference to High Court, vide Section 196 where the aggrieved person or the Collector may refer the questions of law arising out of the order passed by the Tribunal for determination. The judgment of the Hon'ble High Court under Section 196 is finally challengeable before the Hon'ble Supreme Court.

11. The Hon'ble Supreme Court while deliberating on the importance of right to access to justice, vide judgment in case of *Mehram Ali & others Vs. Federation of Pakistan & Others (P L D 1998 Supreme Court 1445)* has observed that:-

“The right of 'access to justice to all' is a well-recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States,

Second Edition, Vol-II at page 1709 where the term 'due process of law' has been summarized as follows:-

- (1) *He shall have due notice of proceedings which affect his rights.*
- (2) *He shall be given reasonable opportunity to defend.*
- (3) *That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and*
- (4) *That it is a Court of competent jurisdiction”.*

12. Hon’ble High Court of Lahore in the case titled as **Z.N. Exports (Pvt.) Ltd. Vs. Collector Of Sales Tax, 2003 PTD 1746** while allowing interim relief against recovery of arrear tax demand in the impugned order has observed that:-

“Learned counsel for the petitioner contends and I will agree that before a recovery created by an impugned order by a Departmental Authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy. The Tribunal as a forum of first appeal having not disposed of the appeal, the petitioner cannot be blamed on that account. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum”.

13. In another case re: **Sun-Rise Bottling Company (Pvt.) Ltd through Chief Executive Vs. Federation of Pakistan & 4 others, 2006 PTD 535** Hon’ble Lahore High Court relying on **cases** of Mehram Ali and Z.N. Enterprises supra has held as under;-

“The Hon’ble Supreme Court has laid down that access to justice is a fundamental right. In the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), it has been held that an essential feature of such right is the determination of any grievance or dispute by an independent Tribunal. Based on that principle and adopting the view of this Court expressed in the Z.N. Export case, it is directed that the respondent No. 5 shall not process for recovery of the impugned dues from the petitioner who shall appear before the learned Appellate Tribunal through an appropriate application seeking final adjudication of this pending appeal. The learned Appellate Tribunal shall endeavor to decide the petitioner’s appeal within a period of three months from the date of receipt of certified copy of this order”.

14. The issue regarding recovery of disputed demand created by the Adjudication Authorities which are also pending decision before Appellate Forums established under the hierarchy of various fiscal statutes, has now been settled in the above referred judgments of the superior courts and the decisions of the Apex Court and the High Court to the extent of deciding the question of law

are binding on all subordinate courts as per Article 189 & 201 of the Constitution of Islamic Republic of Pakistan, 1973. However, it has been observed that the Departmental Authorities working under Federal Board of Revenue are not inclined to follow the law/principle settled in the above referred judgments as incidents of coercive recovery of disputed duties and taxes by the Departmental Authorities and in particular the Custom Department through auction and otherwise without complying any mandatory provision for service of notice to the concerned aggrieved person who's appeal is pending at appellate forum are brought before this court under its constitutional jurisdiction through filing of writ petitions. This conduct of the departmental authorities is not only against the statutory provisions relating to recovery of arrears/outstanding tax demand against person but also contemptuous being in disregard of the judgments of the Hon'ble Apex Court as well as High Courts.

15. Reverting back to the present case, learned counsel for the respondent vehemently submitted that notice dated 18.01.2012 for proceedings to auction the subject vehicle was issued to the petitioners as well as other concerned persons but the same were returned back un-served. In this regard he referred to the said notice, acknowledgement due card and the envelope, in the record of auction file. It has been observed that these are photocopies of notices dated 18.01.2012 without any official stamp/seal of the authority. The two acknowledgement due cards bearing RL No. 22 & 224 found placed in the file, sent to the dispatcher Intelligence and Investigation, Federal Board of Revenue Mauve Area G-10/4, Islamabad, whereas, the envelopes do not show any stamp of the post office of the area of the petitioners. After perusal of the auction file of the department, I am of the considered opinion that neither any mandatory notice for payment of adjudged demand was issued to the petitioner after the ONO nor any notice under section 169(4)/201, of the Customs Act, 1969 was issued to intimate the petitioner regarding auction of the subject vehicle. The respondents, as inferred from the record, have illegally deprived the petitioner from his valuable property, who was in process of availing statutory appellate remedies before the Collector Appeals and thereafter the Tribunal as of his right to prove the genuineness of his claim by challenging the material irregularities in the orders of the below forum.

16. In view of above, instant petition is **allowed**, entire proceedings conducted by Respondent No. 2 regarding auction of the subject vehicle for recovery of the alleged duties and taxes is held to be illegal, without lawful authority and void ab-initio and the petitioner is declared entitled to receive the entire sale proceeds of the subject vehicle obtained by the respondents through auction alongwith the markup at the bank rate up to the time the amount is paid to the petitioner.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on _____.

JUDGE