

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION)**

**PRESENT:** MR. JUSTICE MIAN SAQIB NISAR, HCJ  
MR. JUSTICE UMAR ATA BANDIAL  
MR. JUSTICE MAQBOOL BAQAR

**CIVIL APPEAL NO.1050 OF 2009**

*(Against the judgment dated 17.2.2009 of the Peshawar High Court, Peshawar passed in Custom Reference No.24/2007)*

Collector of Customs, Peshawar

...Appellant(s)

**VERSUS**

Wali Khan etc.

...Respondent(s)

For the appellant(s): Mr. Muhammad Habib Qureshi, ASC  
Mr. M. S. Khattak, AOR

For the respondent(s): Mr. Isaac Ali Qazi, ASC  
(respondent No.1)

Nemo  
(respondent No.2 and 4)

Ex-parte  
(respondent No.3)

Date of hearing: 19.01.2017

...  
**ORDER**

**MIAN SAQIB NISAR, CJ.-** This appeal with the leave of the

Court entails the facts that the customs authorities seized certain goods, i.e. cloth and black tea both of foreign origin, belonging to respondents No.3 and 4 (*the owners*) along with the transportation vehicles belonging to respondents No.1 and 2, under Sections 2(s), 16 and 157 of the Customs Act, 1969 (*the Customs Act*) read with Section 3(1) of the Imports and Exports (Control) Act, 1950 (*the Imports and Exports Act*) punishable under Sections 156(1), (8), (89) and 164 of the Customs Act. After investigation and issuance of show cause notices to the respondents, the Additional Collector Customs passed an order-in-original dated 14.2.2007 according to which the goods and vehicles

were outrightly confiscated. Aggrieved, the respondents filed an appeal which was allowed by the Collector Customs (Appeals) *vide* order dated 12.3.2007 and the order-in-original was modified to the extent that the confiscated goods were allowed to be redeemed upon payment of a redemption fine of 30% of the customs value of the goods in addition to payment of the duties/taxes leviable subject to production of an NOC from the concerned Trial Court where the criminal proceedings were taking place and imposition of a personal penalty of Rs.100,000/- each upon the owners of the goods. This order was challenged by both the sides and the Customs, Federal Excise & Sales Tax Appellate Tribunal (*the Tribunal*) while dismissing the appeal of the appellant-department and accepting that of the respondents, through an order dated 27.6.2007, reduced the redemption fine on cloth from 30% to 15% and remitted in full the personal penalty upon the owners of the goods. The appellant's reference before the learned High Court was dismissed. Leave in this case was granted on 21.7.2009 to consider the following questions:-

- “i) Whether provision of Section 2(s) of the Customs Act, 1969, was correctly interpreted and applied by the Tribunal and the High Court;*
- ii) Whether imposition of fine in lieu of confiscation of goods is not in addition to any other penalty in terms of Section 181 of the customs Act, 1969; and*
- iii) Whether the redemption fine of 15% is in violation of SRO 574(1)/2005 dated 06.06.2005.”*

2. Learned counsel for the appellant submitted that the goods could only have been outrightly confiscated, as the option of redemption of goods upon payment of fine under Section 181 of the Customs Act was not available to the respondents in view of SRO No.574(I)/2005 dated 6.6.2005 (*SRO No.574*). He further argued that assuming that this

option was available to the respondents, then the redemption fine could not be less than 30% as provided by Column 3 of the Table of the said SRO. He stated that the respondents have admitted that the cloth was smuggled, whereas black tea is notified under SRO No.566(I)/2005 dated 6.6.2005 (*SRO No.566*) and both goods were smuggled in terms of Section 2(s) of the Customs Act as they were brought into Pakistan in breach of a prohibition/restriction and the respondents had evaded payment of customs duties/taxes leviable thereupon. In support of his submissions, learned counsel relied upon the judgment of this Court dated 30.9.2014 passed in Civil Appeal No.112/2005 titled "Muhammad Saeed & another Vs. Collector Customs & Central Excise Peshawar".

3. Contrarily, learned counsel for respondent No.1 argued that the goods were freely importable as there was no law that prohibits or restricts them from being brought into Pakistan and therefore they did not fall within the purview of smuggling. While arguing that the law treats smuggled goods and non-duty paid goods differently, he conceded that duty was leviable upon such goods as they were being brought through an unauthorized route. Learned counsel stated that there was a difference between Clauses 89 and 90 of the table under Section 156 of the Customs Act, and that the respondents' case fell within the latter.

4. Heard. In order to resolve the proposition at hand, we find it expedient to reproduce the relevant provisions of law which read as under:-

**The Customs Act, 1969**

*"2. Definitions.- In this Act, unless there is anything repugnant in the subject or context:-*

*(s) "smuggle" means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force, or en route*

*pilferage of transit goods or evading payment of customs-duties or taxes leviabale thereon,-*

- (i)

*gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or*
- (ii)

*manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed one hundred and fifty thousand rupees in value; or*
- (iii)

*any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs-station and includes an attempt, abetment or connivance of so bringing in or taking out of such goods; and all cognate words and expressions shall be construed accordingly;*

*16. Power to prohibit or restrict importation and exportation of goods.- The Federal Government may, from time to time, by notification in the official Gazette, prohibit or restrict the bringing into or taking out of Pakistan of any goods of specified description by air, sea or land.*

*156. Punishment for offences.-(1) Whoever commits any offence described in column 1 of the Table below shall, in addition to and not in derogation of any punishment to which he may be liable under any other law, be liable to the punishment mentioned against that offence in column 2 thereof:-*

*TABLE*

	<i>Offences</i>	<i>Penalties</i>	<i>Section of this Act to which offence has reference</i>
	<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
89.(i)	<i>If any person without lawful excuse, the</i>	<i>such goods shall be liable to</i>	<i>General</i>

	<i>proof of which shall be on such person, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, or in any manner dealing with smuggled goods or any goods in respect to which there may be reasonable suspicion that they are smuggled goods;</i>	<i>confiscation and any person concerned in the offence shall be liable to a penalty not exceeding ten times the value of the goods; and, where the value of such goods exceeds three hundred thousand rupees, he shall further be liable, upon conviction by a Special Judge, to imprisonment for a term not exceeding six years and to a fine not exceeding ten times the value of such goods</i>	
90.	<i>If any person, without lawful excuse the proof of which shall be on such person, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods, not being goods referred to in clause 89, which have been unlawfully removed from a warehouse, or which are chargeable with a duty which has not been paid, or with respect to the importation or exportation of which there is a reasonable suspicion that any prohibition or restriction for the</i>	<i>such goods shall be liable to confiscation, and any person concerned shall also be liable to a penalty not exceeding ten times the value of the goods.</i>	<i>General</i>

	<i>time being in force under or by virtue of this Act has been contravened, or if any person is in relation to any such goods in any way, without lawful excuse, the proof of which shall be on such person, concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon, or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods;</i>		
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*181. Option to pay fine in lieu of confiscated goods.- Whenever an order for the confiscation of goods is passed under this Act, the officer passing the order may give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit*

*Provided that the Board may, by an order, specify the goods or class of goods where such option shall not be given:*

*Provided further that.....*

*Explanation.- Any fine in lieu of confiscation of goods imposed under this section shall be in addition to any duty and charges payable in respect of such goods, and of any penalty that might have been imposed in addition to the confiscation of goods.”*

The main controversy is whether Section 2(s) of the Customs Act was correctly interpreted and applied by the Tribunal and the learned High Court in that the confiscated goods, i.e. cloth and black tea, are smuggled goods entailing the consequences of Clause 89 or non-duty

paid items covered by Clause 90 of the table given in Section 156 of the Customs Act.

5. In order to resolve the controversy, we first have to ascertain the meaning of the phrase "smuggled goods" as provided in the Customs Act. The definition of "smuggle" provided in Section 2(s) of the Customs Act can be broken down as follows:- (a) to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force; OR (b) en route pilferage of transit goods; OR (c) evading payment of customs-duties or taxes leviable thereon; OF (i) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; OR (ii) manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed one hundred and fifty thousand rupees in value; OR (iii) any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs-station and includes an attempt, abetment or connivance of so bringing in or taking out of such goods. Some restricted goods are mentioned in Section 2(s) of the Customs Act [see Clauses (i) and (ii) thereof]. However, the Federal Government is empowered under Section 16 of the Customs Act to prohibit or restrict, by notification, the bringing into or taking out of Pakistan of any goods of specified description by air, sea or land. Section 3 of the Imports and Exports Act also authorizes the Government to "*prohibit, restrict or otherwise control the import and export of goods of any specified description.*" In this context, the Federal Government, in exercise of the powers conferred by Sections 2(s)(ii) and 156(2) of the Customs Act *vide* SRO No.566, notified certain goods to be prohibited/restricted for the purpose of the said sections. This notification held the field when the goods in question

i.e. cloth and black tea, were recovered from the respondents on 06.01.2007. Item No.35 of SRO No.566 is “*Black Tea (except Op-Pekoe)*”, thus black tea is a restricted/prohibited item and falls within the meaning of smuggled goods in terms of Section 2(s) of the Customs Act. With regard to cloth, Item No.28 of SRO No.566 is “*man-made fiber, man-made yarn and fabric*”. According to the learned counsel for the appellant, the cloth recovered from the respondents squarely falls within this item, whereas the learned counsel for the respondents contended that the same applies only to man-made cloth and not to the cloth confiscated in this case. It would be expedient at this juncture to interpret the scope of the item *ibid* in conjunction with the other items. The other relevant items are that of No.27, 29 and 42 of SRO No.566 provide for “*Cotton, cotton yarn and fabric*”, “*Wool, woollen yarn and fabric*” and “*Natural silk, natural silk yarn and fabric*” respectively. Thus, cotton, wool, natural silk and their yarn and fabric on one hand and man-made fiber, yarn and fabric on the other have been dealt with separately. It is important to note that while both categories of yarn and fabric involve some mechanical process for its making, the distinction between both the categories lies in the fact that Items No.27, 29 and 42 refer to naturally occurring materials including cotton, wool and silk, whereas Item No.28 pertains to man-made or synthetic fibers/fabric. By way of example, the latter category can include polyester, acrylic, nylon etc. The cloth in question has been referred to A/S cloth in the orders of the forums below, which stands for artificial silk cloth and is undoubtedly a man-made fabric as it comprises of synthetic fiber and thus is squarely covered by Item No.28 of SRO No.566. Hence the cloth from foreign origin is a restricted/prohibited item as per Item No.28 of SRO No.566 and falls within the meaning of smuggled goods in terms of Section 2(s) of the Customs Act.



6. Adverting now to the applicability of Clause 89 or 90 of the table in Section 156 of the Customs Act, it is to be noted that Section 156 *ibid* provides for the punishment against any contravention of the Customs Act. Clause 89(i) of the table in Section 156 *ibid* provides that any person who, without any lawful excuse, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, or in any manner dealing with **smuggled goods** or any goods in respect to which there may be reasonable suspicion that they are smuggled goods, he shall be liable for the punishment detailed in Column 2 thereof. A few salient features need to be pointed out. First, Clause 89(i) deals with smuggled goods as well as those goods regarding which there is reasonable suspicion that they are smuggled. Secondly, a person is permitted to acquire possession etc. of such goods only with lawful excuse, the burden of proof of which lies on such person, and in case he fails to do so, it would be presumed that the goods were smuggled entailing the consequences provided in Column 2 of Clause 89 *ibid*. On the other hand, Clause 90 contained in the table under Section 156 of the Customs Act deals with “*any goods, not being goods referred to in clause 89.*” This makes it abundantly clear that the said clause deals with goods that are not smuggled and regarding which there is “*fraudulent evasion or attempt at evasion of any duty chargeable thereon.*” In this eventuality too, the burden lies on the person involved in such activities to prove the contrary, in the absence of which it will be presumed that the goods were non-duty paid in terms of Clause 90 *ibid*. In this regard, first the department has to show that the goods which are of a foreign origin could only be imported on payment of duty or under a license or their import is prohibit or restricted. It will then be for the possessor of such goods to show that they were lawfully imported either before any restrictions/prohibitions were imposed or in

accordance with such restrictions/prohibitions.<sup>1</sup> As held above in paragraph 5, the foreign cloth and black tea are notified items in terms of SRO No.566, therefore, they are restricted/prohibited goods and therefore fall within the ambit of smuggled goods as defined in Section 2(s)(ii) of the Customs Act. Resultantly, it is Clause 89 of Section 156 of the Act that deals with smuggled goods which is applicable to the instant case and not Clause 90 thereof.

7. The confiscated goods were admittedly of foreign origin and there was no proof that they were lawfully imported into Pakistan (*by an authorized importer under a valid license and through an authorized route*), the burden of which, according to Clause 89 as mentioned above, was on the respondents. When confronted, learned counsel for the respondents failed to provide any concrete evidence except contending that these goods are easily available in the market and can be purchased from anywhere. Thus, the respondent has failed to prove that the confiscated goods were not smuggled goods. Therefore the forums below have erred in holding that the confiscated goods were not notified and thus do not fall within the purview of Section 2(s) of the Customs Act.

8. We would now like to discuss the question as to whether the option to pay a fine in lieu of confiscation of goods, in addition to any other penalty, could be given or not. Section 181 of the Customs Act allows an officer passing an order for confiscation of goods to give the owner of the goods an option to pay a fine in lieu of such confiscation. However, according to the first proviso to Section 181 *ibid*, the Board may by an order specify the goods or class of goods where such option shall not be given. The Board in exercise of the powers conferred by Section 181 has issued SRO No.574 which provides, *inter*

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<sup>1</sup> *Messrs S. A. Haroon and others Vs. The Collector of Customs, Karachi and the Federation of Pakistan (PLD 1959 SC (Pak) 177) and Sikandar A. Karim Vs. The State (1995 SCMR 387).*

*alia*, that “no option shall be given to pay fine in lieu of confiscation in respect of... (i) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969) or (ii) conveyance including packages and containers found carrying offending goods of section 2(s) of the Customs Act, 1969...” Thus, the imposition of redemption fine at 30% by the Collector Customs (Appeals) and 15% by the learned Tribunal is in violation of Section 181 of the Customs Act and SRO No.574 issued thereunder.

9. In the light of the above, this appeal is allowed and the impugned judgments of the learned High Court, the Tribunal and the Collector Customs (Appeals) are set aside.

CHIEF JUSTICE

JUDGE

JUDGE

**Announced in open Court**

on **23.2.2017** at **Islamabad**

Approved For Reporting

Waqas Naseer/\*

CHIEF JUSTICE