

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, HCJ

MRS. JUSTICE AYESHA A. MALIK

MR. JUSTICE ATHAR MINALLAH

CIVIL PETITION NOS.5671 AND 5672 OF 2021

*(Against the judgment dated 10.06.2021 of the
Peshawar High Court, Peshawar passed in Customs
Reference Nos.5-P and 6-P of 2012)*

Collector of Customs, Peshawar

... Petitioner *(in both cases)*

Versus

M/s New Shinwari Ltd. & another

... Respondents *(in both cases)*

For the petitioner:

Mr. Abdul Rauf Rohaila, Sr.ASC

For the Federation:

Mr. Ayaz Shaukat, DAG
a/w Afnan, Addl.Collector

For the Respondents:

Nemo

Date of hearing:

24.02.2023

ORDER

Athar Minallah, J.- The Collector of Customs has sought leave in both the petitions against the consolidated judgment of the High Court, dated 10.06.2021, whereby the questions of law proposed through reference applications filed under section 196 of the Customs Act 1969 (**'Act of 1969'**) were answered.

2. The respondent company is, *inter alia*, engaged in the business of import of goods into Afghanistan. The goods are transported to Afghanistan through the territory of the Islamic Republic of Pakistan by availing the transit facility pursuant to Pak-Afghan Transit Trade Agreement 2010 (**'agreement'**). The respondent company had shipped its consignments and upon arrival at the customs port, they were transported to the exit port through the licensed carriers after completion of the formalities prescribed in connection with the transit facility. On arrival of the

consignments at Amangarh, Nowshera, the goods were subjected to examination by the customs officials. The consignments of polyester fabric were found to be in excess of the quantities declared at the port of entry. Consequently, a show cause notice was served upon the respondent-company and its border/clearing agent. It was alleged that sections 32 and 129 of the Act of 1969, punishable under section 156(1), (9), (43), (64) and (90), *ibid*, were violated. The show cause notice was adjudicated vide order-in-original No.47 of 2011, dated 02.02.2011, and the excess quantities of polyester fabric were out rightly confiscated. The appeal preferred before the Collector of Customs (Appeals) was partially allowed vide order in appeal No.115 of 2011, dated 23.6.2011, by extending the option to redeem the confiscated goods subject to payment of fine under section 181 of the Act of 1969. The second appeal preferred by the respondent-company was allowed by the Customs Appellate Tribunal ('**Tribunal**') vide judgment, dated 27.12.2011, and consequently the order-in-appeal and the order-in-original were set-aside. The Collector of Customs filed a reference application under section 196 of the Act of 1969, proposing multiple questions of law stated to have arisen out of the judgment of the Tribunal. The latter's judgment was upheld by the High Court and the proposed questions were answered vide the impugned judgment dated 10.06.2021.

3. The learned counsel for the parties have been heard.

4. The respondent-company had availed the transit facility pursuant to the Agreement executed between two sovereign States. It is not the case of the department that the consignments were transported in violation of the rules nor that the seals had been tampered with. The only allegation against the

respondent- company was that upon examination of the consignments at Amangarh, Nowshera, the consignments of polyester fabric were found in excess of the quantities declared at the port of entry i.e. Karachi. It is not disputed that goods transported to Afghanistan through the territory of Pakistan are not subject to levy or charge of customs duty and other taxes. The goods are in transit, as contemplated under section 129 of the Act of 1969, and such mode of facility is distinct from import of goods for home consumption, warehousing or transshipment. In the case of transit, the territory of Pakistan is used solely for the purpose of transmitting goods and their import into Afghanistan, pursuant to the Agreement between the two countries. In the petitions before us, the transit facility was not breached since it is not the case of the department that the rules were violated or an attempt was made to tamper with the seals or pilferage of the goods in transit. The levy and charge of custom duty and taxes are attracted in the case of transit goods if they are unauthorizedly unloaded from the licensed bonded carriers or even if such an attempt is made, or the transit rules are materially breached. In the absence of such acts, the goods in transit are not subject to payment of duties and taxes.

5. In the petitions before us, the show cause notice had alleged violations of sections 32 and 129 of the Act of 1969, despite no attempt having been made to pilfer the goods in transit and the absence of any actus rea that could have been construed as an intent to use the goods for a purpose other than transit to Afghanistan. Sub-section (1) of Section 32 of the Act of 1969 describes the doing or omitting to do acts in connection with matters of customs, knowing or having reasons to believe to be

false, which will constitute an offence under the section. Sub-section (2) and (3) describe two distinct eventualities i.e. where the duties and taxes or charge has not been levied or has been short levied or has been erroneously refunded by reason of some collusion or inadvertence or error or misconstruction, as the case may be. The offence under section 32 of the Act of 1969 is relatable to the duty, taxes or charge which has not been levied or has been short levied or has been erroneously refunded. In the case in hand, there is no allegation against the respondent-company of having evaded or of making an attempt to evade the duties, taxes or any charge. The offence under section 32 of the Act of 1969 was, therefore, not attracted in the facts and circumstances of the case before us. Likewise, section 129 of the Act of 1969 provides that where any goods are entered for transit across Pakistan to a destination outside Pakistan, the appropriate officer may, subject to the provisions of the rules, allow the goods to be so transmitted without payment of duties which would otherwise be chargeable on such goods. Moreover, the Federal Government may, by notification in the official gazette, prohibit the bringing into Pakistan by sea, land or air in transit to a foreign territory any goods or class of goods. It is also not the stance of the petitioner department that the Federal Government, by notification, had prohibited bringing into Pakistan the polyester fabric found in excess of the declared value. The transit trade between Pakistan and Afghanistan is regulated under the provisions of the Act of 1969 and the rules made by the Federal Board of Revenue in exercise of powers conferred under section 219 *ibid*. Chapter XXV of the Customs Rules, 2001, notified vide SRO 450(1)/2001 dated 18.06.2001 (**'Rules of 2001'**) titled Afghanistan-Pakistan Transit Trade Rules regulate the transit of

goods from arrival of the cargo into and its exit from Pakistan. They are self contained and comprehensive rules dealing with all aspects of the transit of goods to Afghanistan through the territory of Pakistan. These rules were inserted vide SRO 601(1)/2011 dated 13.06.2011.

5. The Additional Collector of Customs has appeared along with the Deputy Attorney General. In response to our query, they could not justify the issuance of the show cause notice under sections 32 and 129 of the Act of 1969, let alone the adjudication thereof by ordering confiscation of the excess quantities of the fabric. They, however, have stated that the observations made by the High Court in the impugned judgment may be construed as placing clogs in the powers and functions of the customs authorities in connection with the examination of the goods in transit and before their exit from the territory of Pakistan. As already noted above, the Federal Board of Revenue has framed comprehensive and self-contained rules in exercise of powers conferred under section 219 of the Act of 1969. The rules are explicit and, therefore, they cover almost all aspects of the transit trade between Pakistan and Afghanistan, including the powers and functions of the customs officials. The powers and functions are subject to observance of the said rules which cannot be transgressed by the customs authorities. In the case in hand, the High Court has correctly interpreted the provisions of the Act of 1969 and its appreciation of the nature of the transit trade pursuant to the Agreement has not been found to suffer from any legal infirmity requiring interference by this Court. The petitioner department has not been able to persuade us that a question of law of public importance has arisen for our

consideration and thus leave is refused and, consequently, the petitions are disposed of with the expectation that the customs authorities would ensure that powers and functions are exercised in accordance with the provisions of the Act of 1969 and the rules made pursuant to powers conferred under section 219 *ibid*.

Chief Justice

Judge

Judge

Islamabad the,
24th February, 2023
NOT APPROVED FOR REPORTING.
(Aamir Sh.)