JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Customs Reference No.112 of 2023

IFTIKHAR AHMED KHAN

Versus

THE CUSTOMS APPELLATE TRIBUNAL *and others*

Appellant by	**:**	**Mr. M. Ikram Shah and Raja Iftikhar Ahmed, Advocates.**
Respondents by	**:**	**M/s M. Amin Feroz Khan and Ch. Talib, Advocate.** (for Respondents No.2, 4, and 5)
Date of hearing	**:**	**22-04-2024.**

SAMAN RAFAT IMTIAZ, J.

1. The present Custom Reference Application has been filed by the Applicant [Iftikhar Ahmed Khan] against the Judgment dated 17.07.2023 ("**Impugned Judgment**") passed by the learned Customs Appellate Tribunal ("**Tribunal**") in Appeal No. 32/CU/IB/2023.

2. The brief facts as per the Memo of Custom Reference Application are that one Toyota Hilux Surf Model 1999 bearing registration No. E-0482 Jacobabad Sindh ("**Subject Vehicle**") was alleged to have been smuggled and action for its confiscation for violation of the provisions under Section 156 (1) (89) of the Customs Act, 1969 ("**Customs Act**") read with Section 3 (3) of the Import and Export Trade Control Act, 1950 ("**Import and Export Trade Control Act**") and S.R.O. 499 (1) 2009 dated 13-06-2009 and Section 2 (s) and 16 of the Customs Act and S.R.O.

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565 (1) 2005 dated 06-06-2005 was taken. The Subject Vehicle was detained on 13-09-2022 under Section 17 of the Customs Act and later converted into seizure under Section 168 of the Customs Act vide Seizure Report No. 176/2022 dated 06-10-2022. A Show-Cause Notice was issued on 03-11-2022 which culminated in an outright confiscation of the Subject Vehicle vide the Order-in-Original No.21 of 2023 dated 27-01-2023. Being aggrieved, the Applicant filed an appeal before the learned Tribunal which was also dismissed vide the Impugned Judgment, hence the instant reference application. The Customs Reference Application raises the following questions of law:

i. *Whether the Subject Vehicle duly registered with the Motor Registration Authority, Jacobabad Sindh on 16-12-1999 and whose Motor Vehicle Tax is paying upto June-2022 is liable to confiscation which was seized from the possession of the applicant (2nd purchaser)?*

ii. *Whether vehicle registration No. E-0482-Sindh duly registered with Motor Registration Authority, Jacobabad registered on 16-12-1999 is liable to outright confiscation in terms of Section 156(1)(89) of the Customs Act read with Section 2(s) and 16 of the Customs Act in which seizing agency could not prove charge of smuggling?*

iii. *Whether the learned Tribunal has failed to properly read the evidence on record provided by the Applicant under Section 187 of the Customs Act and shifted the burden on prosecution?*

iv. *Whether the learned Tribunal has seriously erred in law by not considering that the Subject Vehicle cannot be registered with the Motor Registration Authority, Jacobabad Sindh without payment of duty and taxes as confirmed by Motor Registration Authority, Jacobabad, in the shape of its report dated. 18.10.2022 of Sindh?*

v. *Whether on the facts and circumstances of the case the learned Tribunal erred in law by deciding the case on mis-reading and non-reading of the law points involved therein?*

vi. *Whether the learned Tribunal while concluding the Impugned Judgment has seriously erred in law and failed to understand that in terms of Section 187 of the Customs Act the Applicant/possessor of the Subject Vehicle has failed to discharge burden of proof of lawful possession?*

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vii. *Whether the learned Tribunal badly erred in law and escaped attention of burnt / destroyed of all record of M.R.A. Jacobabad on 27.12.2007 in the violence when the Prime Minister Mohtarma Benazir Bhutto Martyred in the year 2007 enclosing copy of F.I.R of the incident?*

viii. *Whether the Customs Authorities can ask for production of record including import documents from owner in respect of a Motor Vehicle or any other importable item beyond the period of five years in terms of Section 211 of the Customs Act?*

ix. *Whether the learned Tribunal badly erred in law and escaped attention that the registration documents of Subject Vehicle produced and annexed with Appeal as Annex-E-1 to E-12 are forged or bogus documents?*

x. *Whether the learned Tribunal badly erred in law while passing the Impugned Judgment that reference to provision of Section 211 of the Customs Act imposes a restriction of five years for production of record and the Applicant is under no legal obligation to maintain a record pertaining to import beyond the period of five years nor Customs department can demand such record under the Customs Act?*

3. The learned counsel for the Applicant submitted that as per the FSL Report the chassis number of the Subject Vehicle has not been tampered with. Yet the learned Tribunal passed the Impugned Judgment dismissing the Applicant's appeal and upholding the confiscation of the Subject Vehicle on the erroneous ground that PRAL data does not reflect any import of the Subject Vehicle. The learned counsel argued that the learned Tribunal failed to appreciate that the Subject Vehicle was imported in the year 1999 whereas PRAL database was set up in the year 2000. He also submitted that the limitation period provided under the proviso to sub-section (3) of Section 179 for cases in respect of clause (s) of Section 2 of the Customs Act is thirty days of the issuance of the show-cause notice and as such the Order-in-Original No.21 of 2023 dated 27.01.2023 issued two months and twenty four days after the Show-Cause Notice dated 03-11-2022 was time barred.

4. The learned counsel for the Respondents No.2, 4, and 5 argued that the Applicant failed to prove the lawful import of the Subject Vehicle and as such could not discharge the burden of proof under Section 187 of the Customs Act.

5. We have heard the arguments of the learned counsel for the parties and perused the record.

6. The learned Tribunal has held vide the Impugned Judgment that it is clear that the Subject Vehicle is a non-duty paid smuggled vehicle liable to confiscation in view of the fact that the PRAL data base does not reflect any import data of the Subject Vehicle and by relying upon two unreported judgments of this Court whereby it was held that Section 211 of the Customs Act does not absolve a person from discharging his or her burden under Section 187 *ibid.*

7. In reaching its decision, the learned Tribunal failed to take into consideration that the Subject Vehicle is a 1999 model whereas the PRAL database was set up in the year 2000. As such the learned Tribunal erred in basing its decision on the finding that the PRAL data does not reflect any import data of the Subject Vehicle.

8. The learned Tribunal also failed to give due weightage to the fact that the Applicant produced the registration documents of the Subject Vehicle. The Custom Authorities sought verification of such registration documents but the Motor Registration Authority, Jacobabad was unable to provide the relevant record as their documentation was destroyed in the year 2007. However, in such circumstances, the conclusion that the Subject Vehicle is a smuggled vehicle is mere conjecture and a presumption.

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9. In *Collector Customs, Sales Tax and Central Excise Vs. Professor Muhammad Khan,* 2007 SCMR 10 a vehicle owned by the respondent was detained by the Custom Authorities on suspicion that it was smuggled. The respondent showed the documents of registration to the custom officials but they insisted on production of import documents for release of the car. The Supreme Court held that the Custom Authorities do not have unbridled powers under the Customs Act to detain goods of foreign origin in the absence of any proof that goods in possession of a person were brought into Pakistan in violation of any law on a presumption that the same were not brought into Pakistan in a lawful manner and that they have no authority to detain such goods merely on the basis of suspicion.

10. In the case of *Additional Collector of Customs (Adjudication) at Model Customs Collectorate, Ardara Road, Peshawar Vs. Hidayat Ullah,* 2024 PTD 226 the Peshawar High Court held that submission of the documents of the vehicle issued by the Motor Registration Authority, Lahore was substantial compliance of the burden of proof under Section 187 of the Customs Act despite the fact that the FSL report showed that the chassis number had been tampered with. The Peshawar High Court observed that on the other hand at no stage of the proceedings an iota of evidence was produced that the subject vehicle was brought into the country unlawfully. In such circumstances the Additional Collector of Customs (Adjudication)'s customs reference against the decision of the Tribunal for unconditional return of vehicle was answered in the negative.

11. Similarly, the High Court of Sindh at Karachi in the case of *Collector of Customs (Prevention), Karachi Vs. Ghulam Muhammad*, 2008 PTD 525 held that registration of vehicle is sufficient proof that it

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was legally imported into the country because as soon as the registration papers are presented before the Motor Registration Authority it is their responsibility to check the documents and examine them thoroughly with reference to their genuineness before registration. It was also observed that calling upon a party to produce import documents after lapse of fourteen years is nothing but a practical joke given that by virtue of Section 211 of the Customs Act an importer or exporter is liable to maintain import related record and documents only for five years whereas, individual importer who imports goods for private or personal use is excluded from the purview of that section.

12. In a more recent case reported as *the Additional Director, Directorate General of Intelligence and Investigation-FBR, Regional Office, Karachi Vs. Imran*, 2021 PTD 1683 the Sindh High Court observed that in the cases before it there was no allegation against the owners/subsequent purchasers of committing an act of smuggling rather the allegation was that since they could not produce any lawful import documents therefore they have smuggled the vehicle without payment of customs duty and taxes. The court found that since the subsequent purchasers/owners supplied the registration documents the initial burden of proof that they are bonafide lawful owners/purchasers and have not committed any act of smuggling nor are in possession of smuggled vehicles was met. The court also took note of the fact that under Section 211 of the Customs Act the period for retention of import documentation is only 5 years and beyond that the importer or owner is under no legal obligation to maintain any record nor can they be demanded by the Customs Authorities. In such circumstances the court held that in the absence of any material establishing the charge of smuggling in terms of Section 2(s) of the Customs Act the detention/confiscation of the vehicles

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was arbitrary. In fact the Court held that if public functionaries are given the authority to charge owners of vehicles with the criminal offence of smuggling in the absence of any evidence or material to such effect merely on an unlawful presumption because the owners could not produce import documents of vehicles admittedly manufactured beyond the period of five years it would amount to giving them unbridled powers to act arbitrarily and abuse the process of law.

13. In light of the foregoing case law we are of the considered view that the Applicant discharged his burden of proof under Section 187 of the Customs Act by producing the registration documents. The Applicant cannot be penalized for the failure of the Motor Registration Authority, Jacobabad for their failure to verify the registration document on account of loss of their record. Since the Applicant met its initial burden, the burden to prove that the Subject Vehicle was a smuggled one shifted upon the Custom Authorities which they failed to discharge as not a shred of evidence is available on the record to prove the charge of smuggling against the Applicant.

14. The learned Tribunal has relied upon the unreported judgments of the Islamabad High Court in *Director General of Intelligence & Investigation, Federal Board of Revenue Vs. Malik Muhammad Ajmal Khan & another*, Custom Reference No.05/2013, and *Director General of Intelligence and Investigation Custom, Islamabad Vs. Ghulam Ali Noon & another*, Custom Reference No.28/2020. However, the said judgments were passed *per incuriam* as they were without reference to *Professor Muhammad Khan (Supra)* and as such are not binding.

15. Moreover, the Order-in-Original No.21 of 2023 dated 27.01.2023 was clearly time barred as it was passed two months and twenty four days

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after the Show-Cause Notice dated 03-11-2022. In similar circumstances, the Peshawar High Court in the case of *Collector of Customs (Appraisement), Peshawar Vs. Messrs Allied Associates, Peshawar*, 2024 PTD 374 was pleased to hold that the judgment passed by the Tribunal setting aside the order-in-original as time barred was in accordance with law. The Peshawar High Court held that the issue does not require detailed discussion as the matter has been laid to rest by the apex Court in the judgment reported as *Messrs Mujahid Soap and Chemical Industries (Pvt.) Ltd. Vs. Customs Appellate Tribunal, Bench-I, Islamabad*, 2019 SCMR 1735 wherein the decision given beyond the prescribed limitation under Section 179(3) of the Customs Act was held invalid. Similar conclusion was reached by this Court in *Messrs Khyber Tea and Food Company, Peshawar Vs. Collector Customs, Model Customs Collectorate, Islamabad*, 2021 PTD 879. This aspect was totally ignored by the learned Tribunal.

16. In view of the foregoing, the instant Customs Reference is **allowed**. Resultantly, all the questions proposed by the Applicant are answered in his favour and the Impugned Judgment is set aside.

17. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal as required by Section 196(5) of the Customs Act.

(BABAR SATTAR)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

JUNAID

Approved for Reporting
Blue Slip added.

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