

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Munib Akhtar, JJ

CIVIL APPEAL NO. 24-Q OF 2014

(On appeal from the judgment dated 20.09.2010 passed by the Balochistan High Court, Quetta in Constitutional Petition No.320 of 2010)

AND

CIVIL APPEAL NO. 26-Q OF 2018

(On appeal from the judgment dated 15.07.2013 passed by the Balochistan High Court, Quetta in Custom References Nos. 20 and 23 of 2018)

Haji TOOTI and another---Appellants

Versus

FEDERAL BOARD OF REVENUE, ISLAMABAD and others---Respondents

Civil Appeal No.24-Q of 2014 and Civil Appeal No. 26-Q of 2018, decided on 26th May, 2021.

Per Munib Akhtar, J; Umar Ata Bandial, CJ. agreeing; Syed Mansoor Ali Shah, J. also agreeing but with his own reasons.

(a) Customs Act (IV of 1969)---

---Ss. 181 & 223---SRO 574(I)/2005 dated 06.06.2005 ("SRO 574"), vires of---Option to pay fine in lieu of confiscated goods---Officers of customs to follow Board's orders, etc.---Whether SRO 574 issued by the Federal Board of Revenue in exercise of its powers under section 181 of the Customs Act 1969 ("Act") is ultra vires the proviso to section 223 of the Act---Legislative and administrative orders issued by the Federal Board of Revenue under sections 181 & 223 of the Customs Act 1969---Extent, scope and nature of such orders explained.

Per Munib Akhtar, J. (Majority view):

The case put forward by the appellants was that SRO 574(I)/2005 dated 06.06.2005 ("SRO 574") was ultra vires section 223 of the Customs Act, 1969 ('the Act'); that this was so because it unlawfully interfered with the discretion granted by the main part of section 181 of the Act to the concerned officer to "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"; that the second proviso made the notification issued by the FBR (i.e., SRO 574) binding thereby wholly depriving the officer of the discretion conferred on him. This, according to the appellants, could not be done by the FBR by reason of section 223 of the Act.

The order made by the concerned officer under section 181 is not in exercise of quasi-judicial functions. It is in exercise of a statutory power, and is in the nature of an administrative or executive order. Secondly, if the submissions made by the appellants are accepted that would in effect reduce the second proviso of section 181 to redundancy. This would be so because any exercise of the statutory power thereby conferred would "interfere" with the power conferred on the officer of customs under the main part. The result would be that the power under the second proviso could never be exercised, i.e., would be made redundant. Thirdly, appellants misunderstood section 223. This section is not exclusive to the Act; it is to be found in all fiscal statutes, cast in nearly identical terms. It confers a broad and general power, of an administrative and executive nature, on the FBR (in its capacity as the body at apex of the fiscal hierarchy) to supervise, control and guide the tax authorities in the discharge of their duties and functions under the tax laws. However, some of those powers and duties are of a quasi-judicial nature such as, e.g., those conferred on officers holding an appellate post (Collector (Appeals)) or exercising powers in revision. It would obviously be wrong in principle (and contrary to the well-established jurisprudence of the Supreme Court and the High Courts) for the FBR to be in a position to influence or affect the proceedings of such authorities. Hence, the proviso. It is not to be regarded as a standalone provision; it makes sense only when read along with the main part of section 223.

The power exercised by the FBR in terms of the provisos to section 181 is not an exercise of the general statutory power conferred by section 223. That is, a notification issued under section 181 is not some general

administrative or executive order, instruction or direction given by the FBR. It is rather the exercise of a specific and separate statutory power conferred under a different provision for a distinct purpose.

Sections 181 and 223 are separate and distinct, one from the other. The effect of the submissions made by the appellants would however be to conflate and merge the two, one into the other. SRO 574 cannot therefore be regarded as ultra vires section 223 of the Act. Appeals were dismissed.

Per Syed Mansoor Ali Shah, J.

The power exercised by the customs officer under section 181 of the Customs Act, 1969 ('the Act') is quasi-judicial in nature. An order passed by the customs officer, in exercise of his discretion under section 181 of the Act, giving or not giving the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as he thinks fit, being ancillary to his power of confiscating the goods and involving the exercise of discretion, is quasi-judicial and not administrative or executive in nature.

M.A. Rahman v. Federation of Pakistan 1988 SCMR 691; Tariq Transport Company v. Sargodha-Bhera Bus Service PLD 1958 SC 437; Messrs Faridsons Ltd. v. Government of Pakistan PLD 1961 SC 537 and Dr. Zahid Javed v. Dr. Tahir Riaz PLD 2016 SC 637 ref.

The orders made by the Federal Board of Revenue ('the Board') under the provisos to section 181 and the orders, instructions or directions issued by it under section 223 of the Act are two different species: one passes for delegated legislative power while the other is merely recognition of administrative supervisory power of the Board. Section 223 provides that officers of customs and other persons employed in the execution of the Act are to observe and follow the orders, instructions and directions of the Board. Under the said provision, the Act is recognizing or acknowledging that the Board has the power to issue orders, instructions and directions to all the officers of customs and that any such orders, instructions and directions issued by the Board shall be binding on the officers of customs in execution of the Act. This statutory acknowledgement of the power of the Board to issue administrative orders, instructions and directions to all the customs officers has no bearing on the rights of the third parties. Section 181 of the Act, on the other hand, provides for giving an option to the owner of goods to pay fine in lieu of confiscation of goods, and its provisos authorize the Board to specify, by an order, any goods or class of goods where such option shall not be given and also to fix the amount of fine, which in lieu of confiscation shall be imposed on any goods or class of goods. The delegation of power under the provisos to the Board, thus, passes for delegated legislation and affects third party rights. The two species of power, therefore, do not conflate or converge.

The Legislature by enacting the first proviso to section 181 has delegated the power to the Board for creating exception to the application of the main provisions of the Section to certain goods or class of goods, and by the second proviso delegated such power for limiting the discretion of the adjudicating customs officer in fixing the amount of fine which he, in lieu of confiscation, can impose on certain goods or class of goods under the main provisions of the Section. An order made by the Board under the powers conferred on it by any one of the two provisos to section 181 is, thus, delegated legislation. Once the Board validly makes such order, it partakes the colour and authority of a statutory instrument. It is read as part of section 181 and has the force of law accordingly. Such order having the force of law is, therefore, binding on the adjudicating customs officer while performing his quasi-judicial function under section 181.

Collector of Customs v. Muhammad Tasleem 2002 MLD 296 and Collector Customs v. Salman Khan 2015 PTD 1733 affirmed.

Collector of Customs v. Wali Khan 2017 SCMR 585 and Maqbool Ahmed v. Customs Appellate Tribunal 2009 SCMR 226 ref.

The orders, instructions and directions issued by the Board under section 223 to the Customs Officers are, therefore, administrative/ executive in character as only the customs officers and other persons employed in the execution of the Act are bound to observe and follow them. Such orders, instructions and directions are not binding on the assessee or other persons whose matters are to be dealt with under the Act. As a corollary, they are also not binding on customs officers who exercise quasi-judicial functions as well as on the appellate authority/tribunal and the courts. They being not applicable to and enforceable against all concerned, thus, lack generality - an essential characteristic of a legislative instrument. They are also limited to the administrative

matters dealt with by the customs officers in the execution of the Act, and can be issued by the Board only in respect of matters falling within the range of the administrative functions of the customs officers.

State Bank of Travancore v. Commissioner of Income Tax AIR 1986 SC 757; Messrs Central Insurance Co. v. CBR 1993 SCMR 1232 and Collector of Customs v. Askari Cement 2020 SCMR 649 ref.

The provisos to Section 181 and the SROs issued thereunder, thus, do not conflict in any manner with the proviso to section 223 of the Act as the latter relates to the administrative orders, instructions or directions of the Board, and not to the legislative order of the Board.

Per Munib Akhtar, J.

(b) Interpretation of statutes---

---Redundancy of a provision in a statute---Redundancy is not to be lightly imputed, and an interpretation that yields such a result is to be avoided if at all possible.

Naseebullah Khan, Advocate Supreme Court for Appellants (in both cases, Video-Link, Quetta).

Shakeel-ur-Rehman, Advocate Supreme Court and Raja Abdul Ghafoor, Advocate-on-Record for Respondents (in C.A. 24-Q of 2014).

Iftikhar Raza Khan, Advocate Supreme Court for Respondents (in C.A. 26-Q/2018, Video-Link, Quetta).

Date of hearing: 26th May, 2021.

JUDGMENT

MUNIB AKHTAR, J.---These two appeals arise under the Customs Act, 1969 ("Act") and raise the same questions of law, on facts that can broadly be regarded as similar. The appeals are against two separate judgments of the High Court. In C.A. 24-Q of 2014 (hereinafter the "first appeal") a writ petition filed by the appellant (hereinafter the "first appellant") was dismissed by judgment dated 20.09.2010 (hereinafter the "first judgment"). In the other matter, C.A. 26-Q of 2018 (hereinafter the "second appeal"), a tax reference filed by the department was allowed by means of the judgment dated 15.07.2013 (hereinafter the "second judgment", the appellant being the "second appellant"). Leave was granted in the first appeal vide order dated 30.09.2014. In the other matter leave was granted vide order dated 28.11.2018 on the ground, inter alia, that it involved the same questions as in the first appeal.

2. The facts can be stated briefly. In the first appeal, the truck of the first appellant was confiscated on the ground that it was carrying smuggled goods. In the second appeal, a coach operated by the second appellant (and used to transport goods and passengers) was confiscated on the same ground. The charge of such smuggling stands established for present purposes in each case. The case of each appellant was that his conveyance was merely transporting goods (and/or passengers), with which the appellant had no concern whatsoever. Insofar as the conveyances were concerned, each appellant was given the option of their release on payment of a redemption fine under section 181 of the Act. That provision is as follows:

"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 the Board may, by an order, fix the amount of fine which, in lieu of confiscation, shall be imposed on any goods or class of goods imported in violation of the provisions of section 15 or of a notification issued under section 16, or any other law for the time being in force.

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."

In exercise of the powers granted under the two provisos, the Board (i.e., the Federal Board of Revenue) has issued notifications from time to time. The one relevant for present purposes was SRO 574(I)/ 2005 dated 06.06.2005 ("SRO 574") whereby (as presently relevant) the redemption fine for release of conveyances confiscated in circumstances as those of the appellants' was 30%. This option was, as noted, given to the appellants. The first appellant filed a petition in the High Court challenging SRO 574 as being ultra vires the

Act. It may be noted that at the same time departmental proceedings regarding the confiscation of the truck, and option to pay the redemption fine, also reached the High Court by way of a tax reference filed by the first appellant. The learned High Court, by means of the first judgment whereby a number of matters were decided, dismissed the petition. However, insofar as the tax reference was concerned the High Court was pleased to remand the matter (along with those in several other tax references) for fresh determination in light of the observations made in the judgment. The first appellant approached this Court against the dismissal of his writ petition (but not as regards the disposal of his tax reference) and was granted leave to appeal by means of the order dated 30.09.2014.

3. The matter of the second appellant arose, as noted, out of a tax reference. The learned Appellate Tribunal decided in favor of the second appellant and the tax reference, filed by the department, was allowed by means of the second judgment. That led to the second appellant approaching this Court where leave to appeal was granted in terms as stated above.

4. The case put forward by learned counsel for the appellants was that SRO 574 was ultra vires section 223 of the Act. This was so because it unlawfully interfered with the discretion granted by the main part of section 181 to the concerned officer to "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". The second proviso made the notification issued by the FBR (i.e., SRO 574) binding thereby wholly depriving the officer of the discretion conferred on him. This, according to learned counsel, could not be done by the FBR by reason of section 223, which may now be set out:

"223. Officers of Customs to follow Board's orders, etc.---All officers of customs and other persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the appropriate officer of customs in the exercise of their quasi-judicial functions."

Reliance was placed on the proviso to this section, it being contended that the order made by the officer concerned under section 181 was in exercise of quasi-judicial functions. The learned High Court in the first judgment, while holding that the determination of the concerned officer under section 181 was of a quasi-judicial nature nonetheless held that SRO 574 (and its predecessor) were not ultra vires the Act. The petition filed by the first appellant was accordingly dismissed. In the other matter the learned High Court allowed the tax reference filed by the department by relying on an unreported judgment of this Court (which is, unfortunately, only partially identified (*Said Gul v. Collector of Customs and others*) and which could not be traced here).

5. We have heard learned counsel as above and considered the provisions involved. In our view, the appeals must fail for the following reasons. Firstly, and with respect to the learned High Court, the order made by the concerned officer under section 181 is not in exercise of quasi-judicial functions. It is in exercise of a statutory power, and is in the nature of an administrative or executive order. Secondly, if the submissions made by learned counsel are accepted that would in effect reduce the second proviso of section 181 to redundancy. This would be so because any exercise of the statutory power thereby conferred would "interfere" with the power conferred on the officer of customs under the main part. The result would be that the power under the second proviso could never be exercised, i.e., would be made redundant. It is well settled that redundancy is not to be lightly imputed, and an interpretation that yields such a result is to be avoided if at all possible. Yet, that would precisely be the effect of the case put forward by the appellants. Thirdly, learned counsel have, with respect, misunderstood section 223. This section is not exclusive to the Act; it is to be found in all fiscal statutes, cast in nearly identical terms. It confers a broad and general power, of an administrative and executive nature, on the FBR (in its capacity as the body at apex of the fiscal hierarchy) to supervise, control and guide the tax authorities in the discharge of their duties and functions under the tax laws. However, some of those powers and duties are of a quasi-judicial nature such as, e.g., those conferred on officers holding an appellate post (*Collector (Appeals)*) or exercising powers in revision. It would obviously be wrong in principle (and contrary to the well established jurisprudence of this Court and the High Courts) for the FBR to be in a position to influence or affect the proceedings of such authorities. Hence, the proviso. It is not to be regarded as a standalone provision; it makes sense only when read along with the main part of section 223. Now, the power

exercised by the FBR in terms of the provisos to section 181 is not an exercise of the general statutory power conferred by section 223. That is, a notification issued under section 181 is not some general administrative or executive order, instruction or direction given by the FBR. It is rather the exercise of a specific and separate statutory power conferred under a different provision for a distinct purpose. That purpose has been considered and highlighted by the learned High Court in the first judgment. Sections 181 and 223 are separate and distinct, one from the other. The effect of the submissions made by learned counsel would however be to conflate and merge the two, one into the other. In our view, that would be to incorrectly appreciate the statutory scheme envisaged by the Act, and a misunderstanding and misapplication of the two sections. SRO 574 cannot therefore be regarded as ultra vires section 223.

6. For the foregoing reasons it was announced in Court at the conclusion of the hearing that the appeals stood dismissed.

Sd/-

Umar Ata Bandial, J

I arrive at the same conclusion for different reasons. Hence I have attached a separate note elaborating my reasons for arriving at the final conclusion.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Munib Akhtar, J

SYED MANSOOR ALI SHAH, J.---

7. I have had the privilege of reading the judgment authored by my learned brother, Justice Munib Akhtar. While I agree with the conclusion, I arrive at it through a different path of reasoning, which is explained hereunder through this additional note.

8. The question before us is whether SRO No. 574(I)/2005 ("Notification") dated 06.06.2005 issued by the Federal Board of Revenue¹ ("Board") in exercise of its powers under section 181 of the Customs Act 1969 ("Act") is ultra vires the proviso to section 223 of the Act. In other words, can the Notification control or regulate the exercise of quasi-judicial power of a customs officer, in spite of the bar contained in the proviso to section 223 of the Act?

9. It is settled that the power exercised by the customs officer under section 181 is quasi-judicial in nature as is evident from the reading of sections 179-181 of the Act and is also affirmed by a five member Bench of this Court in *M.A. Rahman v. Federation* (1988 SCMR 691). The power is quasi-judicial if it authorizes a customs officer (not a judicial officer) to settle a dispute relating to the rights and liabilities of a person in respect of ownership of goods after ascertaining certain facts on the basis of relevant material/evidence, thus entailing civil consequences for that person.² Likewise, an order passed by the customs officer, in exercise of his discretion under section 181 of the Act, giving or not giving the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as he thinks fit, being ancillary to his power of confiscating the goods and involving the exercise of discretion, is quasi-judicial and not administrative or executive in nature.³

10. Coming to the question debated before us i.e., whether the Notification issued by the Board under the powers conferred on it by the provisos to section 181 offends the proviso to section 223 of the Act, which provides that "no such orders, instructions or directions shall be given [by the Board] so as to interfere with the discretion of the appropriate officer of customs in the exercise of their quasi-judicial functions." The orders made by the Board under the provisos to section 181 and the orders, instructions or directions issued by it under section 223 of the Act are two different species: one passes for delegated legislative power while the other is merely recognition of administrative supervisory power of the Board. We know that it is common for the Legislature to confer by an Act on the executive bodies the power to make rules having the force of law - delegation of power to legislate. Thus, the phrase "delegated legislation" covers exercise of that power by an executive body to legislate. This delegation brings under its sway the determination of the rights of the third parties. On the other hand, where the Legislature establishes a hierarchy of officers to execute the provisions of an Act, it usually confers the power to the supervisory and controlling officers to make such orders and directions to the

subordinate officers as are considered necessary for efficient performance of their duties under the Act.⁴ This conferment or recognition of power is limited and only extends to the officers mentioned under the Act. This power is internal, supervisory and administrative in nature. This is evident from the scope of section 223, which simply provides that officers of customs and other persons employed in the execution of the Act are to observe and follow the orders, instructions and directions of the Board. Under the said provision, the Act is recognizing or acknowledging that the Board has the power to issue orders, instructions and directions to all the officers of customs and that any such orders, instructions and directions issued by the Board shall be binding on the officers of customs in execution of the Act. This statutory acknowledgement of the power of the Board to issue administrative orders, instructions and directions to all the customs officers has no bearing on the rights of the third parties. Section 181 of the Act, on the other hand, provides for giving an option to the owner of goods to pay fine in lieu of confiscation of goods, and its provisos authorize the Board to specify, by an order, any goods or class of goods where such option shall not be given and also to fix the amount of fine, which in lieu of confiscation shall be imposed on any goods or class of goods. The delegation of power under the provisos to the Board, thus, passes for delegated legislation and affects third party rights. The two species of power, therefore, do not conflate or converge.

11. The Legislature has by enacting the first proviso to section 181 has delegated the power to the Board for creating exception to the application of the main provisions of the Section to certain goods or class of goods, and by the second proviso delegated such power for limiting the discretion of the adjudicating customs officer in fixing the amount of fine which he, in lieu of confiscation, can impose on certain goods or class of goods under the main provisions of the Section. An order made by the Board under the powers conferred on it by any one of the two provisos to section 181 is, thus, delegated legislation. Once the Board validly makes such order, it partakes the colour and authority of a statutory instrument. It is read as part of section 181 and has the force of law accordingly. Such order having the force of law is, therefore, binding on the adjudicating customs officer while performing his quasi-judicial function under section 181. I endorse similar views expressed by the Division Benches of the Lahore and Peshawar High Courts in *Collector of Customs v. Muhammad Tasleem* (2002 MLD 296) and *Collector Customs v. Salman Khan* (2015 PTD 1733). This Court also has read the SRO No. 574 with section 181 and decided the cases accordingly in *Collector of Customs v. Wali Khan* (2017 SCMR 585), *Maqbool Ahmed v. Customs Appellate Tribunal* (2009 SCMR) 226, *Said Gul v. Collectorate of Customs* (C.Ps. Nos. 95-Q and 96-Q of 2008, decided on 30.04.2009) and a similar previous SRO No. 1374 dated 17.12.1998 in *Musa Gul v. Collector Customs* (C.P. No. 196-P of 2003 decided on 03.11.2003).

12. The Board being the apex Authority in the hierarchy of Federal Tax Administration, is to supervise, control and guide all the officers performing their functions of tax collection under different tax laws. It has, therefore, been recognized or expressly empowered under almost all the tax laws by enacting the provisions similar to that of Section 223 to issue such orders, instructions and directions to them from time to time as it considers necessary for the proper application and implementation of the various provisions of the relevant tax law, and the officers and other persons employed in the execution of that law are bound to observe and follow them.

13. The orders, instructions and directions issued by the Board under section 223 to the Custom Officers are, therefore, administrative/ executive in character⁵ as only the customs officers and other persons employed in the execution of the Act are bound to observe and follow them. Such orders, instructions and directions are not binding on the assesseees or other persons whose matters are to be dealt with under the Act. As a corollary, they are also not binding on customs officers who exercise quasi-judicial functions as well as on the appellate authority/ tribunal and the courts. They being not applicable to and enforceable against all concerned, thus, lack generality - an essential characteristic of a legislative instrument. They are also limited to the administrative matters dealt with by the customs officers in the execution of the Act, and can be issued by the Board only in respect of matters falling within the range of the administrative functions of the customs officers as held by this Court in *Messrs Central Insurance Co. v. CBR* (1993 SCMR 1232)⁶ and *Collector of Customs v. Askari Cement* (2020 SCMR 649). The provisos to Section 181 and the SROs issued thereunder, thus, do not conflict in any manner with the proviso to section 223 of the Act as the latter relates to the administrative orders, instructions or directions of the Board, and not to the legislative order of the Board.

Sd/-

Syed Mansoor Ali Shah, J

MWA/T-4/SC Appeals dismissed.