

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Mr. Justice Md. Abu Zafor Siddique

CIVIL APPEAL NO.115 OF 2009

(From the judgment and order dated 06.05.2007 passed by the High Court Division in Writ Petition No.4509 of 2003).

National Board of Revenue, represented :Appellants.
by its Chairman, Segunbagicha, Dhaka
and others.

-Versus-

Basic Dredging Company Limited, :Respondents.
represented by its Managing director
Mr. Md. Saiful Islam, 18 Kamal Ataturk
Avenue, Banani, Dhaka and another.

For the Appellants. : Mr. Sk. Md. Morshed, Additional
Attorney General instructed by Mr.
Haridas Paul, Advocate-on-Record.

For the Respondents. : Mr. Md. Zafarullah Chowdhury, Senior
Advocate instructed by Mr. Md.
Zahirul Islam, Advocate-on-Record.

Date of Hearing. : The 05th April, 2023.

Date of Judgment. : The 05th April, 2023.

J U D G M E N T

Borhanuddin,J: This civil appeal by leave is directed
against the judgment and order dated 06.05.2007 passed by
the High Court Division in Writ Petition No.4509 of 2003
making the Rule absolute.

Brief facts are that the respondent herein as petitioner preferred the writ petition challenging adjudicating order dated 07.07.2002 passed by the writ-respondent no.3 The Commissioner of Customs, Mongla Customs House, Khulna imposing a penalty of Tk.43,38,97,851.00 upon the writ-petitioner under Clause 9(i) of Section 156(1) of the Customs Act, 1969 for violating Section 16 of the Customs Act and Section 3(1) of the Imports and Exports (Control) Act, 1950 and order dated 25.05.2003 passed by the writ-respondent no.2 Customs, Excise and VAT Appellate Tribunal, Dhaka directing the writ-petitioner to deposit 5% in cash and 5% in bank guarantee of the penalty amount under Section 194 of the Customs Act, contending interalia, that the writ-petitioner is a private limited company incorporated under the Companies Act, 1913 and engaged in engineering and dredging works; Pursuant to an international tender, the writ-petitioner alongwith P.T. Rukindo, (known as the P.T. Rukindo-Basic Dredging Partnership), an Indonesian Company entered into an agreement on 05.06.2000 with the Mongla Port Authority under the auspices of the Ministry

of Shipping, Government of Bangladesh to perform maintenance dredging in the Pasur Channel of Mongla Port; In order to facilitate the said dredging work P.T. Rukindo supplied one survey boat, one communication boat and a hopper suction dredger namely, TSHD, ARU II to its Bangladeshi partner i.e. writ-petitioner which were brought into Bangladesh from Indonesia by sea; The total declared value of the three vessels was US\$ 8,464,647.88 equivalent to Bangladeshi Tk.43,38,97,850.30 and value of Customs Duty, VAT and other taxes provisionally assessed as per bill of entry was BDT Tk.13,92,75,825.13 and duly cleared upon provisional assessment by the Customs authority; In terms of SRO No.542 dated 10.12.1984 issued by the respondent no.1 National Board of Revenue the vessels were temporarily imported in Bangladesh with a view to subsequent re-exportation upon completion of the said dredging project and said vessels would not be used for any other purpose or be transferred to any other person/party, otherwise the Customs authority would be legally entitled to take steps under the relevant law; Aforementioned vessels were arrived in Bangladesh on

21.08.2000 and duly cleared upon provisional assessment on 24.08.2000 without realizing any Customs duty and Tax; In course of dredging, the hopper suction dredger TSHD ARU II broken down repeatedly and had to be taken to Chattogram Dry Dock for repair since there was no such facility in Mongla Port; On last occasion the said dredger left for Chattogram Dry Dock in order to repair but did not return back and could not found anywhere in Bangladesh; Writ-respondent no.3 issued show cause notice upon the petitioner; Petitioner's shipping agent informed the Mongla Port Authority in writing that the vessel deceptively sailed to Indonesia instead of Chattogram and steps were being taken to bring it back to Bangladesh but ultimately the dredger did not return; Thereafter the writ-petitioner was called upon to show cause within 15 days of issuance of the notice as to why punitive action should not be taken under Section 156(1)(9) of the Customs Act, 1969 and Section 3(3) of the Imports and Exports (Control) Act, 1950 for violating the conditions on which approval for temporary importation without payment of Customs duty and VAT was granted and

consequently the writ-petitioner through demand notice dated 09.06.2002 was asked to deposit Tk.13,92,75,895.13 as Customs duty, VAT and other Taxes within 15 days of issuance of the said notice and the writ-petitioner replied the same; Upon hearing the parties and perusing the papers/documents, the respondent no.3 vide adjudication order no.08/2002 dated 07.07.2002 imposed a penalty of Tk.43,38,97,851.00 upon the writ-petitioner and thereby cancelled the demand of Tk.13,92,75,825.13 issued earlier; Against said order, the writ-petitioner filed memo of appeal under Section 196A of the Customs Act, 1969 before respondent no.2, Appellate Tribunal and the Tribunal by an order dated 11.09.2002 asked the writ-petitioner to deposit 50% in cash and 50% in bank guarantee of the statutory deposit under Section 194 of the Customs Act, 1969; Considering an application by the petitioner, the Appellate Tribunal vide order dated 25.05.2003 asked the petitioner to deposit 5% in cash through treasury chalan and 5% in bank guarantee of the abovementioned penalty amount of Tk.43,38,97,851.00 within 24.06.2003 and challenging the order of the

Tribunal, the writ-petitioner invoked the writ jurisdiction under Article 102 of the Constitution.

Upon hearing the petitioner, a Division Bench of the High Court Division issued a Rule Nisi upon the respondents to show cause.

Writ-respondent no.1 the National Board of Revenue, contested the Rule by filing an affidavit-in-opposition, contending inter alia, that the dredger and other identical equipments which were temporarily imported from Indonesia for performing "*Maintenance dredging in the Pasur River (Channel) of Mongla Port*" with a condition to subsequent re-export and the goods were released upon provisional assessment under the Customs Act, 1969; Writ-respondent no.1 communicated its decision to release the dredger and other equipments without payment of any Customs duty and VAT for use of them in the aforementioned dredging project; But the dredger deceptively sailed to Jakarta, Indonesia instead of Chattogram for repairing in violation of Sections 16 and 21 of the Customs Act, 1969 and as such the adjudicating order dated 07.07.2002 passed by the respondent no.3 is

lawful and within the purview of the relevant law and the writ petition has been filed with a malafide intention to evade duty and taxes; The Rule is liable to be discharged.

Upon hearing the parties, a Division Bench of the High Court Division made the Rule absolute vide judgment and order dated 06.05.2007.

Feeling aggrieved, the writ-respondent nos.01/03-05 as petitioners preferred Civil Petition for Leave to Appeal No.1255 of 2007 before this Division and obtained leave granting order on 12.11.2008.

Consequently, this civil appeal arose.

Mr. Sk. Md. Morshed, learned Additional Attorney General appearing for the appellants at the very outset raised the question of maintainability of the writ petition submitting that the writ petition was not maintainable since the writ-petitioner did not avail the statutory forum of appeal as provided under Section 196A of the Customs Act and that being the alternative

efficacious remedy no relief can be granted under Article 102 of the Constitution.

On the other hand Mr. Md. Zafarullah Chowdhury, learned Advocate appearing for the respondents supports the impugned judgment and order dated 06.05.2007 passed by the High Court Division. He submits that the High Court Division discussed the question of maintainability elaborately in disposing of the writ petition.

Heard the learned Advocates for the respective parties. Perused the papers/documents contained in the paper book.

Since the question of maintainability of the writ petition has been raised by the writ-respondents i.e. by the appellants, it is necessary to first discuss whether the writ petition was maintainable or not inasmuch as after discussing all the issues on merit if it is found that the writ petition was not maintainable, then discussing all the issues on merit will be sheer wastage of time.

Our apex court in the case of *TeaHung Packaging (BD) Limited and others Vs. Bangladesh and others*, reported in 18 BLC (AD) 144, held:

"When the question of maintainability of a writ petition is raised by the contesting respondents, it is the first and foremost duty of the learned judge to decide the said question first. If the writ petitions are found not maintainable, then it will be sheer wastage of court's valuable time to consider and discuss the merit of the case."

It appears that the respondent no.1 herein as writ-petitioner challenged the adjudication order no.08/2002 dated 07.07.2002 passed by the writ-respondent no.3 imposing a penalty of Tk.43,38,97,851.00 and also challenged the order dated 25.05.32003 passed by the writ-respondent no.2 directing the writ-petitioner to deposit 5% in cash and 5% in bank guarantee of the penalty amount under Section 194 of the Customs Act, 1969.

It appears that the adjudication order was passed by the Commissioner of Customs, Mongla Customs House, Khulna. Section 196A of the Customs Act, 1969 provides forum of appeal against any decision or order passed by

the respective Customs authority. Accordingly, the writ-petitioner preferred appeal before the Tribunal against the adjudication order passed by the Commissioner of Customs.

Section 194 of the Customs Act provides statutory deposit as a pre-condition for filing appeal providing discretion to the appellate authority in the following manner:

194. Deposit, pending appeal, of duty demanded or penalty levied-(1) Any person desirous of appealing under Section 193 [or Section 196A] against decision or order relating to any duty demanded in respect of goods which have ceased to be under the control of customs authorities or to any penalty levied under this Act shall, at the time of filing his appeal or if he is so permitted by the appellate authority at any later stage before the consideration of the appeal, deposit with the appropriate officer 50% of the duty demanded or 50% of the penalty imposed or both.

Provided that such person may, instead of depositing as aforesaid the entire amount of the penalty, deposit only fifty percent thereof and furnish a guarantee from a scheduled bank for the due payment of the balance.

Provided further that where, in any particular case, the appellate authority is of the opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit to impose.

(2) If, upon an appeal, it is decided that the whole or any portion of the aforesaid duty or penalty was not leviable, the appropriate officer shall return to the appellant such amount or portion as the case may be.

Admittedly, in the instant case the writ-petitioner preferred appeal before the Customs, Excise and VAT Appellate Tribunal under Section 196A of the Customs Act, 1969 against the adjudication order dated 07.07.2002 passed by the writ-respondent no.3 the Commissioner of Customs, Mongla Customs House, Khulna. The Tribunal directed the appellant to deposit 5% in cash and 5% in bank guarantee of the demanded amount under Section 194 of the Customs Act. But the writ-petitioner without complying the order passed by the Tribunal invoked the jurisdiction under Article 102 of the Constitution challenging the order passed by the Tribunal as well as

the adjudication order passed by the Commissioner of Customs.

By now it is settled that when there is a statutory provision to avail the forum of an appeal against an adjudication order passed by the concern Customs Official then the judicial review under Article 102(2) of the Constitution bypassing the appellate forum created under the law is not maintainable.

Article 102 of the Constitution provides as under:

"102.(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

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(emphasis supplied)

It is apparent from Article 102(2) of the Constitution that the High Court Division may give directions or orders under Article 102(1) of the

Constitution where there is no other equally efficacious remedy provided by law.

Our Apex Court in the case of *TaeHung Packaging (BD) Limited and others vs. Bangladesh and others*, reported in 18 BLC (AD) (2013) 144, held:

"The consistent views of this Division are that if any alternative remedy is available, the judicial review by the High Court Division in writ jurisdiction is not available with the exception that where the vires of a statutory provision is challenged or where the alternative remedy is not efficacious exercise of such power may be justified."

It is also held:

"In exercising the power of judicial review the High Court Division does not assume the function of an appellate authority."

The Appellate Tribunal as the last court of facts can go through the facts and relevant laws under Section 196C(7) of Customs Act which is as follows:

196C(7) *The Appellate Tribunal shall, for the purposes of discharging its functions, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters, namely-*

- (a) *discovery and inspection;*
- (b) *enforcing the attendance of any person and examining him on oath;*
- (c) *compelling the production of books of account and other documents; and*
- (d) *issuing commissions.*

It is pertinent to mention here that Clause (2) of Article 102 of our Constitution empowers the High Court Division to interfere with any proceeding if satisfied that there is '*no other equally efficacious remedy is provided by law.*'

From the various decisions of this Division and the reasons stated above, we are of the view that where there is a statutory appellate forum under Section 196A of the Customs Act the aggrieved person must exhaust that forum and without exhausting that statutory forum an application under Article 102 of the Constitution is not maintainable inasmuch as the statutory appellate forum under Section 196A of the Customs Act is competent to address the question of both fact and law. As such we find substance in the submission made by the learned Additional Attorney General. Since, we already held that the writ petition is not maintainable as such refrained from going into merit of the case.

However, since the writ-petitioner pursues its grievance in a wrong forum as such we are inclined to give the writ-petitioner an opportunity to exhaust the forum prescribed by the statute.

Accordingly, this civil appeal is disposed of.

The impugned judgment and order dated 06.05.2007 passed by the High Court Division is hereby set-aside.

The respondent is directed to deposit 5% in cash and 5% in bank guarantee within two months from the date of receipt a copy of this judgment and order otherwise the Customs authority can realize the amount in accordance with law.

The appellate Tribunal is directed to dispose of the appeal on merit expeditiously.

However, no order as to costs.

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