

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)**

In the matter of:

Applications under Article 102(2)(a)(i) and
(ii) of the Constitution of the People's
Republic of Bangladesh

WRIT PETITION No. 9656 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9567 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9568 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9569 OF 2011

Mohammad Solaiman
Proprietor of M/s. Sonali Traders
60/10, Jafar Market, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9608 OF 2011

Mohammad Solaiman
Proprietor of M/s. Sonali Traders
60/10, Jafar Market, Khatungonj

Chittagong
... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others
... Respondents

With

WRIT PETITION No. 9653 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong
... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others
... Respondents

With

WRIT PETITION No. 9654 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong
... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others
... Respondents

With
WRIT PETITION No. 9655 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With
WRIT PETITION No. 9657 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With
WRIT PETITION No. 9659 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9660 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With

WRIT PETITION No. 9661 OF 2011

Md. Mujahid Zamil
Proprietor of M/s. East West Trading
34, Chandu Miah Lane, Khatungonj
Chittagong

... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others

... Respondents

With
WRIT PETITION No. 9662 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong
... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others
... Respondents

With
WRIT PETITION No. 9663 OF 2011

Mohammad Musa
Proprietor of M/S. Musa & Sons
322, New Chaktai,
Chittagong
... Petitioner

Versus

Commissioner of Customs
Customs House (Import)
Chittagong and others
... Respondents

With
WRIT PETITION No. 9664 OF 2011

Mohammad Solaiman
Proprietor of M/s. Sonali Traders
60/10, Jafar Market, Khatungonj
Chittagong
... Petitioner

Versus

Commissioner of Customs
 Customs House (Import)
 Chittagong and others

... Respondents

With

WRIT PETITION No. 9665 OF 2011

Md. Mujahid Zamil
 Proprietor of M/s. East West Trading
 34, Chandu Miah Lane, Khatungonj
 Chittagong

... Petitioner

Versus

Commissioner of Customs
 Customs House (Import)
 Chittagong and others

... Respondents

Mr. A. F. Hasan Arif with
 Mrs. Fawzia Karim Firoze
 Mr. Modersher Khan
 Mr. A. H. M. Ziauddin

... For the petitioners

Mr. S. M. Maniruzzaman, DAG with
 Mr. Titus Hillol Rema, AAG,
 Mrs. Salma Rahman, AAG

... For respondent No. 1

Heard on the 20th and 23rd April

And

Judgment on the 29th April, 2015

Present:

Ms. Justice Zinat Ara

And

Mr. Justice J. N. Deb Choudhury

Zinat Ara, J:

Similar facts and identical issues are involved in the above mentioned Writ Petitions. Moreover, the Hon'ble Chief Justice of Bangladesh by order dated 15.02.2015 sent Writ Petition No. 9656 of 2011 for hearing by this Bench along with the other writ petitions. So, these writ petitions have been heard together and are being disposed of by this common judgment.

In the above mentioned writ petitions, the petitioners have challenged the legality of making final assessments dated 16.11.2011 of their imported goods (Annexure-F to the respective writ petitions). The petitioners also sought for a direction upon the respondents to make final assessments of their respective imported goods on the basis of Value Information as evident from Annexures-C and D to the respective writ petitions following the provision of rule 5(4) of the শুল্ক মূল্যায়ন (আমদানীকৃত পণ্যের মূল্য নিধারণ) বিধিমায়া,

੨੦੦੦ (hereinafter referred to as the Rules). The petitioners further sought for a direction upon the respondents to return the bank guarantees furnished by the respective petitioners at the time of releasing their respective imported goods (white sugar).

At the outset, it be mentioned that Annexure-F to the respective writ petitions are not final assessments of the imported goods, as claimed by the petitioners, but an order for making assessments. However, respondent No. 1 has not denied the statements made in the writ petitions about the final assessments, rather admits the said statements. So, further discussion is not necessary on it.

It be further mentioned that the record of Writ Petition No. 9658 of 2011 could not be produced by the relevant Writ Section and it is verbally reported by the Writ Section Superintendent that the record is missing. Therefore, the Writ Section has been verbally directed to take necessary steps for reconstruction of the record and the same is under process. In this circumstance, though the Hon'ble Chief Justice passed an order for hearing of the above writ petitions as well as Writ Petition No. 9658 of 2011, we were unable to hear Writ Petition No. 9658 of 2011.

Facts of the writ petitions are more or less similar except the letters of credit (the L/C) numbers, the quantities of imported white sugar, countries of origin, invoice value, assessed value, etc. Therefore, to avoid unnecessary repetition, the facts of the cases are summarized as under:-

The petitioners are carrying on import businesses in their respective proprietary firms under various names and styles as mentioned in the respective writ petitions. The petitioners are registered as importers with the Office of the Chief Controller of Imports and Exports and engaged in the business of import of white sugar from abroad. The petitioners imported various quantities of white sugar from Brazil and Thailand by opening L/Cs on various dates. After arrival of the said goods, the petitioners submitted bills of entry on various dates with the office of respondent No. 1, the Commissioner of Customs, Customs House (Import), Chittagong (hereinafter stated as the Commissioner) for release of the goods for the purpose of home consumption. The invoice values of the white sugar were US\$ of various amounts, but the Customs Authority without accepting the

invoice values assessed the goods at higher rates per metric ton arbitrarily. Thereafter, the petitioners filed Writ Petitions No. 3152 of 2005, 5388 of 2004, 2850 of 2005, 4248 of 2004, 3987 of 2005, 5553 of 2005, 5554 of 2005, 7723 of 2005, 4722 of 2005, 4138 of 2005, 3920 of 2005, 3146 of 2005, 3922 of 2005, 5401 of 2004, 6656 of 2005 and 3783 of 2005 before the High Court Division. Whereupon, Rules were issued upon the respondents with ad-interim orders directing the respondents to release the goods on payment of duties, taxes and other charges on the basis of invoice values in cash and on furnishing bank guarantees for the difference of duties and taxes between the invoice values and the values assessed by the Customs Authority. The respective petitioners released their goods after payment of duties and taxes on the basis of invoice values in cash and by furnishing bank guarantees for the amount of difference between the invoice values and the values demanded by the Customs Authority. Eventually, the High Court Division, upon hearing of the aforesaid writ petitions, by judgment dated 17.04.2008 passed in Writ

Petition No. 2850 of 2005, judgment dated 11.03.2008 passed in Writ Petition No. 4248 of 2004, judgment dated 11.03.2008 passed in Writ Petitions No. 3152 of 2005 and 5388 of 2005, judgment dated 23.03.2008 passed in Writ Petitions No. 3987 of 2005, 5554 of 2005, 5553 of 2005, 4723 of 2005, 4722 of 2005 and 4138 of 2005 and judgment dated 12.03.2008 passed in Writ Petitions No. 3920 of 2005, 3146 of 2005, 3922 of 2005, 5401 of 2004, 6656 of 2004 and 3783 of 2005 disposed of the Rules issued in the above writ petitions with similar directions to the concern customs authority to finally assess the imported white sugar to duties in accordance with the Customs Act, 1969 and the Rules.

Thereupon, some of the petitioners filed Civil Petitions for Leave to Appeals No. 1092 to 1103 of 2008 before the Appellate Division and the said leave petitions were dismissed by common order dated 07.04.2009.

Thereafter, the petitioners filed applications before the Commissioner to release the bank guarantees after

making final assessments. Eventually, the Commissioner opened various Nathies for final assessments purpose. Then respondent No. 2, Joint Commissioner of Customs on 28.07.2011, in order to make final assessments of the petitioners' consignments requested the Commissioner to form a committee with higher officials. The Commissioner then formed a committee comprising of respondents No. 2 to 6. Thereafter, the Commissioner wrote letter to respondent No. 7 to supply information in respect of imported white sugar in order to make final assessments in the light of the judgments passed by the High Court Division. Whereupon, respondent No. 7 wrote a letter to the Commissioner to supply materials in respect of imported goods, namely, white sugar. Thereupon, the Commissioner wrote a letter to respondent No. 7 annexing all information and data in respect of imported white sugar. Respondent No. 7 then submitted value prepared on the basis of data base to the Commissioner in respect of the goods imported from France, Brazil and Thailand. From the information supplied by respondent No. 7, it is evident that the lowest value of

the imported goods of Brazil origin is US\$ 178 per metric ton. Subsequently, respondent No. 7 submitted another value information prepared on data base to the office of the Commissioner. From the said information, it is evident that the lowest price of imported goods of Guatemala, Colombia and India origin were US\$ 184.97, 184.65 and 194.95 per metric ton respectively. The Commissioner did not make final assessments and was delaying the matters. So, at the instance of the petitioners, the learned Advocates issued contempt notices upon the Commissioner and after receiving the contempt notices, the Commissioner asked the petitioners to supply the documents in support of their respective values. The petitioners, in reply, informed the Commissioner that they had already submitted documents at the time of releasing of the goods in support of their valuations and, as such, they are unable to submit any additional valuation informations. Eventually, final assessments were made by the Customs Authority.

The countries of origin of the imported sugar, the bills of entry dates, invoice values, assessed values, etc. of respective writ petitions are described in the following table:-

Table

Sl No	Writ Petitions No. with previous writ petitions No.	Names of the petitioners	Country of Origin	Bills of Entry dated	Invoice Value (per metric ton)	Assessed Value (per metric ton)	Final Assessed value (per metric ton)
1.	9656 of 2011 (5553/2004)	Md. Mujahid Zamil, son of Md. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	30.07.2005	US\$188	US\$ 275	US\$ 224
2.	9567 of 2011 (5401/2004)	Md. Musa, Proprietor of M/s. Musa & Sons, of 322 , New Chaktai, Chittagong	Thailand	07.09.2004	US\$195	US\$224	US\$ 224
3.	9568 of 2011 (2850/2005)	Md. Mujahid Zamil, Proprietor of M/s. East West Trading, of Chadu Miah Lane, Khatungonj"	Brazil	17.04.2005	US\$188.5	US\$ 216	US\$ 216
4.	9569 of 2011 (3152/2005)	Md. Solaiman, Proprietor of M/s. Sonali Traders, 60/10, Jafar Market, Khatungonj Chittagong	Thailand	07.05.2005	US\$189	US\$ 303	US\$ 224
5.	9608 of 2011 (4248/2004)	Md. Solaiman, Proprietor of M/s. Sonali Traders, 60/10, Jafar Market, Khatungonj Chittagong	Thailand	28.07.2004	US\$195	US\$ 224	US\$ 224
6.	9653 of 2011 (3146/2005)	Md. Musa, son of late Rashid Ahmed, Proprietor of M/s. Musa & Sons, of 322 , New Chaktai, Chittagong	Thailand	07.05.2005	US\$189	US\$ 303	US\$ 224
7.	9654 of 2011 (3920/2005)	Md. Musa, son of late Rashid Ahmed, Proprietor of M/s. Musa & Sons, of 322 , New Chaktai, Chittagong	Brazil	08.06.2005	US\$ 189	US\$ 275	US\$ 224
8.	9655 of 2011 (6656/2004)	Md. Musa, son of late Rashid Ahmed, Proprietor of M/s. Musa & Sons, of 322 , New Chaktai, Chittagong	Brazil	01.12.2004 02.12.2004	US\$ 190	US\$ 216	US\$ 224
9.	9657 of 2011 (5554/2005)	Md. Mujahid Zamil, son of Md. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	30.07.2005	US\$ 188	US\$ 275	US\$ 224

10.	9659 of 2011 (4138/2005)	Md. Mujahid Zamil, son of Md. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	12.06.2005	US\$ 190	US\$ 275	US\$ 224
11.	9660 of 2011 (3987/2005)	Md. Mujahid Zamil, son of Me. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	08.06.2005	US\$ 179	US\$ 275	US\$ 224
12.	9661 of 2011 (4722/2005)	Md. Mujahid Zamil, son of Md. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	02.07.2005	US\$ 188	US\$ 275	US\$ 224
13.	9662 of 2011 (3922/2005)	Md. Musa, son of late Rashid Ahmed, Proprietor of M/s. Musa & Sons, of 322, New Chaktai, Chittagong	Brazil	08.06.2005	US\$ 178	US\$ 275	US\$ 224
14.	9663 of 2011 (3783/2005)	Md. Musa, son of late Rashid Ahmed, Proprietor of M/s. Musa & Sons, of 322, New Chaktai, Chittagong	Brazil	02.04.2005	US\$ 178	US\$ 275	US\$ 224
15.	9664 of 2011 (5388/2004)	Md. Solaiman son of Ahmed Hossain, Proprietor of M/s. Sonali Traders, 60/10, Jafar Market, Khatunagonj, Chittagong	Thailand	05.09.2004	US\$ 195	US\$ 224	US\$ 224
16.	9665 of 2011 (4723/2005)	Md. Mujahid Zamil, son of Md. Mahbub Ali, Proprietor of M/s. East West Trading, of 34, Chadu Miah Lane, Khatungonj, Chittagong	Brazil	02.07.2005	US\$188	US\$ 275	US\$ 224

The petitioners allege that the final assessments were made without issuing notices to the respective petitioners violating the principle of natural justice and the assessments were also made in violation of the Customs Act, 1969 (shortly, the Act) as well as the Rules and, as such, unlawful.

In the backdrop of the aforesaid facts and circumstances, the above mentioned writ petitions have been filed by the

respective petitioners and the Rules were issued with ad-interim orders of stay of the orders for encashing the bank guarantees.

Respondent No. 1 contested the writ petitions by filing an affidavit-in-opposition in Writ Petition No. 9656 of 2011 denying/controverting the assertions made in the writ petitions and supporting the final assessments.

The sum and substance of the case of respondent No. 1 i.e. the Commissioner are stated hereinafter:-

After submissions of bills of entry, assessments were initially made relating to the imported white sugar. The petitioners not being satisfied with the assessments filed the above mentioned writ petitions and as per direction of the High Court Division, the goods were released pursuant to interim orders passed in Writ Petition No. 5553 of 2005 and others. The petitioners already got delivery of their respective goods upon provisional assessments on payment of the customs duties, taxes, etc. in cash according to the invoice values and on furnishing bank guarantees for the difference between the invoice values and the assessed values. The Rules were subsequently heard by a Division

Bench and after hearing both parties, the Rules were disposed of with direction to finally assess white sugar in accordance with the provisions of the Act and the Rules and the petitioners were also directed to produce the papers and documents, if any, in support of the invoice values. The petitioners then preferred Civil Petitions for Leave to Appeals being No. 1092 to 1103 of 2008 before the Appellate Division. Eventually, the leave petitions were dismissed on 07.04.2009 by a common judgment with some observations to finally assess the imported white sugar. Respondent No. 1 as per observations of the High Court Division made in the judgment dated 23.03.2008 determined the values of white sugar following the Rules and final assessments were made properly and, as such, the application to release the bank guarantees after making final assessments cannot be entertained. Respondent No. 7 categorically admitted that he has not collected the value informations of identical and/or similar goods from internet or other sources, because his office had no subscription for collecting the same through internet and, as such, the value

contained in the letter of respondent No. 7 could not be considered as proper value for final assessments. As per order of the High Court Division, the petitioners were obliged to produce documents in favour of their invoice values, if any, but the petitioners did not produce any document in support of the invoice values. Notices were not required before making final assessments inasmuch as the final assessments were made as per direction of the High Court Division and the respondents as per direction of the High Court Division wrote letters to the respective petitioners to produce the documents in favour of their invoice values and therefore, the petitioners got opportunity to produce documents, if there be any, before final assessments. The Customs Authority determined the value of the goods in compliance with all legal formalities of the Rules by collecting the relevant data base and the value information obtained from internet and other sources from Brazil, Thailand, India, Guatemala and Columbia and the Commissioner of Customs and the duly constituted committee in comparison with the values of white sugar

assessed the value of the goods in accordance with law. The final assessments were made by the Customs Authority as per rule 5(4) of the Rules. The petitioners had an equally efficacious alternative remedy by way appeals under section 193 of the read with rule 13 of the Rules. Therefore, without exhausting the alternative remedy available to the petitioners, the writ petitions are not maintainable. Thus, the Rules are liable to be discharged.

Respondent No. 2 filed an affidavit-in-compliance stating that it is apparent from the order issued by the National Board of Revenue (shortly, NBR) vide Nathi No. 5(3) **শুক্র** **মূল্যঃ/শুমূদঃ/২০০১/৯৪১** dated 13.07.2002 (the Order, in brief) that respondent No. 7, the Commissioner of Customs, Valuation and Internal Audit Commissionerate has jurisdiction as per section 3 of the Customs Act to supply information in respect of customs valuation purposes; that as per clause (ক) of the Order of NBR, the Commissioner of Customs, Valuation and Internal Audit Commissionerate has to perform his function as co-ordinator in respect of Customs Valuation and as per clause (2) of the order he has

to assist the Board and/or Customs Authority to be updated in determining the value by collecting different publications from WTO, WCO, etc., preserve it and supply value information, if necessary; that respondents No. 2-6 have the exclusive authority to determine the correct value of the goods and respondent No. 7 has to play the role as auxiliary and/or as co-ordinator under clause (3) of the Order which provides,-- “for Valuation Data Base (VDB) তৈরী, হালনাগাদকরণ ও মাঠ পযায়ে বিতরণ এ লখে বিষয়ে প্রকাশিত আন্তর্জাতিক জানাল, বুলেটিন, সংবাদপত্র এবং ইন্টারনেট থেকে মূল্য তথ্য সংগ্রহ এবং সংগৃহীত তথ্য সমন্বয় সম্পাদন.” But from Annexures-C and D as supplied by respondent No. 7, it was found that data base was prepared on the basis of disputed invoices supplied by the petitioners and in column No. 4 (অন্যান্য মূল্য বা অন্য সূত্র) it was categorically written that “পাওয়া যায় নাই” and respondent No. 7 has shown the reason that due to non-availability of data for want of subscription, minimum value of assessed goods from internet and other sources could not be found and, as such, he has supplied a fruitless data base (recorded on

the basis of invoice) which does not reflect the proper transaction value as well as the true picture of real transaction value of international market price; that it is crystal clear that respondent No. 7 has not discharged his function and duty properly and he has supplied the data base most whimsically; that for this reason customs authority lawfully by ignoring the data, as supplied by respondent No. 7 (without discharging his function properly), determined the values by collecting the values of identical goods from internet and other sources properly by a duly constituted assessment committee having lawful jurisdiction and, as such, the values as determined by the Customs Authority through final assessments cannot be the subject matter of writ jurisdiction. Therefore, the Rules are liable to be discharged.

Respondent No. 7 submitted an affidavit-in-reply stating that he was appointed as Commissioner of Customs, Valuation and Internal Audit Commissionerate as per section 3(d) of the Customs Act, 1969; that he performed his duty as per the direction of NBR as contained in Nathi No. (3) **শুক্র** **মূল্যঃ/শুমূদঃ/২০০১/৯৪১** dated 13.07.2002; that different type of publications and journals regarding valuation of Imported

Articles are sent to NBR and NBR, if thinks it proper, sends the journals and publications to his office for preservation and upgrading the valuation data base; that the Customs and Internal Audit Commissionerate works to help the customs houses to determine proper and actual value of the imported commodities for making assessment to duties; that in each of the customs houses, there is existing assessment committee and if there is any objection about assessments of imported goods, then the assessment committee solves it; that in the present cases, respondent No. 7 had tried to collect value information from internet, but did not get any information regarding price anywhere by different searches of 'sugar price', 'raw sugar price', 'price of sugar from Brazil.' So, his office rightly wrote 'Not available'; that in the present writ petitions, after searching the value of white sugar, his office supplied highest and lowest value to the Chittagong Customs Houses based on 100 bills of entry of sugar imported from Brazil, India, Guatemala and some bills of entry of Thailand; that in the letter dated 25.09.2011 his office gave information of highest and lowest prices.

The petitioners filed an affidavit-in-reply in Writ Petition No. 9656 of 2011 stating that the value of the goods should be determined considering the value supplied by respondent No. 7, vide Annexures-C and D to the writ petitions, following the Rules. Therefore, the final assessments were made by the customs authority without following the Rules on arbitrary basis and therefore, the assessments were unlawful.

Mr. A. F. Hasan Arif, the learned Advocate for the petitioners in all the writ petitions, appearing with learned Advocates Mrs. Fawzia Karim Firoze, Mr. Modersher Khan and Mr. A. H. M. Ziauddin, takes us through the writ petitions, the affidavit-in-opposition filed by respondent No. 1 in Writ Petition No. 9656 of 2011, the affidavit-in-compliance filed by respondent No. 2, the affidavit-in-reply filed by respondent No. 7 against the affidavit-in-opposition filed by respondent No. 1, the affidavit-in-reply filed by the petitioner in Writ Petition No. 9656 of 2011 and the connected materials on record and forwards before us the following arguments:-

- (1) by judgment dated 23.03.2008 passed by the High Court Division in Writ Petitions No. 3152

of 2005, 5388 of 2004, 2850 of 2005, 4248 of 2004, 3987 of 2005, 5553 of 2005, 5554 of 2005, 7723 of 2005, 4722 of 2005, 4138 of 2005, 3920 of 2005, 3146 of 2005, 3922 of 2005, 5401 of 2004, 6656 of 2005 and 3783 of 2005 direction was given to the Customs Authority to finally assess the imported white sugar to duties in accordance with the Customs Act, 1969 and the শুল্ক মূল্যায়ন (আমদানীকৃত পণ্যের মূল্য নিধারণ)

বিধিমালা, ২০০০ on consideration of the papers and documents, if any, that may be produced by the petitioners in support of the invoice values within a period of thirty days of receipt of the order positively;

- (2) the Commissioner was delay dallying the matters relating to final assessments of the petitioners imported white sugar;

- (3) in the circumstances, the petitioners sent notices for contempt to respondent No. 1. Whereupon, respondent No. 1 formed a committee to finally assess the goods;
- (4) the committee directed respondent No. 7 to submit valuation of sugar of various origins. Accordingly, respondent No. 7 submitted the valuation of the imported sugar of various origins by submitting annexures-C and D to the writ petitions;
- (5) respondent No. 1, violating the provisions of rule 5(4) of the Rules, finally assessed the imported sugar at a higher rate, although he ought to have assessed the goods at the minimum value available on the basis of information supplied by respondent No. 7;
- (6) respondent No. 1 having passed the order violating the provisions of rule 5(4) of the Rules, the Rules are liable to be made absolute.

Mr. Arif, however, submits that he does not press the ground relating to non-service of notices upon the petitioners before final assessments inasmuch as final assessments have been made as per order of the High Court Division and letters were issued to the petitioners for submitting documents as per order of the High Court Division by the authority concerned.

Mr. S. M. Maniruzzaman, the learned Deputy Attorney General appearing with Mr. Titus Hillol Rema and Ms. Sultana Rahman, the learned Assistant Attorney Generals, on behalf of respondent No. 1, at the outset, submits that identical facts and questions of law are involved in all the writ petitions. Therefore, the affidavit-in-opposition submitted by respondent No. 1 in Writ Petition No. 9656 of 2011 be treated as affidavit-in-opposition in all the cases. Mr. Maniruzzaman takes us through the affidavit-in-opposition and the materials on record, section 193 of the Customs Act, 1969 and rule 5(4) of the Rules and forwards before us the following arguments:-

- (a) as per direction of the High Court Division in Writ Petition No. 5553 of 2005 and others, to make final assessments of the petitioners'

imported white sugar following the Act and the Rules, respondent No. 1 constituted a committee for finally determining the valuation of the goods;

- (b) the respective petitioners were asked to submit documents following the order of the High Court Division in support of their respective invoice values of white sugar, but the petitioners did not submit any document in support of their respective invoice values;
- (c) the committee, after considering the valuation of imported sugar available from data base and all other available documents finally assessed the goods to duties in accordance with the provisions of the Act and the Rules;
- (d) from the affidavit-in-compliance filed by respondent No. 2, it is evident that the data base supplied by respondent No. 7 was prepared on the basis of disputed invoices supplied by the petitioners and it was categorically written that

“পাওয়া যায় নাই” and respondent No. 7

clearly

stated that due to non-availability of the data base for want of subscriptions, the valuations of the imported goods could not be found and, as such, he supplied a fruitless data base on the basis of invoices which did not reflect the proper transaction value and, as such, there was no scope to consider Annexures-C and D supplied by respondent No. 7;

- (e) in the circumstances, duly constituted assessment committee, having lawful jurisdiction, finally assessed the valuation of the imported sugar following the provisions of the Rules by collecting assessed values of the goods during that time and the value of international market from data base;
- (f) after final assessments of the goods, the petitioners ought to have filed appeals under section 193 of the Act and rule 13 of the Rules;

- (g) the writ petitions have been filed as a cunning device to avoid encashment of the bank guarantees;
- (h) since there is an alternative efficacious remedy in the forum of appeal, the instant writ petitions challenging the final assessment orders are not maintainable and therefore, the Rules are liable to be discharged.

In reply, Mr. A. F. Hasan Arif, the learned Advocate for the petitioners, submits that according to rule 5(4) of the Rules, if different values of identical goods are available, in such cases, final assessments have to be made on the minimum value available to the Customs Authority. He next submits that from Annexures-C and D as supplied by respondent No. 7 it is evident that the minimum values of imported white sugar supplied by him was the lower than the value assessed by the Customs Authority and, as such, the final assessments have been made beyond jurisdiction and therefore, the Rules are liable to be made absolute.

In support of his submissions, Mr. A. F. Hasan Arif has relied on the decisions of the following cases:-

- (i) Salim (Md.) Vs. Assistant Commissioner of Land and Chairman, Debt Settlement Board and others reported in 54 DLR (2002) 72;
- (ii) Angana Ranjan Chakma Vs. Director of Technical Education reported in 31 DLR (1979) 184; and
- (iii) an unreported judgment dated 19.01.2015 passed by this Division in Writ Petition No. 2777 of 2006 (United Sugar Mills Limited and another Vs. Government of the People's Republic of Bangladesh, represented by the Secretary, Internal Resources Division and others).

In reply, Mr. S. M. Maniruzzaman contends that the assessment authority had legal jurisdiction to finally assess the goods and no question has been raised by the petitioners that the persons who assessed the goods finally were not competent/empowered to assess the goods finally under the Rules.

He next contends that for argument sake, even if it is presumed that final assessments were made wrongly by the assessing authority, in such case also, the petitioners' remedy lies before the appellate forum and not in writ jurisdiction.

In support of his arguments, Mr. Maniruzzaman has referred to the following cases:-

- (a) Secretary, Ministry of Finance, Internal Resources Division and others Vs. Sherajul Islam reported in 20 BLC (AD)(2015) 64 and
- (b) an unreported judgment dated 23.07.2014 passed by the High Court Division in Writ Petition No. 4406 of 2012 with Writ Petitions No. 4406 of 2012 and 5789 of 2012 (Khandker Mannan Hossain and others; Khandker Abdul Latif Vs. the Commissioner of Customs, Customs House, Chittagong and others.

We have examined the writ petitions, the affidavit-in-oppositions filed by respondent No. 1, the affidavit-in-compliance filed by respondent No. 2, the affidavit-in-reply filed by respondent No. 7 against the affidavit-in-opposition filed by

respondent No. 1 and the affidavit-in-reply filed by the petitioners. We have also studied the relevant provisions of section 193 of the Act, rule 5(4) of the Rules and the decisions as referred to by the learned Advocate for the petitioners and the learned Deputy Attorney General.

In view of the submissions as advanced by the learned Advocate for the petitioners and the learned Deputy Attorney General, the questions to be determined in these writ petitions are:-

- (i) whether the instant writ petitions are maintainable?
- (ii) whether the impugned final assessments are lawful?

It is an admitted proposition and a matter of record that the petitioners are importers of white sugar from various countries of origin as mentioned hereinbefore in the Table. It is further admitted that the petitioners after import of white sugar from various countries submitted bills of entry of various dates for release of their imported goods i.e. white sugar on the invoice values. Further, that the Customs Authority assessed goods to duties at a higher rate than the invoice values supplied by the

respective petitioners. There is also no dispute that the petitioners then preferred several writ petitions as mentioned hereinbefore and on the basis of ad-interim directions, the imported goods were released on payment of duties, taxes, etc. in cash on the invoice values and on furnishing bank guarantees for the difference between the invoice values and the assessed values.

Though, in course of arguments, it was submitted that by a common judgment dated 23.03.2008 the High Court Division disposed of all those writ petitions, but on scrutiny of the records, it transpire that High Court Division by several judgments of various dates disposed of the earlier writ petitions with some other writ petitions, being, judgment dated 17.04.2008 passed in Writ Petition No. 2850 of 2005, judgment dated 11.03.2008 passed in Writ Petition No. 4248 of 2004, judgment dated 11.03.2008 passed in Writ Petitions No. 3152 of 2005 and 5388 of 2005, judgment dated 23.03.2008 passed in Writ Petitions No. 3987 of 2005, 5554 of 2005, 5553 of 2005, 4723 of 2005, 4722 of 2005 and 4138 of 2005 and judgment dated 12.03.2008 passed in Writ Petitions No. 3920 of 2005, 3146 of 2005, 3922 of 2005, 5401 of 2004, 6656 of 2004, 3783 of 2005.

However, it transpires from the above judgments that in all cases, the High Court Division disposed of the Rules with directions to the concern customs authority to finally assess the imported white sugar to duty in accordance with the Customs Act, 1969 and the Rules on consideration of the papers or documents, if any, that may be produced by the petitioner in support of the invoice value within a period of thirty days of receipt of this order positively and also that the Customs Authority shall be at liberty to encash the bank guarantee(s) deposited for clearance of the goods if the amount that becomes due after such final assessment is not paid in cash within 15 days thereof, in each of the cases.

Admittedly, some of the petitioners then preferred Civil Petitions for Leave to Appeals No. 1092 to 1103 of 2008 before the Appellate Division. The said leave petitions were dismissed by the Appellate Division by judgment dated 23.04.2009 with the following observations:-

“The concerned customs authority is hereby directed to finally assess the imported white sugar with duty in accord, 2000 in the light of observation in Writ Petition No. 6643 of 2004 and on

consideration of the papers or documents, if any, that may be produced by the petitioner in support of the invoice value within a period of thirty days of receipt of this order positively.

Mr. Mahmudul Islam, learned Counsel appearing for the petitioner submits that direction may be given to the Customs Authority for allowing the petitioner a hearing to consider the papers and documents, if any, in support of the invoice value.

In the facts and circumstances of the case, we feel that no such order is necessary to get the papers clarified in support of the invoice value.

Accordingly, the leave petitions are dismissed.”

Thereafter, eventually, the goods were finally assessed by the Customs Authority and then the Customs Authority issued letter dated 16.11.2011 vide Annexure-G to the respective writ petitions to encash the bank guarantees. The petitioners then once again filed the instant writ petitions for assessments of the imported goods on the basis of valuation information Annexures-C and D to the respective writ petitions following the provisions of the Rules and to direct return of the bank guarantees.

In the above background of the cases, let us consider the first question i.e. on maintainability of the writ petitions.

To decide the question, it is necessary to study the relevant provisions of section 193 of the Act and rules 5(4) and 13 of the Rules.

For better understanding, the aforesaid provisions are quoted below:-

“Section 193. Appeals to Commissioner (Appeal)—(1) Any person aggrieved by any decision or order passed under this Act, not being a decision or order passed under section 82 or section 98, by an officer of customs lower in rank than a Commissioner of Customs, may appeal to the Commissioner (Appeal) within three months from the date of communication to him of such decision or order:

Provided that the Commissioner (Appeal) may, if he is satisfied that the appellant was prevented by sufficient causes from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of two months.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf .”

(Bold, emphasis given)

“৫। অভিন্ন পণ্যের (identical goods) বিনিময় মূল্য।-

(৪) এই বিধির অধিন অভিন্ন পণ্যের একাধিক বিনিময় মূল্য পাওয়া গেলে উহাদের মধ্যে সর্বাপেক্ষা কম বিনিময় মূল্যের ভিত্তিতে আমদানিকৃত পণ্যের মূল্য নির্ধারণ করিতে হইবে।”

“১৩। আপীল।- আমদানিকৃত পণ্যের মূল্য নির্ধারণের ক্ষেত্রে আমদানিকারকের ঘোষিত মূল্য ব্যতীত এই বিধিমালায় বর্ণিত কোন পদ্ধতিতে ভিন্নতর মূল্য নির্ধারণ করা হইলে আমদানিকারককে সেই সম্পর্কে উক্ত মূল্য নির্ধারণের তারিখেই লিখিতভাবে অবহিত করিতে হইবে এবং কোন সংক্ষুদ্ধ আমদানিকারক আইনের section 193 অথবা, ক্ষেত্রমত, section 196 এর অধীন উক্ত মূল্য নির্ধারণের বিরুদ্ধে আপীল দায়ের করিতে পারিবেন।”

(Underlined by us)

It is true that under rule 5(4) of the Rules, the Customs Authority has to assess goods on the minimum value available for identical goods, but, under rule 13 of the Rules, if the goods are assessed in any other procedure under the Rules except the value declared by the importer, in such case, the aggrieved importer has

to file an appeal under section 193 or section 196, as the case may be, of the Act against the valuation of the goods.

Now, let us study the decisions as referred to by the contending parties.

In the case reported in 54 DLR 72, as referred to by Mr. Arif, it was decided by the High Court Division that,--

“it is borne out from record that **the impugned order was corum non jure having been passed by the Chairman of the Board alone without the presence and participation of other members who also did not sign the impugned order. As a Result the impugned order was wholly without jurisdiction and hence void.** It is needless to mention here that section 5 of the Limitation Act was not applicable in the instant case. Moreover, the impugned order as we have found is illegal and without jurisdiction. Therefore, the petitioner, in our opinion, is not debarred from invoking writ jurisdiction of this Court under Article 102 of the Constitution without availing of the alternative remedy by way of appeal before the Revenue Authority.”

(Bold, emphasis given)

In this referred case, the constitution of the Debt Settlement Board itself was not proper, as there was absence of two other members and the Chairman alone passed the impugned order. So, the order was coram non-judice. This is not the scenario of the instant cases.

In the case reported in 31 DLR 184, it was decided by the High Court Division as under:-

“It is true that an alternative remedy was available but it was not availed of. Ordinarily writ jurisdiction is not available to a person who does not seek alternative remedy provided by law but this provision may be waived if an impugned order is, on the face of it, without jurisdiction or is violative of any provision of the Constitution.”

In this case, the High Court Division decided that writ jurisdiction may be availed of on the ground that the notice served was not a notice as contemplated in Article 177 of the late Constitution. This is not also relevant to the present cases.

However, we are in agreement with the view taken by their lordships in the above two cases as referred by Mr. Arif that if an

order is coram non-judice/without jurisdiction, a person may invoke writ jurisdiction in such case.

The 3rd case referred by Mr. A. F. M. Hasan Arif is the unreported judgment dated 19.01.2015 passed by the High Court Division in Writ Petition No. 2777 of 2006. This case is relating to declaration that assessment of duty @ 25% is violative of Article 27 of the Constitution being discriminatory. So, the facts and circumstances of this case is quite distinguishable from the instant cases and, as such, this decision is not also applicable here.

The latest decision of the Appellate Division as placed before us by the learned Deputy Attorney General is the decision reported in 20 BLC (AD) 64. The judgment of this case was delivered on July 22, 2014. In this case, their lordships decided as under:-

“Admittedly, the respondent has filed the writ-petition challenging the order dated 31-1-1995 (Annexure-E to the writ-petition), that is, the **assessment made by the Customs Authority on the imported goods. Such assessment made by the Customs Authority can only be challenged by filing an appeal as proved under section 193 of the**

Customs Act. Section 193 of the Customs Act as quoted below:

‘193. Appeals to Commissioner (Appeal)—(1) Any person aggrieved by any decision or order passed under the Act, not being a decision or order passed under section 82 or section 98, by an officer of customs lower in rank than a Commissioner of Customs, may appeal to the Commissioner (Appeal) within three months from the date of recommendation to him of such decision or order.

Provided that the Commissioner (Appeal) may, if he is satisfied that the appellant was prevented by sufficient causes from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of two months.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.’

Having considered the above section, we find that a person aggrieved by a decision or order passed, under this Act may appeal to the Commissioner (Appeal) within 3 (three) months

from the date of communication to him of such decision or order.

The assessments order dated 31-1-1995 comes within the purview of section 193 of the Customs Act and, as such, the writ petition filed by the respondent before the High Court Division was not at all maintainable.

In this connection, reliance may be placed on the case of Bangladesh vs Mizanur Rahman, 52 DLR 149, in which, it has been held as under:

‘In the instant case, the writ-petitioner released the imported goods on payment of the assessed duty and he neither preferred an appeal against the order of assessment under section 193 of the Act nor filed any application for refund of the alleged excess duty under section 33 of the Act nor gave any explanation for non filing of any appeal or application for refund. **In the face of provisions for appeals under sections 193 and 196 of the Act and also provision for refund of any excess duty under section 33 of the Act within six months of such payment his writ petition is not maintainable.**’

Having considered the case referred to the above, **we are of the view that the principle expounded in the above case applies to the facts and circumstances of the present case and therefore, the writ petition filed by the respondent was not maintainable.**

Classification of the imported goods and assessment thereon by the Customs Authority are disputed questions of fact which could not be resolved in the writ jurisdiction. The High Court Division exercised writ jurisdiction without considering this aspect of the case at all and on this score alone the writ petition was not maintainable.”

(Bold, to give emphasis)

From this decision, it is evident that in this case the Appellate Division held that the writ petition is not maintainable on two counts— the first one was that the assessment order comes within the purview of section 193 of the Customs Act and, as such, the writ petition filed by respondent before the High Court Division was not at all maintainable. The second was that disputed question of fact was involved in the case. So, writ petition was not maintainable. Thus, by this decision, the Appellate Division clearly set out the principle that assessment

made by the Customs Authority can only be challenged by filing an appeal as provided under section 193 of the Customs Act, 1969. The said decision of the Appellate Division is binding upon us.

Similar decision was taken in the unreported judgment dated 23.07.2014 passed in Writ Petitions No. 4406 of 2012, 5466 of 2012 and 5789 of 2012 wherein their lordships decided as under:-

“Even after knowing the fact of final assessment made on 04.04.2012 and the same order of final assessment was informed to the Bank Manager by the impugned letters. These Writ Petitions were filed even after knowing about the final assessment. The petitioners did not undertake the appropriate forum as per the provision of the Customs Act, 1969 including section 193 and/or 196 filing of appeal/review before the Appellate Tribunal constituted under the Customs Act as the appropriate forum including, the Commissioner of Customs and/or Customs Appellate Tribunal, instead, the petitioners filed this Writ Petitions, without exhausting the above forum challenging the final assessment even after knowing through the impugned orders as to the final assessment made by the

Customs Authority of the imported goods. In such circumstances we are of the view that these Writ Petitions do not merit any further discussion as these Writ Petitions have been filed challenging the encashment of the bank guarantees furnished by the petitioners in order to get the imported goods released which are merely consequences final assessment made by the Customs Authority as per provisions of the Customs Act, 1969, the Valuation Rules, 2000 and also pursuant to the judgments and orders passed by this court on the Writ Petitions in the year of 2005, thus, these writ petitions are premature.

Accordingly, we do not find merit in the Rules.”

(Underlined by us)

Now, let us study whether the final assessments made by the customs authority are coram non-judice/without jurisdiction.

It is not the case of the petitioners that the assessments were made by a person not legally empowered/competent to make assessment. Rather, it is the case of the petitioners that the relevant customs authority made assessments violating the provision of rule 5(4) of the Rules. Thus, it appears that the

assessment was made by person/persons having legal jurisdiction to make assessment, but assessments were made wrongly, not following rule 5(4) of the Rules.

In this matter, our considered view is that there is a difference between an order passed by a competent person/authority having legal jurisdiction to entertain and decide the matter but which suffers from some irregularity or error (wrong) and an order passed by a person who has no competency or jurisdiction to entertain and decide the matter at all. An order may also be without jurisdiction if it is passed by a person not being lawfully appointed as an authority to pass such order. In the former case, a person's remedy lies before the appellate forum, if such forum is available under a law and in the later cases, a person may avail writ jurisdiction.

In the light of our above observations, we are of the view that if an assessment order is passed by a person, who has no legal competency/authority to make assessment, in such case 'a person aggrieved' may invoke writ jurisdiction. A person may also avail writ jurisdiction if on the face of assessment order, it is apparent that those are malafide or fraudulent. In other cases a

person aggrieved by an assessment order has to file an appeal under sections 193/196 of the Act read with rule 13 of the Rules.

In these cases, admittedly, final assessments were made by person/persons who had legal authority/competency to make final assessments. The case of the petitioners, as it transpires from the materials on record, that the assessments were made wrongly and not following the provision of rule 5(4) of the Rules.

In the above admitted scenario, our considered view is that the petitioners' remedy lies in the appellate forum.

In the facts and circumstances as discussed in the foregoing paragraphs, vis-à-vis the law, we are of the view is that the instant writ petitions are not maintainable and the petitioners' appropriate remedy is by way of preferring appeals before the appropriate Customs Authority in accordance with the provisions of rule 13 of the Rules read with sections 193/196 of the Act.

Further, we would like to mention that in the affidavit-in-reply, respondent No. 7 Mr. A. H. M. Shahabuddin Nagari himself admitted that he did not get any information regarding price anywhere by different searches of sugar price, raw sugar

price and price of sugar from Brazil and so, wrote “Not available.” He further admitted that the Customs House, Chittagong had full authority to ignore the price supplied the office of respondent No. 7. He also admitted that he supplied the highest and lowest values to the Chittagong Customs House on the basis of 100 bills of entry of sugar imported from Brazil, India, Guatemala and some bills of entry from Thailand. Therefore, it is evident from the affidavit-in-reply of respondent No. 7 that he has not supplied the value at which the sugar of different origins had been assessed by the Customs Authorities at the relevant time. Rather, he supplied the values mentioned in the bills of entry by the importers. In the affidavit-in-reply, respondent No. 2 also clearly stated that respondent No. 7 has not discharged his function duly and whimsically supplied data relating to values of sugar (Annexures-C and D) prepared on the basis of disputed invoices supplied by the petitioners. Therefore, the fruitless data base supplied by respondent No. 7 was ignored by the committee lawfully and the committee following the provisions of the Rules and the Act lawfully assessed the goods to duties.

The aforesaid disputed facts cannot be decided in exercising jurisdiction under article 102 of the Constitution and this question may only be decided in appellate forum. On this count also the instant writ petitions are not maintainable.

In view of the discussions made in the foregoing paragraphs, vis-à-vis the law, we find no merit in the arguments of Mr. Arif and we find merit and force in the arguments of Mr. Maniruzzaman.

Since it has been decided that the instant writ petitions are not maintainable, we do not like to embark upon the other question raised in these writ petitions.

In the result, the Rules are discharged without any order as to costs.

The orders of stay stand vacated.

The petitioners are at liberty to avail the forum of appeal in accordance with law, if not otherwise barred by limitation.

This judgment of ours do govern Writ Petitions No. 9567 of 2011, 9568 of 2011, 9569 of 2011, 9608 of 2011, 9653 of

2011, 9654 of 2011, 9655 of 2011, 9657 of 2011, 9659 of 2011,
9660 of 2011, 9661 of 2011, 9662 of 2011, 2993 of 2011, 9664
of 2011 and 9665 of 2011.

Communicate the judgment to respondent No. 1 at once.

J. N. Deb Choudhury, J.

I agree.

Hasib/
B.O.