
(1994) 01 CAL CK 0028

In the Calcutta High Court

Case No : Writ Appeal in Matter No. 480 of 1987

Assistant Collector of Customs

APPELLANT

Vs

East Anglia Plastics (India) Ltd.

RESPONDENT

Date of Decision : 18-01-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 265
Customs Act, 1962 — Section 27, 27(1)
Customs Tariff Act, 1975 — Section 3

Citation : (1994) 74 ELT 29

Hon'ble Judges : Prabir Kumar Majumdar, J; Baboo Lall Jain, J

Bench : Division Bench

Advocate : N.C. Roy Chowdhury, Prantosh Mukherjee and Pradip Mukherjee, for the Appellant; Bhaskar Gupta Samir Chakraborty and S. Jhunjunwala, for the Respondent

Final Decision : Dismissed

Judgement

Prabir Kumar Majumdar, J.—The appellant has preferred this appeal from the judgment and order dated 19th March, 1990 passed by a learned Single Judge of this Court in the matter No. 480 of 1987 allowing the application of the respondent company under Article 226 of the Constitution of India.

2. By the said application under Article 226 of the Constitution the respondents prayed for a direction upon the concerned respondent authorities for considering the refund applications contained in Annexure "C" to the Writ Petition to grant refund of the countervailing or Additional Duty of Customs, which according to the respondents were wrongfully or illegally realised.

3. The case of the respondent-writ petitioner is that the respondent company (the petitioner No. 1 before the trial Court) is the manufacturer of Phthalate Plasticizers and for the manufacture of the said Plasticizers the respondent company required as raw materials, inter alia, certain industrial alcohol known as "2 Ethyl Hesanol, ISO Butanol and ISO-Octanol (referred to as the said goods).

During the period from March, 1979 to February, 1985 the respondent company imported a number of consignments of the said goods through the Calcutta Port. The respondent Company duly paid the necessary basic or auxiliary duties of Customs payable in respect of the said consignments before obtaining clearance thereof from the appellant authorities, and in addition, paid the additional or countervailing duty u/s 3 of the Customs Tariff Act to the tune of Rs. 23,34,965.03 as levied and demanded by the Customs Authorities.

4. The respondents' case is that they were unaware that the Alcohol of all kinds at the material times were excluded from the purview of levy of duty under the Central Excise Tariff including Item No. 68 thereof, and being unaware of the relevant provisions of law, the respondents paid in respect of the said goods, additional duty or countervailing duty u/s 3 of the Customs Tariff Act to the tune of Rs. 23,34,965.03.

5. It is the further case of the respondents that in or about January 1985 they came to know from a circular dated 1st October, 1984 issued by the Central Board of Excise and Customs that no countervailing or additional duty was payable on alcohol treating the same as falling under Tariff Item No. 68 of the Central Excise Tariff. On 9th April, 1985 the respondents applied to Assistant Collector of Customs (the appellant) for refund of additional or countervailing duty paid by them under a mistake. The appellant Assistant Collector neither processed the said application of the respondents nor made any order for refund on the said application till the date of Writ Petition.

6. As recorded in the judgment under appeal, when the writ application was moved by the respondents, the learned Judge entertaining the writ application directed the Customs Authorities to dispose of the refund application by 31st July, 1987, and pass necessary orders by 14th August, 1987. The Assistant Collector of Customs by his order dated 10th August, 1987 disposed of the said application by rejecting 131 Bills of Entry as barred by limitation u/s 27(1) of the Customs Act, 1962, but allowed 3 Bills of Entry as within time. In allowing the claims under the said three Bills of Entry, the Assistant Collector of Customs held that the said products of alcohol as imported were not leviable to countervailing duty under Tariff Item No. 68 of Central Excise Tariff. Accordingly, necessary refund orders were made in respect of three Bills of Entry.

7. The learned trial Judge found that from the said order of the Assistant Collector dated 10th August, 1987 it was evident that the products of alcohol imported at the material time were not leviable to countervailing duty and there was no dispute as to that. The only question that arose for consideration for the learned trial Judge is whether the Assistant Collector was justified in rejecting the applications as time barred.

8. The learned trial Judge held, inter alia, that under Article 265 of the Constitution, no tax could be levied or collected except by the authority of law. There was no dispute, as found by the Assistant Collector in respect of the claims

under the said three Bills of Entry, that products were not subject to duty. It was, therefore, held by the learned Judge that the impugned levy was under a common mistake, and, therefore, the Customs Authorities could not deny the writ petitioners refund of duty on the plea of limitation u/s 27 of the Customs Act, 1962. The learned Judge held that where the initial levy was without jurisdiction, and realisation illegal, the period of limitation under the Customs Act was not applicable. In such a situation the general law of limitation would be applicable. The learned Judge found that the writ petitioners came to know only in January, 1985 by the said circular dated 1st October, 1984 that the duty as levied was without any authority of law. The writ petitioners immediately thereafter made applications for refund between April and May 1985.

9. Referring to various decisions of the Supreme Court and several High Courts, the learned Judge held that if the duty was collected without the authority of law, the department could not retain the excess duty and the petitioners had the corresponding legal right to recover it. The learned Judge further held that the Writ Court had jurisdiction to grant relief notwithstanding the procedure prescribed by the Act. The learned Judge finally made the Rule absolute, set aside the said order dated 10th August, 1987 passed by Assistant Collector of Customs in respect of 131 Bills of Entry and directed the Assistant Collector of Customs to reprocess the applications in respect of said 131 Bills of Entry within a week from the date of the order and grant refund within two weeks thereafter with interest at the rate of 10% from the date when their applications for refund were rejected until the date of payment.

10. Mr. N.C. Roy Chowdhury, learned Senior Counsel for the appellants first submits that where the claim application is considered by the concerned authority under the provisions of statute, both should accept such adjudication as binding. Mr. Roy Chowdhury submits that u/s 27(1) of the Customs Act, 1962 (hereinafter referred to as the Act) the application for refund has to be made before the expiry of six months from the date of payment of duty, the date of payment being the date of Bill of Entry in each case. It is submitted by Mr. Roy Chowdhury that in the instant case the Assistant Collector of Customs acting within the parameter of the Act rightly rejected the applications for refund pertaining to the claims under 131 Bills of Entry on the ground of limitation. He submits there is no dispute that those applications as rejected were after the expiry of the time prescribed by Section 27(1) of the Act, and the view taken by the authority concerned on the question of limitation cannot be said to be incorrect. It is the submission that the learned trial Judge was not justified in setting aside the order of the Assistant Collector rejecting the said applications for refund. Mr. Roy Chowdhury in this connection relies on a decision of the Supreme Court in *Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others*, .

11. The next submission of Mr. Roy Chowdhury is that if the levy or imposition of duty is without the authority of law, the remedy available to the respondent-writ

petitioners is to file a suit for recovery of the amount alleged to be realised without the authority of law, and such suit may be filed within the period prescribed under the Limitation Act, 1963. It is submitted by Mr. Roy Chowdhury that the writ petitioners instead cannot seek any Mandamus under Article 226 of the Constitution directing the authorities to make an order for refund when the concerned authority rejected the applications for refund on the ground of limitation as prescribed by the Act. Mr. Roy submits that the court in a proceeding under Article 226 of the Constitution should not grant any relief as to refund of duty by lifting the bar of "limitation provided u/s 27(1) of the Act. He has relied on a decision of the Supreme Court in Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, and also a decision of this Court in Incheck Tyres Ltd. Vs. Assistant Collector of Customs for Refund Section and Others, .

12. Mr. Roy Chowdhury has also argued that Excise Duty or Customs levy is an indirect tax and generally the manufacturer or seller paying the duty passes it on to the buyers. He submits that it is true that if the collection of duty is found to be illegal and without jurisdiction, the concerned authority realising such duties cannot hold on it and is bound to refund the same. But when the assessee passed it on to the buyer, he cannot claim refund just because he has paid the duty and the department collected the same illegally. The learned counsel refers to a decision of this court in Assistant Collector v. Madura Coats reported in 1987 (33) E.L.T. 29 , and also a decision of Supreme Court in State of Madhya Pradesh Vs. Vyankatlal and Another, . Here Supreme Court held that when the burden of paying the duty was transferred to the purchasers, then allowing such a refund by the Court would amount to unjust enrichment. The Supreme Court observed that only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same.

13. Mr. Roy Chowdhury arguing the case on the question of unjust enrichment has submitted also that if the duty levied illegally by the concerned authority is passed by the assessee to the consumers, the Court may direct a fund to be created for disbursement of the amount to various consumers to whom the duty was passed. Mr. Roy Chowdhury in this connection has referred to a Special Bench decision of Bombay High Court in New India Industries v. Union of India 1990 (46) E.L.T. 23. Mr. Roy Chowdhury has also referred to Central Excises and Customs Laws (Amendment) Act, 1991. He submits that by said Amendment Act a Consumer Welfare Fund has been established, and the said Amendment Act has substituted a new section for Section 27 of the Customs Act by providing, inter alia, that where the incidence of duty has been passed by the assessee to any other person the amount of duty should be credited to the said fund.

14. Finally, Mr. Roy Chowdhury has argued that the Customs Authorities deciding the refund claim as quasi-judicial authorities are bound to adhere to the provisions of law and cannot grant any refund u/s 27 of the Customs Act, 1962, if the claim is per se barred by limitation as prescribed by Section 27 of the Act.

It is the submission on behalf of the appellants that when the concerned authority acted within the parameters of the Act, and when the writ petitioners invoked the remedies available under the Act, the Court of the first instance should not have interfered with the order dated 10th August, 1987 passed by the Assistant Collector. Mr. Roy Chowdhury has also submitted that the Court in a Writ proceeding cannot grant any relief beyond the parameters of the statute, namely, in the instant case, the Customs Act, 1962.

15. Mr. Bhaskar Gupta, learned Senior Counsel appearing for respondents has submitted that the court's power is wider in granting relief even beyond the parameters of the Statute. Mr. Gupta submits that right to claim refund of tax or duty paid under a mistake of law with corresponding obligation of the State to repay has been consistently upheld by the Supreme Court as also various High Courts. Mr. Gupta has also argued that the sovereign power to levy tax or duty by the Government is subject to constitutional restrictions under Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. Mr. Gupta also submits if the tax or duty is levied and collected illegally, the same is liable to be refunded and for which direction can be issued under Article 226 of the Constitution even if the claim is found to be barred by rule of limitation under the relevant statute. Mr. Gupta in support of the above submissions has referred to several decisions of the Supreme Court and the High Courts to some of which we will refer presently.

16. The Supreme Court in *Salonah Tea Co. Ltd. v. Superintendent of Taxes and Ors.* 1988 (33) E.L.T. 349 sc has held, inter alia, that in case of refund of tax collected without authority of law, the State is liable to refund the said amount and the statutory provision under any Special Law providing for refund is inapplicable and the High Court in its writ jurisdiction has power to direct the refund unless there has been avoidable laches on the part of the petitioner. In another earlier decision in *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, , the Supreme Court has held that High Court under Article 226 of the Constitution has power for enforcement of fundamental and statutory rights to make consequential orders for refund of money realised by the Government without the authority of law, and this is an alternative remedy provided by the Constitution in addition to but not in supersession of the ordinary remedy by way of suit. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , the Supreme Court observed that where a suit would lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within three years of the knowledge of mistake would also lie.

17. Mr. Gupta has also referred to certain other decisions of the High Court, on the question of the Court's power under Article 226 of the Constitution to order for refund of the amount collected by the State without authority of law. These decisions are *Guru Charan Industrial Works Vs. Union of India (UOI) and Others*, . *Ashoka Industries Vs. Union of India (UOI)*, , *Indian Cable Co. Ltd. Vs. Cus., Ex. and Gold (Control) Appellate Tri.*, and *Indian Cable Company Ltd. Vs.*

CEGAT, .

18. Mr. Gupta on the doctrine of unjust enrichment, as sought to be pressed on behalf of the appellant that when the writ petitioners must have passed the duties on to the consumers or purchasers, the petitioners should not be allowed to enrich themselves by seeking refund, submits that claim for refund is not rejectable on the ground that there would be unlawful enrichment on the part of the petitioners, on the contrary, it would be tantamount to enrichment of the Government when the duties levied and collected by the Government admittedly without the authority of law. Mr. Gupta submits that the claim for refund cannot be defeated on this imaginary ground of unjust enrichment. Mr. Gupta has submitted that no foundation to alleged passing of incidence of duty to the purchasers amounting to unjust enrichment has been laid in the instant case. He also submits that in instant case the goods being an ingredient is required for the end-product. This ingredient by itself is not a saleable product, but the finished goods are only saleable. Therefore, the presumption of such passing of incidence to others does not arise. Mr. Gupta has referred to several decisions on the question of unjust enrichment and they are 1990 (46) E L T 23 (Bom) , Dayapara Tea Co. Ltd. Vs. Assistant Collector of Central Excise and Others, , Orient Paper and Industries Ltd. Vs. Union of India (UOI) and Others, and 1988 (36) E L T 537 (A P).

19. Regarding the application of Central Excises and Customs Laws (Amendment) Act, 1991, the submission of Mr. Gupta is that this Act has no application to the instant case since the Act came into force in October, 1991. Further, as submitted by Mr. Gupta, this Act contemplates transfer of the burden of duty along with the sale of the same goods which were imported, Mr. Gupta submits that in the instant case the said goods were imported for the purpose of manufacture of the said Phthalate Plasticizers. It is submitted by Mr. Gupta that the doctrine of unjust enrichment being the genesis of the said Amendment Act has no application to the cases where the imported goods either consumed by the importer or are used by him in the manufacture of other products. In this connection Mr. Gupta refers to a Bombay decision in Solar Pesticides Pvt. Ltd. Vs. Union of India (UOI), .

20. As we have already stated, the respondent writ petitioners imported certain industrial alcohol products during the period from March 1979 to February 1985 for manufacture of Phthalate Plasticizers. The respondent company duly paid the basic or auxiliary duty of customs, and in addition, paid the additional duty or countervailing duty u/s 3 of the Customs Tariff Act to the tune of Rs. 23,34,965.03 as levied and demanded by the Customs Authorities. The respondent company came to know in or about January 1985 that no countervailing or additional duty was payable on alcohol of any sort as clarified under the Circular dated 1st October, 1984 issued by the Central Board of Indirect Taxes. The respondent company thereupon lodged a claim for refund in respect of 134 Bills of Entry under 11 applications and those applications were

disposed of by the Assistant Collector of Customs by his order dated 10th August, 1987. The Assistant Collector of Customs found that except for 3 Bills of Entry, claims of refund against all the rest 131 Bills of Entry were lodged after expiry of six months from the respective dates of payment. The Assistant Collector, therefore, finally held that except for claims against three Bills of Entry, all claims against the 131 Bills of Entry were barred by limitation u/s 27(1) of the Customs Act, 1962. The claims for refund against 3 Bills of Entry were found to be lodged in time, and the Assistant Collector having found that the products of alcohol imported under them were not leviable to countervailing duty collected under Tariff Item No. 68, ordered for refund against the said 3 Bills of Entry.

21. It, therefore, appears that countervailing duty was not leviable in respect of the said goods and the appellants levied and collected the duty without any authority of law. Now the question is whether the appellants are liable to make refund of duties or taxes collected without any authority of law, and whether the court in a proceeding under Article 226 of the Constitution can grant any relief as to refund to the respondent company, the writ petitioner before the court of first instance.

22. It appears from the decisions of the Supreme Court and also various High Courts referred to above that the Courts have consistently held that if the levy and collection of duty or taxes are without any authority of law, the same is liable to be refunded, and the courts in a proceeding under Article 226 of the Constitution can direct the authority concerned to refund the amount of duty levied and collected without any authority of law. It has also been consistently held by the Supreme Court that when the tax was levied and collected without authority of law the High Court under Article 226 of the Constitution can grant relief in the order of refund even though the claim is barred by the Special Law of limitation u/s 27(1) of the Customs Act, 1962. In *Salonah Tea Co.* (supra) the Supreme Court observed that in case of refund of tax collected without authority of law, the State is liable to order for refund and statutory provision under any special law providing for refund is inapplicable. In *Shree Vallabh Glass Works Ltd.* (supra) it is held by Supreme Court that the court under Article 226 has power to enforce fundamental and statutory rights to make consequential order for refund of money realised without authority of law, and this is an alternative remedy provided by the Constitution in addition and not in supersession of ordinary remedy of suit for recovery of money paid under a mistake of law. In *D. Cawasji* (supra) the Supreme Court also held that where a suit can lie for recovery of money paid under a mistake of law, a writ petition for refund would also lie.

23. We, therefore, do not accept the submission of Mr. Roy Chowdhury for the appellant that remedy, if any, is only available in a suit for recovery of money realised without authority of law or paid under a mistake of law, but no remedy in this regard is available in a proceeding under Article 226 of the Constitution. Mr. Roy Chowdhury has relied on a decision of Supreme Court in *Madras Rubber*

Factory (supra) and a decision of a Division Bench of this court in Incheck Tyres (supra). In Madras Rubber Factory the Supreme Court upheld the action of the Customs Authority rejecting a time-barred claim. But in this case Supreme Court was not called upon to consider the question whether the assessee could claim refund of duty by filing a writ petition under Article 226 of the Constitution even when such claim application was held to be barred under special law of limitation provided by the statute. The decision in Incheck Tyres (supra) is distinguishable as there it was a case of irregular recovery and the assessee paid duty under protest. In any event, in view of recent decisions of the Supreme Court on the point as referred to above, this decision of the Division Bench of this court need not detain us.

24. On the question of unjust enrichment we accept the submission of Mr. Gupta appearing for the respondent. The claim for refund is not liable to be rejected on the ground of unjust enrichment as consistently held by the several High Courts in the cases referred to by Mr. Gupta. Moreover, in the instant case, there is nothing on record to show that respondent company passed the incidence of duty to other persons. As we have already indicated above that in the instant case the respondent company imported the said goods as ingredients to the end-product to be manufactured by the respondents.

25. Mr. Roy Chowdhury has referred to Central Excises and Customs Laws (Amendment) Act, 1991 to contend that amounts even without authority of law collected by the appellant, it should be credited to the Fund constituted under the said Amendment Act for the purpose of disbursement to the consumers to whom incidence of duty was passed by the assessee. In our view, this Amendment Act has no application as the claim for refund was in respect of goods imported long prior to the commencement of this Act. Further, there is no evidence of shifting the incidence of duty to other persons. The Bombay High Court in Solar Pesticides case (supra) has held that the scheme of the said Amendment Act envisages a direct transfer of the burden of duty along with the sale of the same goods which were imported. But this has no application to the cases where the imported goods are either consumed by the importers or are used by him in the manufacture of other products. In the case of the imported products customs duty paid on it becomes a part of the cost of manufacture of the new item in which the imported component is an ingredient. We respectfully agree with this view of the Bombay High Court.

26. It appears from the judgment under appeal that the learned trial Judge held that the respondent writ petitioners were also entitled to interest @ 10% on the amount to be refunded. Mr. Roy Chowdhury for the appellant also assails this part of the finding of the learned trial Judge. The appellant, not being entitled to recover from the respondent company the duty covered by the 131 Bills of Entry, cannot withhold the amount recovered without the authority of law. Interest is the compensation for the use and detention of money as held by the learned trial Judge. We agree with this view of the learned trial Judge.

27. All the contentions raised on behalf of the appellant fail. We agree with the reasonings in the judgment under appeal, and we hereby affirm the judgment and order dated March 19, 1990 passed by trial Court. The appellant should forthwith reprocess the application in respect of the 131 Bills of Entry and grant refund with interest as directed by the trial Court.

28. In the result, this appeal is dismissed. There will be no order as to costs.

29. All parties to act on a signed copy of the minutes of the operative part of this judgment and order on the usual undertaking.

Baboo Lall Jain, J.

30. I agree.