(1965) 06 BOM CK 0007

In the Bombay High Court

Case No : Appeal No. 71 of 1963

Assistant Collr. of Cus. APPELLANT

Vs

Warana Sahakari Sakhar Karkhana RESPONDENT

Date of Decision : 25-06-1965

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 20, 39

Citation : (1965) 06 BOM CK 0007

Hon'ble Judges : Modi, J;Chaianani, J

Bench : Division Bench

Advocate : Modi, for the Appellant;

Judgement

1. On 17th March, 1958 the respondents had imported precision, brass tubes for evaporators as component parts of sugar manufacturing plant machine. The Customs duty on these goods was assessed at 10% of the value thereof, whereas the proper duty payable, according to the Customs authorities, was 35%. In June, and July, 1958 and in May, 1959 the respondents imported some other goods. In respect of the goods imported in June and July, 1958, the respondents made eight applications in September, 1958 for refund of the excess duty paid by them. Another application for refund of the excess duty paid in respect of the goods imported in May, 1959 was also made. On 31st December, 1958 the Asstt. Collector of Customs addressed a letter to the respondents in which he stated that in respect of the consignment received on 17th March, 1958 customs duty had been short-levied by Rs. 40,000.7 P. He added in his letter that a demand u/s 39 of the Sea Customs Act, 1878, in respect of the excess amount of duty was time-barred, but he stated that payment of the amount, if made voluntarily, would be accepted. Thereafter there was considerable correspondence between the Customs authorities and the respondents. The applications made by the respondents for refund of duty in respect of the consignments received in June, 1958 and in May, 1959 were not decided till some time in 1962. On 28th July, 1962 the Asstt. Collector of Customs,

addressed a letter to the respondents, in which he stated that refund claims to the tune of Rs. 28,386.21 nP. had been passed in favour of the respondents. He also stated that the less charge in respect of the consignment received on 17th March, 1958 was Rs. 33,333.96. He added that it had been decided to set-off the refund amounts against the pending less charge claims. He called upon the respondents to pay the remaining amount of less charge Rs. 4,945.75 nP. Against that order the respondents filed a petition in the High Court, in which they contended that the Customs authorities were not entitled to set off any amount from the amounts payable to them on account of excess duty paid by them and that in fact the claim for the duty which had been short-levied was time-barred u/s 39 of the Sea Customs Act, 1878. They therefore, prayed that the decision contained in the letter of the Asstt. Collector of Customs dated the 28th July, 1962 should be quashed and that the respondents to the petition, i.e., the Asstt. Collector of Customs, the Collector of Customs and the Union of India, should be directed to pay to them Rs. 28,388.21 nP., the amount which they were entitled to as refund of the excess duty recovered from them. This petition was allowed by Mr. Justice K. K. Desai who set aside the decision contained in the letter of the Asstt. Collector of Customs dated 28th July, 1962 and also directed Rs. 28,388.21 to be paid to the respondents.

2. Mr. Modi, on behalf of the appellants has raised various points. We are in the present case concerned with the former Sea Customs Act, 1878, which was in force at the time when the goods were imported. The first point, which Mr. Modi has urged, is that the liability to pay customs duty was imposed by section 20, that section 39 only creates a bar of limitation to the recovery of the customs duty which has not been levied or which has been short-levied, that it only extinguishes the remedy but that it does not also extinguish the liability to pay customs duty. He has urged that then respondents were, therefore, liable to pay the full amount of customs duty properly leviable, that their liability was not extinguished even though the period of three months had expired and that consequently the customs authorities were entitled to retain the amount payable to the respondents which was, lying with them and to adjust the same against the amount of duty which was payable by the respondents for the goods imported by them.

3. Section 20 of the Sea Customs Act, 1878, provides that customs duties shall be levied at such rates as may be prescribed on the goods referred to in the section. Sub-section (1) of section 39 of the said Act reads as under :-

"39(1) When customs duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs or through mis-statement as to real value, quality or description on the part of the owner.

Or when any such duty or charge, after having been levied, has been owing to any such causes erroneously refunded.

The person chargeable with the duty or charge which has not been levied or which has been so short-levied, or to whom such refund has erroneously been made, shall pay the duty or charge of the deficiency or repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in sub-section (2); and the Customs Collector may refuse to pass any goods belonging to such person until the said duties or charges or the said deficiency or excess be paid or repaid."

4. Mr. Modi has laid stress on the words "shall pay, on a notice of demand being issued to him". He has contended that this section, therefore, only provides a summary remedy for recovery of the amount of duty which has been short-levied. The remedy is to refuse to pass any goods belonging to the person concerned until the deficiency in duty has been paid. We have considered these arguments of Mr. Modi, but we find it difficult to accept them. Both sections 20 and 39 must be read together. If this is done, it will appear that when customs duty has been short-levied, not only the remedy to recover the duty becomes barred after the expiry of the period of 3 months from the relevant date, but also the liability to pay the deficiency in duty. It has been conceded that deficiency in duty cannot be recovered after the expiry of three months. No demand can be made and the liability to pay the duty, therefore does not continue after that period. Consequently, in the present case the respondents were liable and could not be called upon to pay the deficiency in duty which had not been recovered from them in respect of the first consignment received in March, 1958. It follows, therefore, that the appellants were not entitled to adjust the deficiency in duty against the amount payable to the respondents on account of the excess duty paid by them in respect of their other consignments.

5. The second point which has been urged by Mr. Modi is that the respondents should not have been granted any relief in this application because they could have pursued an alternative remedy by way of appeal to the Collector of Customs or other higher Customs authorities and also because there had been gross delay and laches on the part of the respondents in approaching this Court. The main prayers which the respondents have made in their petition are two. The first prayer is that the decision in regard to set off or adjustment of their claim against the amount claimed by the Customs authorities on account of short duty levied should be set aside. In regard to this prayer the decision of the Customs authorities was communicated to the respondents on 28th July, 1962. The petition was filed on 9th October, 1962. It cannot, therefore, be said that there had been unreasonable delay in approaching the court. The respondents no doubt could have pursued an alternative remedy by way of appeal to the Collector of Customs or other higher Customs authorities. The question whether a party should be granted relief on a writ application even though the alternative remedy is open to it is a matter of discretion of the Court. The learned Judge, who heard the petition, has exercised his discretion in favour of the respondents and we do not think that we will be justified in interfering with it.

6. So far as the second prayer for refund of the amount payable to the respondents is concerned, Mr. Modi has contended that if the respondents had not been negligent, they could have filed a civil suit within the period of limitation after they had found that orders had not been passed on their applications for refund that on the date, when the petition was filed their suit would have been barred by limitation and that consequently no relief should be granted to them. In support of this argument reliance has been placed on the decision of the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others, , in which the Supreme Court has observed that where the delay is more than the period of limitation, it would always be proper for the Court to hold that it is unreasonable. Having regard to the provisions of the Sea Customs Act and the machinery provided by it for a party to obtain relief, it is very doubtful whether the respondent could have filed a suit for recovery of the amount of excess duty paid by them (Sect. 42 Bom. LR p. 67). Consequently, the respondent cannot be denied relief merely on the ground that a suit should have been filed. The petition in respect of this prayer also cannot be said to have been made after unreasonable delay, because it was only on 28th July, 1962 that they were informed that their claims for refund had been granted.

7. The learned trial Judge has made an order for payment of the amount claimed by the respondents only against appellants Nos. 1 and 2, i.e. the Asstt. Collector of Customs and the Collector of Customs Mr. Modi has urged that no such order could have been made against these officers, that the order could only have been made against the Union of India, that on the date on which the petition was filed the Union of India was not subject to the jurisdiction of this Court under Article 226 of the Constitution and that, consequently, no relief with regard to the prayer for refund could have been granted. There is force in this argument. Since, however, the respondents are lawfully entitled to the amount claimed by them, we do not think we should dismiss the petition on this ground alone. The Union of India was a party to the petition. The Union of India is also one of the appellants. It has been conceded by Mr. Modi that after the Fifteenth Amendment of the Constitution an order can be made by this Court against the Union of India. If, therefore, we had decided to interfere on this ground, we would have remanded the petition for a proper order being made against the Union of India or alternatively allowed the respondent to file a fresh petition. No useful purpose will be served by following this procedure, as it will only result in further avoidable delay and also unnecessary expense to the parties. We do not, therefore, propose to interfere on this ground with the order passed by Mr. Justice K. K. Desai.

8. In the result, the appeal fails. There will be no order as to costs of the appeal.