
(1997) 06 MAD CK 0027

In the Madras High Court

Case No : W.A. No. 1113 of 1995 and C.M.P. No. 14238 of 1995

Asstt. Collector of Cus., Madras

APPELLANT

Vs

Sun Paper Mill Ltd.

RESPONDENT

Date of Decision : 24-06-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Contract Act, 1872 — Section 28C, 72

Customs Act, 1962 — Section 129A, 27

Citation : (1997) 95 ELT 187

Hon'ble Judges : S.M. Siddick, J;A.R. Lakshmanan, J

Bench : Division Bench

Advocate : Shri V.T. Gopalan, for S. Udayakumar, Addl. CGSC, for the Appellant;
Shri V. Shanmugham, for the Respondent

Judgement

A.R. Lakshmanan, J.—The writ Appeal is directed against the order of Shivaraj Patil, J., dated 27-7-1995 in W.P. No. 4881 of 1985,

allowing the said writ petition filed by the respondent herein and directing the appellant herein to consider the application dated 14-8-1983 made

by the respondent for refund of the duty paid, which application was received by the appellant on 1-9-1983, on its merits and in accordance with

law without reference to the period of limitation contemplated u/s 27 of the Customs Act, 1962 (hereinafter referred to as the Act).

2. In this appeal, the only contention raised and which we are considering is, whether the direction given by the learned single Judge that the

appellant shall consider the application dated 14-8-1983 made by the respondent for refund of duty, which was received by the Department on 1-

9-1983, on its merits and in accordance with law without reference to the period of limitation contemplated u/s 27 of the Act, is valid in law. With

respect, we think that it is not.

3. The short facts of the case are as follows :- The respondent/company is engaged in the manufacture of newsprint paper. They are using wood

pulp as the raw material for the manufacture of newsprint. In respect of a consignment of wood pulp imported by the respondent/company,

customs duty of Rs. 22,834.11 at the rate of 5% as basic duty and on the value of the consignment was demanded by the Assistant Collector of

Customs and the respondent paid the same as per bill of entry cash No. 611, dated 17-2-1983. The respondent has imported the said wood pulp

only for the purpose of using the same for manufacture of newsprint and hence the wood pulp is exempted from the whole of customs duty as per

Notification No. 233, Customs, dated 2-8-1976 issued by the Central Government. The authorities had collected the customs duty without any

lawful authority and therefore they are liable to refund the same to the respondent.

4. On 14-8-1983, the respondent made an application to the appellant for the refund of the duty on the ground that the said sum had been

collected from the respondent without any legal authority. By order dated 21-9-1983, the appellant rejected the claim for refund of duty, which

was received in his office on 1-9-1983, as time barred u/s 27 of the Act. Aggrieved by the said order, the respondent filed an appeal before the

Collector of Customs (Appeals), Madras, who [concerned] with the order of the original authority and dismissed the appeal on 18-4-1984. The

respondent filed a further appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, Madras, u/s 129A of the Act. This appeal

was also dismissed by the Tribunal as the refund application has been filed out of time and barred u/s 27 of the Act. The respondent, thereupon,

filed the present writ petition to quash the orders of the authorities and to direct the appellant to refund to the respondent the sum of Rs.

22,934.11.

5. In the writ petition it is averred by the respondent herein that the whole of customs duty on the import of wood pulp has been exempted and

hence the collection of customs duty is wholly illegal. It is further averred in the affidavit that there is no law of limitation especially for public bodies

on the virtue of returning that was wrongly received to whom it belongs. In any

event, it was contended that the appellant ought to have refunded the entire customs duty which had been collected without any authority of law.

6. The writ petition was resisted by the appellant by filing a counter affidavit. It is contended that at no point of time before clearance of the goods,

the respondent had either declared that the goods imported are for the manufacture of newspaper and covered by Notification No. 293/78-

Customs, dated 3-8-1978 or executed any bond under the said Notification at the time of assessment or before the clearance of the goods. The

appellant has also referred to Section 27 of the Act to say that no claim for refund of any duty will be entertained except in accordance with the

provisions of the said section. Since the claim for refund had been preferred after 17-8-1983, the respondent is not entitled for refund. It is the

specific case of the appellant that the application for refund dated 14-8-1983 was received by the department only on 1-9-1983, which is after six

months from the date of payment of duty and that no payment of duty is made under protest explicitly and hence there is no scope for entertaining

the refund application after six months. No protest has been made by the respondent while paying the duty. If the amount was unlawfully collected,

the respondent's right to refund is governed by the statute itself which prescribes the conditions and that the respondent is bound to fulfil these

conditions before claiming refund.

7. Shivaraj Patil, J. after discussing the rival submissions made by the counsel for the parties, passed the following order :

In the view I propose to take, it may not be necessary to go into the question whether the application for refund of duty paid was made within

time. The facts of the case are that the petitioner sent the application by registered post on 14-8-1983, which was received by the 1st respondent

on 1-9-1983. The petitioner has not produced either the postal receipt or the acknowledgment for having sent the application on 14-8-1983, but

all the same, the respondents did not deny that the application was received by registered post on 1-9-1983. No counter affidavit is filed denying

that the application was sent on 14-8-1983. Further, having regard to the fact that the delay was not inordinate, in as much as the application for

refund ought to have been filed before 17-8-1983 and it was actually received by the 1st respondent on 1-9-1983, none of the respondents have

considered the merits of the claim of the petitioner. Under the circumstances and in the interest of justice having regard to the facts and

circumstances of this case, I think it is just and proper to direct the 1st respondent to consider the application for refund of duty paid made by the

petitioner on 14-8-1983 on its merits without reference to the period of limitation contemplated u/s 27 of the Customs Act.

In the result, I pass the following order :

1. The writ petition is allowed.

2. The impugned orders are quashed.

3. The 1st respondent is directed to consider the application dated 14-8-1983 made by the petitioner for refund of duty paid and received by the

1st respondent on 1-9-1983 on its merits and in accordance with law without reference to the period of limitation contemplated u/s 27 of the Act.

Hence the present appeal by the Department.

8. The only question that arises for consideration is, whether the direction contained in Paragraph 8 of the order of the learned Single Judge is valid

in law and whether the Court has the power to give such a direction.

9. Section 27 of the Act reads thus;

27. Claim for refund of duty :-

(1) Any person claiming refund of any duty and interest, if any, paid on such duty :-

(i) paid by him in pursuance of an order of assessment, or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Collector of Customs -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution

or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty in such form as may be specified in the regulations made in this behalf and

the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C) as the

application may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was

collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other

person :

Provided that where in application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment)

Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the

provisions of sub-section (2) :

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such

duty has been paid under protest.

Explanation : For the purposes of this sub-section, "the date of payment of duty and interest, if any, paid on such duty in relation to a person, other

than the importer," shall be construed as "the date of purchase of goods" by such person.

(2) X X X

(3) X X X

(4) X X X.

10. Under this section, refund can be claimed of (1) duty paid by a person in pursuance of an order of assessment; or (ii) duty borne by him. It is

clear from the Explanation to sub-section (1), which relates to the starting point of the period of limitation viz., the date of payment of duty that the

claimant may ordinarily belong to two distinct categories (a) the imported and (b) the purchaser of the goods. Thus, it is the importer who can

claim refund of duty paid by him in pursuance of an order of assessment and it is the purchaser of the goods who can claim refund of duty borne by

him. In other words, where the importer sells the goods after payment of duty as assessed and passes it on to the purchaser, the purchaser can

claim refund of such duty as duty borne by him u/s 27(1)(ii) of the Act, provided he had not passed. On the incidence of such duty to any other

person. This section enjoins the same period of limitation, i.e., six months. This section does not expressly bar jurisdiction of Civil Courts in respect

of claims for refund as sub-section (5) of the old section did. Thus, claims for refund normally beyond the purview of Section 27 can now be

entertained by Civil Courts u/s 72 of the Indian Contract Act.

11. Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel appearing for the appellant made two submissions. They are,

(i) The Court did not have the power to give direction to the authorities to consider the claim for refund on its merits without reference to the

period of limitation contemplated u/s 27 of the Act and

(ii) The period of limitation prescribed u/s 27 of the Act cannot be bye-passed.

In support of the above submissions, Mr. V. T. Gopalan relied on the decisions reported in Escorts Limited v. Union of India 1994 Supl. (3)

S.C.C. 86 and Union of India and Another Vs. Kirloskar Pneumatic Company Limited, .

12. Mr. V. Shanmugham, learned Counsel for the respondent, while reiterating the contentions raised in the affidavit filed in support of the writ

petition, has also alternatively contended that if really the payment of duty was under a mistake of law, the respondent can seek recourse to such

alternative remedy as it may be advised. In the event of this Bench not accepting his contention, Mr. V. Shanmugham wanted us to make an

observation that the respondent should be free to adopt such remedies that are open to it in law. In support of his contention Mr. V. Shanmugham

cited the decisions reported in Union of India (UOI) Vs. A.V. Narasimhalu, ; Kay Foam Limited Vs. Union of India (UOI), ; and Collector of

Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, .

13. The decision reported is also a case of an application made u/s 27 of the Act. In that case, the Supreme Court has held that the authorities

under the Act must necessarily operate within the four corners of the Act and that they have no option but to reject an application filed beyond six

months. The Supreme Court had also, in this connection, noticed the decision reported in Collector of Central Excise, Chandigarh Vs. Doaba Co-

operative Sugar Mills Ltd., Jalandhar, and quoted the observations made by S. Mukherjee, J., as he then was, in Paragraph 6 of that judgment, in

view of the fact that it puts forward another aspect of the controversy relating to refund. The observations of S. Mukherjee, J., as he then was,

which is quoted by the Supreme Court runs as follows :

It appears that where the duty has been levied without the authority of law or without reference to any statutory authority or the specific provisions

of the Act and the Rules framed there under have no application, the decision will be guided by the general law and the date of limitation would be

the starting point when the mistake or the error comes to light. But in making claims for refund before the departmental authority, an assessee is

bound within four corners of the statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be

adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the

department, the provisions of limitation prescribed in the Act will prevail. It may, however, be open to the department to initiate proceedings in the

Civil Court for recovery of the amount due to the department in case when such a remedy is open on the ground that the money received by the

assessee was not in the nature of refund. This was the view taken by the Tribunal in a previous decision in the case of *Miles India Ltd. v. Assistant*

Collector of Customs 1987 (30) E.L.T. 641 (1) but it was assailed before this Court. The appeal was withdrawn. This Court observed that the

customs authorities, acting under the Act, were justified in disallowing the claim for refund as they were bound by the period of limitation provided

therefore in the relevant provisions of the Customs Act, 1962. If really the payment of duty was made under a mistake of law, the party might seek

recourse to such alternative remedy as it might be advised. See the observations of this Court in *Miles Indian Ltd. v. Assistant Collector of*

Customs 1987 (30) E.L.T. 641 (1).

According to the principle of this decision as well, the Supreme Court held, that the appellant's application must be held to have been rightly

dismissed. Accordingly, the Supreme Court dismissed the appeals.

The decision reported in *Union of India and Another Vs. Kirloskar Pneumatic Company Limited*, (referred to supra) is an identical case as that of

the case on hand. In that appeal, the question posed before the Supreme Court was, whether the direction given by the High Court that the

Customs authorities shall not reject the refund application on the ground that it is time barred was valid in law. The Supreme Court answered the

question referred in the negative. The observations made by S. Mukherjee, J., as

he then, in Paragraph 6 of the judgment in 1988 Suppl. S.C.C.

683, was also noticed by the Supreme Court in this case and following the above ruling, the Supreme Court was of the opinion that the direction

contained in Clause 3 of the impugned order was unsustainable in law. The Supreme Court has also observed that it is not permissible for the High

Court to direct the authorities under the Act to act contrary to the statutory provisions and that the power conferred under Articles 226 and 227 of

the Constitution is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the state act in

accordance with law and therefore, it cannot be invoked for directing the authorities to act contrary to law.

14. Mr. V. Shanmugham, learned Counsel for the respondent, relied on the decision reported in *Kay Foam Ltd. v. Union of India* 1988 (34)

E.L.T. 149, (Bom.) wherein a Division Bench held that the duty recovered without any authority of law cannot be retained by the authority and the

provision for filing application within a period of six months from the payment of duty has no application to such a case. The Bench has also held

that it is open for the tax payer to demand back duty which was recovered without authority of law at any stage. In that case, a learned Single

Judge set aside the orders passed by the customs authorities and remitted the proceedings back to the Assistant Collector to determine what

amount of excess duty was realised and then to refund the same to the appellant. The learned Judge directed that the excess duty paid by the

appellant subsequent to 24-4-1978 should be determined and refunded. The appeal was preferred against the direction of the learned single Judge

that the excess duty paid only subsequent to 24-4-1978 should be refunded. The Division Bench interfered with the order of the learned single

Judge and directed the respondents to determine the excess amount paid between July, 1977 and August, 1978, and refund the same.

Accordingly, the appeal was allowed and the judgment of the learned single Judge was modified and the respondents were directed to ascertain

the excess duty paid during the relevant period. We are of the view that the above judgment of the Division Bench of the Bombay High Court is

contrary to the three Supreme Court judgments referred to by us and reported in *Collector of Central Excise, Chandigarh Vs. Doaba Co-*

operative Sugar Mills Ltd., Jalandhar, and Union of India and Another Vs. Kirloskar Pneumatic Company Limited, . We are, therefore, unable to

follow or concur with the views expressed by the Division Bench of the Bombay High Court in Kay Foam Limited Vs. Union of India (UOI), .

15. The decision reported in Miles India Ltd. v. Assistant Collector of Customs 1987 (30) E.L.T. 641 was relied on by Mr. V. Shanmugham for

the limited purpose that the party who paid the customs duty under a mistake of law may also seek recourse to such alternative remedy as it may

be advised. The decision reported in Union of India (UOI) Vs. A.V. Narasimhalu, was relied on by the learned Counsel for the respondent for the

purpose that a civil suit will lie for obtaining appropriate relief in cases like this. In that case, the Supreme Court has observed that the exclusion of

the jurisdiction of the Civil Court to entertain a suit does not exclude the jurisdiction of the High Court to issue high prerogative writs against illegal

exercise of authority by administrative or quasi-judicial Tribunals, and that the finality, which may be declared by the stature qua certain liability

either by express exclusion of the jurisdiction of the Civil Court or by clear implication does not affect the jurisdiction of the High Court to issue

high prerogative writs.

16. Placing reliance on the above decision, Mr. V. Shanmugham contended that the respondent has [invoked] the alternative remedy by invoking

its jurisdiction under Articles 226 of the Constitution. As already seen, the respondent has filed an application for refund before the appellant, an

appeal before the Collector of Customs (Appeals) and a further appeal before the Customs, Excise and Gold (Control) Appellate Tribunal,

Madras, and all the three authorities have rejected the application for refund since the claim for refund was time barred u/s 27 of the Act.

Challenging all the three orders, the respondent, as already noticed, has filed the present writ petition for a certiorarified mandamus to call for the

records of the three authorities, quash the same and consequently direct the appellant to refund the sum collected as customs duty. The said writ

petition was contested by the appellant by filing a counter affidavit and considering the submissions made by both parties, the learned single Judge

has issued the direction as contained in Paragraph 8 of his order.

17. We are unable to accept the contention of the learned Counsel for the

respondent that the jurisdiction of the High Court can be invoked as an alternative remedy. The respondent having invoked the jurisdiction of the statutory authorities as provided under the Act and having suffered orders from their hands, has rightly filed the writ petition in this Court, which, in our opinion, is entertainable in law. However, we cannot close our eyes to the valid contention raised by the learned Senior Counsel for the appellant that the authorities functioning under the Act are bound by the provisions of the Act and if the proceedings are initiated under the Act, the provision of limitation prescribed under the Act will prevail.

18. We are, therefore, of the opinion that an application for refund should be filed within six months from the date of payment of duty u/s 27(1)(b) of the Act, which is mandatory. In the instant case, the respondent had paid the duty on 17-2-1983 and therefore, the refund application ought to have been filed before the concerned authority on or before 17-8-1983. It is not in dispute that the respondent has not produced either the postal receipt or the acknowledgment for having sent the application on 14-8-1983. The application for refund was received by registered post by the Department only on 1-9-1983, i.e., after the period of six months prescribed under the Act. Therefore, the direction given by the learned single Judge to consider the application of the respondent for refund of the customs duty paid on its merit without reference to the period of limitation prescribed u/s 27 of the Act is contrary to law and thereby the learned Judge has acted beyond the jurisdiction. It cannot be disputed that in any event, the burden is entirely on the respondent to prove that the refund application was filed in time. The learned Judge after observing that the respondent had not produced either the postal receipt or the acknowledgment, for having sent the application for refund in time, is not correct in holding that the appellant had not denied in the counter affidavit that the application was sent on 14-8-1983. In any event, it is for the respondent to prove that the application for refund was sent in time and in the absence of proof of despatch of the application for refund on 14-8-1983, the learned single Judge, with respect, ought not to have interfered with the orders passed by the authorities while exercising writ jurisdiction under Article 226 of the Constitution.

19. For the foregoing reasons, the Writ Appeal succeeds. There will be no order

as to costs. Consequently, C.M.P. No. 14238 of 1995 is dismissed as no longer necessary. However, it is open to the respondent to seek recourse to such alternative remedy either by way of suit or otherwise, as may be advised. The order now passed in this writ appeal does not preclude the respondent from adopting such remedies that are open to it under law.