

(1977) 06 KL CK 0042
In the High Court Of Kerala
Case No : O.P. No. 3364 of 1975

BAKUL CASHEW CO.

APPELLANT

Vs

OFFICER OF CUSTOMS.

RESPONDENT

Date of Decision : 17-06-1977

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 14, 17, 18, 25, 27

Citation : (1977) 6 CTR 291

Hon'ble Judges : T. Kochu Thommen, J

Bench : Division Bench

Judgement

T. Kochu Thommen, J. - The petitioner is a partnership firm carrying on the business of importing cashewnuts and exporting cashew kernels. In respect of two consignments of cashewnuts imported by them in 1972, they paid a sum of Rs. 11,491/- to the Customs authorities, Cochin as regulatory duty. The petitioner did not know at that time that, as per notification No. 16 dated 20-4-1972 issued by the Government of India under S. 25 of the Customs Act, 1962 read with sub-S. (4) of S. 4 of the Finance Act, 1971 (Act 14 of 1971) cashewnuts were exempted from regulatory duty. It was only when the petitioner came to know of the notification did they realise that the amounts was unnecessarily paid. It may be mentioned here that complete exemption from regulatory duty is granted under said notification only if certain conditions mentioned therein are also satisfied. According to the petitioner, these conditions had been fully satisfied.

2. The petitioner made an application to the Assistant Collector of Customs and Central Excise, (the 2nd respondent) for a refund of the amount mistakenly paid by them. The Assistant Collector rejected the request for refund by Ext. P1 dated 30-4-1973 for two reasons. In the first place he stated that the claim for refund made after six months from the date of payment of duty was barred by limitation under S. 27 of the Customs Act, 1962. In the second place the conditions upon which the goods were exempted under S. 25(1) of the Customs Act had not been

satisfied. Aggrieved by this order the petitioner filed an appeal before the Appellate collector of Customs (the 3rd respondent). That appeal was dismissed by Ext. P2 dated 20-10-1973 on then ground that it was time-barred. The petitioner took up the matter in revision before the Central Government (the 4th respondent), but without success. It held by Ext. P3 dated 29-3-1974 that the application for refund was time-barred under S. 27(1).

3. It is against these three orders that the petitioner had approached this Court under Article 226 of the constitution. Shri M. Ramachandran, counsel for the petitioner very ably and almost persuasively contended before me that the claim for refund was not attracted by the limitation mentioned under S. 27. According to him there was no order of assessment pursuant to which the amounts was paid. No assessment under S. 17 or S. 18 of the Customs Act had been made by way office of Customs. Consequently any claim for refund of the amounts paid by mistake could not be treated as a claim for refund of duty paid in pursuance of an order of assessment. He further contended that the goods being exempt from regulatory duty, the amount paid in respect such goods was not paid towards by way of duty., These contentions appear to be attractive at first sight, but upon careful consideration. I am unable to accept them. I shall read the relevant provisions of s. 27.

"27. claim for refund of duty :-

(1) Any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of customs lower in rank than an Assistant Collector of Customs may take an application for refund of such duty to the Assistant Collector of Customs before the expiry of six months from the date of duty.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation :- Where any duty is paid provisionally under s. 18, the period of six months shall be computed from the date of adjustment of duty after the final assessment thereof.

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Counsel drew my attention to the Explanation to S. 27 and submitted that even assuming that the amounts was paid towards duty, such payment was only provisional and therefore the period of six months should be computed from the date of adjustment of duty after the final assessment is made. I shall now read S. 18(1) which deals with provisional assessment.

"18 Provisional assessment of duty :-

(1) Where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty;

the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnished of such information or completion of such test or enquiry, be assessed provisionally of the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2)

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It would appear from the above provisions that a provisional order of assessment is made only in three cases; i.e., (1) where an importer is unable to produce any document or furnish any information; (2) where the proper officer deems it necessary to subject any imported goods to any chemical or other test; and (3) where the importer has produced all the necessary documents and furnished full information but the officer deems it necessary to make further enquiry for assessing the duty. None of these questions admittedly arises in the present case. Consequently S. 18 has no application. The only other relevant provision for assessment is S. 17 which relates to final assessment. S. 17 reads as follows :

"17. Assessment of duty. - (1) After an importer has entered any imported goods S. 46 or an exporter has entered any export goods under S. 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in S. 85 be assessed.

(3) For the purpose of assessing duty under sub-S. (2), the proper officer may require the importer, exporter or any require the importer, exporter or any other person to produce any contract, brokers note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-S. (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may without prejudice to any other action which may be taken under this Act, be reassessed to duty."

4. The petitioner who imported the goods submitted the necessary documents before the concerned authority along with the amount which he then thought was payable as regulatory duty in respect of the goods. These were accepted by the officer and the goods were accordingly assessed to duty. The documents were prepared and the amount was paid on the basis that duty was payable. The assessment on such basis was final, notwithstanding the power of the officer to reassess the goods in the circumstances mentioned under sub-S. (4) of S. 17.

5. According to counsel, all that the petitioner did was to submit the documents and pay the amount, and without passing any written order of assessment, the goods were allowed to be cleared. From the wording of sub-S. (4) of s. 17 it would appear that this was precisely the situation that was in the contemplation of the legislature in enacting sub-S. (4) of S. 17. The importer is allowed to tender the documents and money and if there is no reason to disbelieve the information supplied by him, the amounts as computed by him is accepted subject to the condition to duty if the statement made by the importer is later found to be incorrect. The very acceptance of the documents and money by the officer was in effect a final order of assessment in terms of s. 17(4). Without any such order, the goods would not have been permitted to be cleared. I am therefore not in a position to accept the petitioners contention that in respect of the goods in question no order of assessment had been made.

6. counsel however contended that the order of assessment, assuming that it was under S. 17, could not be treated as an order which was lawfully made as the goods in question were not assessable to regulatory duty. S. 25 of the

Customs Act provides for exemption from duty. It reads :

"25 Power to grant exemption from duty. -

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may by notification in the official gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, goods of an exceptional nature to be stated in such order, any goods on which duty is leviable."

These goods were exempted under S. 25(1) of the Customs Act by means of a notification granting a general exemption. The operative portion of this notification is extracted in paragraph 2 of the petition. It shows that in exercise of the powers conferred by sub-S. (1) of S. 25 of the Customs Act, 1962, read with sub-S. (4) of S. 4 of the Finance Act, 1971 (Act 14 of 1971), the Central Government exempted raw cashewnuts from the whole of the regulatory duty of customs leviable thereon under the notification of the Government of India in the Ministry of Finance (Department of Revenue and Insurance) No. 38-Customs, dated the 17th March, 1972, subject to certain conditions. The relevant portions of s. 4 of the Finance Act 1971 read as follows :-

"4. Regulatory duties of customs :-

(1) With a view to regulating or bringing greater economy in imports, there shall be levied and collected, with effect from such date, and at such rate, as may be specified in this behalf by the Central Government by notification in the Official Gazette, on all or any of the goods mentioned in the First Schedule to the Tariff Act, or in that Schedule as amended from time to time, a regulatory duty of customs not exceeding -

(a) 25 per cent of the rate, if any specified in the said First Schedule read with any notification issued, under S. 3A, or sub-S. (1) of S. 4 of the Tariff Act; or

(b) 10 per cent of the value of the goods as determined in accordance with the provisions of S. 14 of the Customs Act, 1962, whichever is higher;

Provided that different dates and different rates may be specified by the Central Government for different kinds of goods.

(2)

(3) The regulatory duty of customs leviable under this section in respect of any goods referred to in sub-S. (1) shall be in addition to any other duty of customs chargeable on such goods under the Customs Act, 1962.

(4) The provisions of the Customs Act, 1962, and the rules regulations made

thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the regulatory duty of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations.

(5)

7. S. 4 of the Finance Act, 1971, read with S. 25 of the Customs Act, shows that the goods brought to charge under the former can be exempted from duty under the latter. In the present case cashewnuts had been brought to charge under S. 4 of the Finance Act as per the rates specified under a notification, but by another notification issued under S. 25 of the Customs Act these goods were exempted from regulatory duty subject to certain conditions. The goods are therefore dutiable goods but are liable to be exempted in certain cases. The notification granting the exemption shows that in the event of the conditions not being satisfied, regulatory duty is payable for cashewnuts. The question whether these conditions are satisfied or not is therefore a question for determination by the fact finding authority. Until such questions are answered in favour of the importer, he remains liable for payment of duty. In the present case there was no occasion for consideration of any such question as no claim for exemption was made by the petitioner and as the amount other wise due had been paid in full.

8. It was therefore necessary for the petitioner, if he believed that the regulatory duty paid him was unnecessarily paid, to make an application for refund. But such as application had to be made within six months as mentioned under S. 27 of the Customs Act. Unfortunately for the petitioner, this was not done. Consequently his claim for refund is barred by limitation.

9. I may in this connection point out that Ext. P1 order of the 2nd respondent is far from satisfactory. An order affecting the civil rights of a person has to be a speaking order. Ext. P1 is not a speaking order. In regard to the petitioners contention that the conditions mentioned for exemption had been fully satisfied, all that the 2nd respondent had to say on that vital question was :

"Further you have failed to observe the conditions laid down in Government of India Ministry of Finance (D. R. & I) Notification No. 60-cus. dated 20-4-72 for becoming eligible for exemption from payment of the said duty."

No details are given as regards the violations of the conditions. It is not stated as to when and in what manner these conditions were violated. It may also be mentioned that the counter-affidavit filed in this case (filed only in the course of agreements) is also far from satisfactory for none of the relevant details finds a place in it. However in the light of what I have stated in regard to limitation, it is unnecessary for me to express any opinion as regards the validity or otherwise if the claim for exemption from regulatory duty.

10. Subject to this observation, the Original Petition is dismissed. The parties will

bear their respective costs.