

(1994) 03 CAL CK 0004
In the Calcutta High Court
Case No : Suit No. 2598 of 1969

Bengal Ruby Mica Supplies Co.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-03-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 14, 18, 27
Limitation Act, 1963 — Section 17, 17(1)(c)
Mica Mines Labour Welfare Fund Act, 1946 — Section 2

Citation : (1994) 48 ECC 100 : (1994) 54 ECR 43

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit K. Sengupta

1. This suit has been instituted in the year 1969 by Bengal Ruby Mica Supplies Co., a partnership firm, claiming a decree for Rs. 1,05,745.25. The case of the plaintiff who carries on business, inter alia, as a dealer in and exporter of mica, is as under:

2. By a notification bearing No. 18/3/66-1 & RC dated June 6, 1966, the Government of India in exercise of its powers u/s 4A of the Indian Tariff Act, 1934, imposed duty at the rate of SO p. per kg on the export of mica of all types from India. By another notification dated June 15, 1966, the Government of India imposed export duty on mica of all sorts at the rate of 40% ad valorem instead of SO p. per kg. By a further notification dated June 27, 1966 issued by the Government of India, it was provided that the notification dated June 15, 1966 should be deemed to have come into force on June 6, 1966.

3. At all material times a cess at the rate of 2 % ad valorem was leviable on all types of mica exported from India under the provisions of Mica Mines Labour

Welfare Fund Act, 1946 (hereinafter referred to as the said Act of 1946).

4. During the period, October 14, 1966 to February 17, 1967, the plaintiff exported from the Port of Calcutta diverse consignments of mica to various foreign countries. In respect of the said assessments, the said authorities calculated the value of mica exported by the plaintiff upon taking into consideration, inter alia, the cess payable as aforesaid at the rate of 2 % of the value of the mica exported treating the said cess as part of the value of such mica.

5. The plaintiff made payments to the Government of India on the basis of the said assessments made by the authorities on account of export duty.

6. It is the case of the plaintiff that in assessing the export duty payable by the plaintiff in respect of the said consignments, the plaintiff had, in fact, paid an excess sum of Rs. 1,05,745.25 inasmuch as the customs authority wrongfully and illegally took into consideration the cess at the rate of 2 % of the value of the mica exported as aforesaid as part of the value of the said mica.

7. The plaintiff has stated that, at all material times, and in particular, when the plaintiff made the said payments on account of export duty as aforesaid, including the payment of the said sum of Rs. 1,05,745.25 the plaintiff believed and acted on the basis as represented and directed by the customs authorities that the amount of cess paid or payable under the said Act of 1946 was to be taken into consideration in law as part of the price or the value of the mica for the purpose of assessment of export duty. The plaintiff made the said payments and in particular paid the said sum of Rs. 1,05,745.25 in excess of its liability thinking that such payment was in fact and in law due by the plaintiff when the same was not so due.

8. The plaintiff is stated to have, discovered in or about July 1968 that the cess payable under the said Act of 1946 was not to be taken into account or consideration in assessing export duty on the value of the mica exported by the plaintiff and that export duty was to be calculated on the basis of the value of the mica exported and that the amount of cess payable by the plaintiff had nothing to do with regard thereto. In the premises, the plaintiff had no liability in law and in fact to make payment of the said excess amount of Rs. 1,05,745.25 by way of export duty. The plaintiff made the said excess payment of Rs. 1,05,745.25 under the mistaken belief and understanding that the same was payable by the plaintiff to the Government of India by way of export duty when the same was in fact and in law not so due. Prior to July 1968 the plaintiff was not aware of the said legal position as was advised to the said effect.

9. The plaintiff is stated to have discovered the said mistake when it came to know of an order passed by the Appellate Collector of Customs, Calcutta being order No. 1197-1205 of 1968 dated the 27th May, 1968 wherein it had been held that no export duty could be charged and/or was chargeable on the amount of the cess payable under the said Act of 1946 and that for the purpose of

calculating the export duty the value of the mica could not be raised by the amount of the said cess.

10. It is also the case of the plaintiff that the authorities had no power or jurisdiction to realise the said sum of Rs. 1,05,745.25 as part of and/or on account of the export duty in respect of the consignments of mica exported by the plaintiff as aforesaid.

11. According to the plaintiff, the said purported assessments made by the customs authorities to the extent of the said sum of Rs. 1,05,745.25 in respect of the aforesaid consignments were and are in excess of jurisdiction and beyond the scope and/or purview of the Customs Act, 1962 and/or illegal, void and of no effect.

12. It is claimed by the plaintiff that the said sum of Rs.1,05,745.25 was paid as export duty and/or part of export duty in respect of the aforesaid consignments by the plaintiff under the aforesaid mistaken belief and misapprehension and as such the defendant is not entitled to retain and is bound to pay and/or refund the same to the plaintiff.

13. In the premises the plaintiff has asked for a decree for the sum of Rs.1,05,745.25 which was allegedly realised in excess of jurisdiction and on the basis of mistake of law common to both the parties.

14. In the written statement there has been only a bare denial of the case made out by the plaintiff. A contention has been raised that the suit is not maintainable in view of Section 27 of the Customs Act, 1962. It is also the contention that the claim is barred by limitation.

15. It was agreed by the learned Counsel appearing for the parties that since a question of law is involved no oral evidence is required to be adduced in this case and the Court should proceed on the basis of the admitted facts and determine the questions raised.

(a) Whether the suit is maintainable in view of the Section 27 of the Customs Act, 1962?

(b) Whether levy of cess is illegal?

(c) To what relief the plaintiff is entitled?

16. The main question is whether the plaintiff is entitled to any refund as claimed. The other issue regarding the maintainability of the suit will largely depend on the determination of the question as to whether the plaintiff is entitled to any refund.

17. In this case the customs authorities have realised the excess export duty by making assessment on value of "cess", purportedly under the provisions of the Customs Act. The question is whether the customs authorities had any power or jurisdiction to levy such duty. The Customs Act does not authorise levy of export

duty on "cess" and, as such, the said collection of export duty on "cess" is without jurisdiction and authority of law. As a matter of fact the customs authority has levied an export duty on "cess" treating the same to be a part of the assessable value within the meaning of Section 14 of the Act.

18. "Cess" is imposed by way of customs duty on mica exported from the territory of India u/s 2 of Mica Mines Labour Welfare Fund Act, 1946. Under the provisions of Section 14 of the Customs Act, 1962, the duty of customs is chargeable on any goods by reference to their "value". Section 14 is *pari materia* with new Section 4(4)(d)(ii) of the Central Excises and Salt Act, 1944 wherein the duty of excise chargeable on any excisable goods is with reference to "value". The Supreme Court in the Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, has laid down that the expression "value" in relation to any excisable goods does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods. As such "cess" which is by way of customs duty cannot be the part of assessable "value". In that case, the Supreme Court observed as follows (2 ECC 102 , para 49):

We now proceed to the question whether any post-manufacturing expenses are deductible from the price when determining the "value" of the excisable article. The old Section 4 provided by the explanation thereto that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new Section 4 provides by Sub-section (2) that where the price of excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price. The new Section 4 also contains Sub-section (4)(d)(ii) which declares that the expression "value" in relation to any excisable goods, does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale. Now, these are clear provisions expressly providing for deduction, from the price, of certain items of expenditure. But, learned Counsel for the assessee contends that besides the heads so specified a proper construction of the section does not prohibit the deduction of other categories of post-manufacturing expenses. It is also urged that although the new Section 4(4)(d)(i) declares that in computing the "value" of an excisable article, the cost of packing shall be included, the provision should be construed as confined to primary packing and as not extending to secondary packing. The heads under which the claim to deduction is made are detailed below:

(1) Storage charges.

- (2) Freight or other transport charges, whether specific or equalised.
- (3) Outward handling charges, whether specific or equalised.
- (4) Interest on inventories (stocks carried by the manufacturer after clearance).
- (5) Charges for other services after delivery to the buyer.
- (6) Insurance after the goods have left the factory gate.
- (7) Packing charges.
- (8) Marketing and selling organisation expenses, including advertisement and publicity expenses.

19. In view of the aforesaid judgement of the Supreme Court, the contention raised on behalf of the defendant that cess payable at the rate of 2 1/2 % ad valorem on export of mica should be treated as part of the value of such mica for the purpose of assessment under the Customs Act, 1962 cannot be accepted. The customs authorities themselves realised that the levy of export duty on "cess" was illegal and without jurisdiction. As such, the excess realisation of export duty on the "value" of "cess" was refunded. The authorities, however, refused to grant the refund for earlier periods on the ground that the same was time barred u/s 27 of the Act.

20. In the present case, customs authority had no jurisdiction to levy any export duty on "cess" treating the same to be a part of the assessable value within the meaning of Section 14 of the Act. When cess was and/or is not a part of the assessable value, any duty realised on the basis of the said value will be clearly without authority of law and/or in excess of the jurisdiction conferred on the authority. It would not be a case of mere error of law or fact under the provisions of the Customs Act, 1962 to levy the export duty on "cess" not authorised under the Act and the same will be beyond the scope and purview of the Customs Act, 1962 and/or the jurisdiction, authorities and competence of the officers under the Act.

21. The next question is whether the suit is maintainable in view of the provisions contained in Section 27 of the Customs Act, 1962. Section 27, as it stood at the material time, so far as material for our purpose, is as follows:--

Section 27: 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 make an application for refund of such duty to the Assistant Collector of Customs before expiry of 6 months from the date of payment 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 u/s 18, the period of six months shall be computed from the date of adjustment of duty after the final

assessment thereof.

22. Section 27 is not a bar in filing the suit for refund if the claim of the plaintiff is based on statutory or fundamental rights arising independently of the Customs Act, 1962.

23. The provisions of Section 27(1) can be attracted only in respect of refund of such duty which has been collected under the provisions of the Customs Act, 1962, either under some error of law or fact or for any other reasons which may entitle the party concerned to apply for a refund. There is a basic distinction between a duty which is levied without jurisdiction and a duty which is levied under an error of law or fact. In the case of the orders which are passed without jurisdiction, provision of Section 27(1) of Customs Act cannot be attracted because the act of levying duty in such a case is totally without authority of law. In such a case, the party aggrieved can ask for recovery of the duty on the basis that the amount has been paid under a mistake of law, within three years of the date of discovery of the mistake see *Atul Products Ltd. Vs. Union of India and others*,

As indicated, in the instant case, the customs authorities have realised excess export duty by making assessment on value of "cess" purportedly under the provisions of the Customs Act, though the authority had no such power or jurisdiction to levy such duty. The Customs Act did not authorise levy of export duty on "cess" as such the said collection of export duty on cess was totally without jurisdiction and authority of law.

24. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, the Supreme Court has held that where a particular Act contains no machinery for refund of taxes collected in excess of constitutional limits or illegally collected, a suit lies. The Supreme Court further held that an exclusion of jurisdiction of the Civil Court is not readily to be inferred.

25. In the instant case, no machinery has been provided under the Customs Act, 1962 for refund of taxes illegally collected or collected beyond the powers conferred on the authorities. In such a case, the suit for refund lies.

26. In *Union of India (UOI) Vs. A.V. Narasimhalu*, the Supreme Court held as follows:--

We, however, deem it necessary to observe that the Civil Courts have jurisdiction to examine cases in which the Customs Authority has not complied with the provisions of the statute or the officer of customs has not acted in conformity with the fundamental principles of judicial procedure or the authority has acted in violation of the fundamental principles of judicial procedure or he has made an order which is not within his competence or the statute which imposes liability is unconstitutional, or where the order is alleged to be mala fide. A civil suit will lie for obtaining appropriate relief in these cases.

(Emphasis added)

27. In this case, as I have already indicated, the "value" in relation to any excisable goods does not include the amount of the duty of cess which is by way of customs duty and cannot be the part of the assessable value. The customs authorities had no jurisdiction to determine the assessable value in treating the cess as part of the assessable value and, accordingly, the order imposing the duty on the plaintiff on such basis is not within the competence of the customs authorities or within the provisions " of the statute. The liability imposed, in this case, is therefore, unconstitutional.

28. The present case, in my view, comes within the purview of the principles laid down by the Supreme Court in *Patel India Private Limited Vs. Union of India and Others*, In that case, the Supreme Court was considering the scope of Section 40 of the Sea Customs Act, 1878 corresponding to Section 27 of the Customs Act, 1962. In that case also the appellant-company acted as the sole distributing agent in India for the products of M/s. Sawyer's Inc., Portland, USA, and as such used to import view-master stereoscopes, reels, etc. The customs authorities used to levy import duty on the basis of the invoice price u/s 29 read with Section 30 of the Sea Customs Act, 1878 as being the real value of the goods so imported. During the year 1954-55, the appellant-company imported several items set out in Annexure "D" to the appellant's special leave petition, the details of which it is not necessary to set out here. When items 1 and 2 arrived in Bombay Port, the customs authorities, ignoring their hitherto followed practice, refused to accept the invoice price as the real value and levied excess duty in the aggregate sum of Rs. 1,356/-. An appeal to the Customs Collector failed whereupon the appellant-company lodged a revision application before the Government of India. Pending the disposal of the said revision, several other items set out in the said annexure "D" arrived in Bombay Port, in respect of which the Customs, refusing to accept their invoice price, charged the appellant-company with excess amounts as import duty. For fear that demurrage charges would have to be incurred, the appellant-company paid the excess duty charged as aforesaid, but under protest. On March 20, 1957, the Government of India disposed of the said revision, accepting the appellant's contention, and directed reassessment of import duty on the said two items 1 and 2 on the basis of their invoice price and also ordered refund to the appellant-company of the excess duty charged on them. It would seem that since the said revision was pending before the Government of India, the appellant-company thought that the customs would follow the principle which would be laid down in the decision in the said revision. The appellant-company, therefore, abstained from filing appeals in respect of the other items, which had arrived pending the decision of the said revision although the Customs had levied excess duty thereon. On the said revision being disposed of and the Government having therein ordered refund, the appellant-company applied for refund of the excess duty charged in respect of some of items, viz., items 22 to 29 and 33-35. This was done u/s 40 of the Act and within the period appointed therein. The customs granted refund on the aforesaid items 22 to 29 and 33-35, although invoice value thereof had

not been accepted and excess duty had been charged. The customs authorities, however, declined to refund the excess duty in respect of rest of the items. The reason given for such refusal was that the application for refund in respect of those items had not been made within the time prescribed by Section 40. An appeal to the Collector and a revision before the Government of India against the said refusal to grant refund were both rejected, the refusal by the Customs Appraiser being confirmed on the ground that refund was not applied for in time u/s 40.

The appellant-company, thereupon, filed a writ petition in the High Court of Punjab (at Delhi) under Article 226 of the Constitution of India pleading, *inter alia*, that:

- (a) Section 40 of the Act had no application,
- (b) the Union of India was not entitled to appropriate or retain the said excess duty,
- (c) the appellant-company had a legal right to the return of the said excess duty, and
- (d) that there was an error apparent on the record in the orders refusing return of the excess duty.

The appellant-company on these pleas prayed that the said orders of refusal should be quashed and an order should be passed directing return of the excess duty.

29. There the Supreme Court observed as follows:?

There is no dispute that the appellant-company had declared the real value of the articles imported by it and in support thereof had produced the manufacturer's invoices. The customs authorities had refused to accept the invoice price as real value and charged excess duty. But, any doubt with regard to the real value of the several consignments imported by the company was totally eradicated when the Government of India decided the company's revision and directed that the invoice price should be accepted and duty should be assessed accordingly. In respect of the two terms to which the revision related, the Government had also directed refund of the excess duty charged and paid under protest. There was, thus, no doubt or dispute left thereafter as regards the invoice prices being the real value of the consignments. The direction given in its decision in the said revision that the invoice price should be accepted as real value within the meaning of Section 30 of the Act applied to the rest of the consignments. The Customs authorities, therefore, were not right in law in charging excess duty on the rest of the consignments. Indeed, the excess duty was charged in violation of Sections 29 and 30 and in excess of jurisdiction, since, as held by the Government of India, the real value of the goods was their invoice price.

This position, indeed, was accepted by the customs authorities when they ordered refund of excess duty charged by them in relation to items 22 to 29 and 33-35. Such refund could only have been ordered on the footing that the excess duty on those consignments had been charged without the authority of law and, therefore, without jurisdiction. The fact that no application had been made, therefore u/s 40 was irrelevant to the point that the excess duty was assessed and recovered without the authority of law.

Section 40 on which the Union of India relied in its return, provides that no customs duties or charges which have been paid, and of which repayment wholly or in part, is claimed in consequence of the same having been paid through inadvertence error or misconstruction, shall be returned unless such claim is made within three months from the date of such payment. The section clearly applied only to cases where duties have been paid through inadvertence, error or misconstruction and where refund application has to be made within three months from the date of such payment.

As rightly observed by the High Court, the present case was not one where the excess duty was paid through any of the three reasons set out in Section 40. The excess duty was demanded on the ground that the invoice price was not the real value of the imported goods and payment under protest was also made on that footing. The ultimate result in the appellant-company's revision was that charging of excess duty was not warranted under the Act, and that the value on which duty should have been assessed was the invoice price and nothing else. That being the position, Section 40 did not apply and could not have been relied upon by the Customs authorities for refusing to refund the excess duty unlawfully levied on the appellant-company.

30. Thus, the Supreme Court held that Section 40 of the Sea Customs Act, 1878 had no application and besides Section 40, there was no other provision laying down any limit within which an importer has to apply for refund. The refusal to return the excise duty (sic) on the ground that the appellant-company had not applied within the time provided by the Act was clearly unsustainable.

31. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, the contention of the appellants before the High Court was that the payments of Cess in question were made by them under a mistake of law; that they discovered the mistake only on May 2, 1968 when the High Court, by its judgment, declared that the provisions of the Act and the amendments thereto were unconstitutional, and that, as they filed the writ petitions within three months of that decision, the writ petitions were within time. There the Supreme Court observed as follows:--

Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment is made under a mistake of law as

contrasted with a mistake of fact, generally the mistake becomes known to the party only when a Court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a Court makes a pronouncement, it is seldom that a person can even with a reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed, i.e. within 3 years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has said that the starting point of limitation is from the date on which, the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the Court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years, the Court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application.

32. In that case, however, the Supreme Court did not grant relief in the writ petition as there was inordinate delay in filing the writ petition. The appellants who are directed by the Court to file suits being they are so advised. In this instant case, as I have already indicated the plaintiff made the payment of duty under a mistake of law and the plaintiff filed the suit as soon as the mistake was discovered. Therefore, the plaintiff is entitled to succeed in this case.

33. In *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, V.R. Krishna Iyer, J. speaking for the Supreme Court observed as follows:--

Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs on the negative plea of "alternative remedy" since the root principle of law married to justice, is *ubi jus ibi remedium*

(Emphasis supplied)

34. In *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, the Supreme Court held as follows (Page 214 of 2 ECC):-

It is not disputed that the High Courts have power, for the purpose of enforcement of fundamental rights and statutory rights, to make consequential orders for repayment of money realised by Government without the authority of law under Article 226 of the Constitution. 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 the absence of any provision which would bar such a suit either expressly or by necessary implication.

(Emphasis added)

Section 27 only provides a period of limitation for acts done by the customs authorities within the scope of the Act. As I have already said, it does not deal with such orders which are without or in excess of jurisdiction or which are unconstitutional or illegal.

35. In *Vazir Sultan Tobacco Co. Ltd. v. Union of India and Ors.*, reported in 1981 ELT 140, the Delhi High Court following the judgment of the Supreme Court in *Patel India (Pvt.) Ltd.* (supra) held as follows:--

If the State has realised tax or duty in contravention of the law, the Court would be fully justified in directing the State to act in accordance with law and to refund the excess amount of tax or duty which it has realised.

Duty of excise is that which is levied in accordance with the Act. Any money which is realised in excess of what is permissible would be a realisation made outside the provisions of the Act. It was held by the Supreme Court in *Patel India Private Limited Vs. Union of India and Others*, that a limitation provided under the Act, Section 40 in the case of Sea Customs Act, would not apply where excise duty has been assessed and recovered without the authority of law.

36. In the instant case, as I have already indicated, the export duty realised on "cess" is beyond the competence of the Customs Authorities and outside the provision of the Customs Act, as such the same is to be refunded.

37. The Bombay High Court in *Industrial Cables (India) Ltd. Vs. Union of India and others*, (printed at page 112 infra) held that where the duty was collected without authority of law it is trite to say that it is the obligation of the Department to refund the excess of duty collected without authority of law. There the Bombay High Court followed the decisions of the Supreme Court in *Patel India (Private) Ltd.* (supra) and *M/s. Shiv Shankar Dal Mills* (supra).

38. The concept of actions without jurisdiction was expounded and extended in the case of *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147. The said decision was subsequently approved by the House of Lords in *Racal Communications Ltd.* reported in 1981 AC 374. In that case Lord Diplock has observed as follows:

...where Parliament confers on an administrative tribunal or authority, as distinct from a Court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority has

asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide question of law as well as questions of fact or of administrative policy, but this requires clear words, for the presumption is that where a decision making power is conferred on a tribunal or authority that is not a court of law, parliament did not intend to do so.

39. The decision in *Anismic* (supra) has been cited with approval by the Supreme Court in the case of *Union of India (UOI) Vs. Tarachand Gupta and Bros*, there the Supreme Court observed as follows:--

The words "a decision or order passed by an officer of Customs under this Act used in Section 188 of the Sea Customs Act must mean a real and not a purported determination. A determination, which takes into consideration factors which the officer has no right to take into account, is no determination.

This is also the view taken by Courts in England. In such cases, the provision excluding jurisdiction of Civil Courts cannot operate so as to exclude an inquiry by them. In *Anisminic Ltd. v. The Foreign Compensation Commission*, (1969) 1 All ER 208; 2 WLR 163 Lord Reid at pages 213 and 214 of the Report stated as follows:--

It has sometimes been said that it is only where a Tribunal acts without jurisdiction that its decision is a nullity. But, in such case, the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the Tribunal being entitled to enter on the enquiry in question. But, there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But, if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

To the same effect are also the observations of Lord Pearce at page 233. *R.V. Fulham, Hammersmith and Kensington Rent Tribunal* (1953) 2 All ER 4 is yet another decision of a Tribunal properly embarking on an enquiry, that is, within its jurisdiction, but at the end of it making an order in excess of its jurisdiction which was held to be a nullity though it was an order of the kind which it was

entitled to make in a proper case.

40. In *Universal Drinks Private Ltd., Nagpur Vs. Union of India and another*, , the Division Bench of the Bombay High Court observed as follows:

There is a catena of decisions of this Court as well as other High Courts in which interpreting the old Rule 11 it has been held that it does not bar either the civil suit or the writ petition under Article 226 of the Constitution for enforcing the claim of refund of the excise duty illegally recovered or wrongly paid by the assessee by mistake, which may be a mistake of fact or a mistake of law.

It was, thus, open to the petitioner to enforce its claim of the refund of excise duty paid through mistake by recourse either to a civil suit or by filing a writ petition under Article 226 of the Constitution. The petitioner has chosen to enforce the claim by preferring a writ petition in this Court after his applications with the Department for granting refund have failed on the ground that the claim is barred by limitation under the new Rule 11 of the Rules. If the old Rule 11 does not enact a self-contained code, the petitioner cannot be precluded from moving this Court under Article 226 of the Constitution in regard to a claim which is held to be barred by time by the Department.

41. In *Dilichand Shreelal Vs. Collector of Central Excise and Others*, , I held that if the levy or collection is illegal the assessee is entitled to get the refund irrespective of whether the claim is barred by limitation under the Act or not. As indicated earlier, the imposition and the collection of the excise duty under tariff item No. 68 on the aforesaid products manufactured by the petitioner are exempt from duty. In that view of the matter, it has to be held that the levy and collection of the excise duty on the aforesaid products manufactured by the petitioner is illegal. In other words, the assessment made levying the duty is consequentially illegal. Therefore, the Court can under such circumstances set aside the orders of assessment and direct the respondents to refund the duty illegally collected. In a case like this where the duty has been unlawfully collected, the plea of limitation will not hold good. The Court can direct the refund of the duty unlawfully collected.

42. In the present case, Customs authority had no jurisdiction to levy any export duty on "cess" treating the same to be a part of the assessable value within the meaning of Section 14 of the Act, when cess was and/or is not a part of the assessable value, any duty realised on the basis of the said value will be clearly without authority of law and/or in excess of the jurisdiction conferred on the authority. It would not be a case of mere error of law or fact under the provisions of the Customs Act, 1962 to levy the export duty on "cess" not authorised under the Act and the same will be beyond the scope and purview of the Customs Act, 1962 and/or the jurisdiction, authority and competence of the officers under the Act. The Customs Act is complete code only if the Customs authorities act within the scope of the provisions of the Act but if customs authority acts beyond the scope of the Act then the order of the Customs authorities cannot be treated as

final. Section 27 is not applicable in case where the duty is realised unconstitutionally or illegally or without any authority of law or in excess of power conferred under the statute, or Rules or notification even if the application for refund is time-barred under the Customs Act. If there is no machinery for refund of taxes collected in excess of constitutional limits or illegally collected, the suit lies. In the instant case, the collection of export duty on "cess" is patently illegal and beyond the powers conferred on the authorities under the Customs Act, as such the suit lies. The Civil Courts have jurisdiction to examine cases in which the Custom authorities do not comply with the provisions of the statute or the officers of the Customs had not acted in conformity with the fundamental principles of judicial procedure or the authority has acted in violation of the fundamental principles of judicial procedure or he has made an order which is not within his competence or the statute which imposes liability is unconstitutional. Since cess could not form part of the assessable value for the purpose of levy export duty, the officer has made an order which was not within his competence. In that view of the matter, the impugned orders of assessment are without jurisdiction and must be set aside and quashed. Consequently, the plaintiff is entitled to the refund.

43. For the reasons aforesaid, issues are answered as follows:

- a) the suit is maintainable;
- b) the levy of cess is illegal;
- c) there will be decree for Rs. 1,05,745.25 p., there will also be decree in terms of prayer (b) of the plaint.

44. A contention was raised that the plaintiff is not entitled to interest but this contention cannot be accepted. In *Elpro International Ltd. Vs. Joint Secretary, Govt. of India, Ministry of Finance and Others*, , the Supreme Court awarded interest at the rate of 12% on duty which was wrongly collected. In *Metal Distributors Ltd. and another Vs. Union of India and others*, (printed at page 114 infra) and in *Atul Products Ltd. Vs. Union of India and others*, , the Bombay High Court has awarded interest at the rate of 12% per annum on duty illegally collected. There will be decree for interim interest and interest on judgment at the rate of 12%. (sic)

The plaintiff will be entitled to costs.