

(1979) 03 BOM CK 0005

In the Bombay High Court

Case No : Misc. Petition No. 1265 of 1973

Dunlop Rubber Co. (India) Ltd.

APPELLANT

Vs

M.V. Raghwan Iyer and Others

RESPONDENT

Date of Decision : 26-03-1979

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1983) 14 ELT 2289

Hon'ble Judges : B. Lentin, J

Bench : Single Bench

Advocate : B.R. Zaiwalla, S.J. Shah and R.G. Seth, for the Appellant; D.R. Dhanuka and S.G. Shah, for the Respondent

Judgement

1.This is a petition under Article 226 of the Constitution of India for quashing or setting aside the impugned passed by the Assistant Collector of Customs (Drawback Department), viz. the 1st respondent, the Appellate Assistant Collector of Customs, viz. the 2nd respondent, and the Union of India, viz. the 3rd respondent, and for an appropriate writ directing the respondents to grant the refund of Rs. 54,308.50 to the petitioner.

2. The petitioner-company carries on business of manufacturing automobile and other tyres and selling the same in India and abroad. On about 24th November, 1966, the petitioner shipped for export 371 tyres of the value of Rs. 1,08,820/- on board the vessel s.s. "Effigyni". Excise Duty was payable at all material times on the tyres manufactured by the petitioner under the provisions of the Central Excises and Salt Act, 1944. Under the provisions of the Act and/or under the Customs Act, 1962 and/or the rules made thereunder, manufacturers such as the petitioner, were entitled to receive a "drawback" of excise duty on goods exported by them. In respect of the 375 tyres exported by the petitioner, it became entitled to a "drawback" under the appropriate drawback rates in force at the material time.

3. On 2nd December, 1966, the petitioner submitted a Shipping Bill to the

Customs authorities and on the reverse thereof, in accordance with the usual procedure, made an application for drawback amounting to Rs. 54,308.50. The petitioner's drawback application was "considered" by the Assistant Collector of Customs, viz. the 1st respondent, who by his undated order, issued on 12th June, 1969, rejected the petitioner's drawback application as being "unsubstantiated".

4. This order was sent by registered post with acknowledgment due to the Bombay office of the petitioner-company which received it on 23rd June, 1969, as appearing from the date on the postal acknowledgment. However, according to the petitioner, it came to know of this order sometime in August/September 1971 on making enquiries about the result of its drawback application. Thereupon on 2nd September, 1971, the petitioner filed an appeal before the 2nd respondent, who by his order dated 30th August, 1972 (and issued on 20th September, 1972), rejected the petitioner's appeal on the ground that it had not been filed within the prescribed period. On 26th October, 1972, the petitioner filed the requisite revision application which, on 22nd December, 1972, was rejected by the 3rd respondent on the same ground. A copy of this order was forwarded from New Delhi to the petitioner's Calcutta Office on 27th January, 1972. On 14th December, 1973, the petitioner filed the present petition.

5. Mr. Zaiwalla, the learned Counsel appearing on behalf of the petitioner, challenged the impugned Order issued on 12th June, 1969 by the 1st respondent as having been passed with utter non-application of mind. Mr. Zaiwalla urged this order is at best non est.

6. At this stage, a reference to the 1st respondent's impugned Order issued on 12th June, 1969 is pertinent. An except of the relevant portions of this order is as under :-

"Subject : Drawback of Customs & C. Ex. Duties on the Export of Medicine under Shipping Bill No. 1642 of 3-12-1966 per SS EFFIGY.

Read :- The Record of the case :-

Messrs The Dunlop Rubber Co. (India) Limited, Bombay, exported the goods under claim for Drawback Shipping Bill 1642 dated 3-12-1966. No rates are available for the period of shipment in respect of the goods exported.

ORDER

I therefore, order that the claim be rejected as unsubstantiated.

Asstt. Collector of Customs, Drawback Department."

7. It is not in dispute that what the petitioner manufactures and exports are automobile and other tyres, and never medicines. It is also not in dispute that under its Shipping Bill No. 1642 dated 3rd December, 1966, the petitioner had never exported medicines on board, the vessel s.s. "Effigyni". It was on the basis of the 375 tyres, and not medicine, which the petitioner had applied for the

requisite drawback in respect of those tyres and not medicine. It is also not in dispute that in the petitioner's application for drawback, there was no mention of, or even any allusion to, medicine. It was this application which was expected to be and is supposed to have been considered by the 1st respondent. Yet, curiously enough, and for some mysteriously unaccountable reason, the order of the 1st respondent proceeds on the footing that the petitioner had applied for drawback in respect of medicine which it never did, and which was not even remotely the subject-matter of the petitioner's drawback application. According to the order, as no rates were available in respect of medicine, the 1st respondent solemnly proceeded to reject the petitioner's drawback application in respect of tyres, as "unsubstantiated". Naturally the 1st respondent came to that conclusion, as presumably the poor man was busy searching for rates in respect of medicine instead of searching for rates in respect of tyres which was the commodity exported by the petitioner and to which the drawback application pertained. The 1st respondent either had some other application before him when he passed his order or did not appreciate the petitioner's application. Be that as it may, and whatever be the reason, on the face of it, this order discloses total non-application of mind.

8. In the affidavit-in-reply filed by the Assistant Collector of Customs Kailash Nath Gupta, (not the same Officer who passed the order), an attempt has been made to explain away the order passed by the 1st respondent, viz. the word "medicine" was a typographical mistake for the word "tyres", which error was of no consequence and could not have caused any prejudice to the petitioner. It has been laid down repeatedly by various High Courts and the Supreme Court that the validity of an impugned order must be judged by the reasons given in the order itself and cannot be complemented or supplemented by fresh reasons in the shape of an affidavit or otherwise, else an order initially bad, may, by the time it comes to Court on account of a challenge, get validated by additional grounds brought out. To the string of decisions on this aspect, the latest is of the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . Mr. Dhanuka, the learned Counsel on behalf of the respondents, stated that the affidavit-in-reply was filed by another officer as the officer who passed the impugned order had left and was not available. Even so, nothing turns on this statement made by Mr. Dhanuka. Even if the same Officer had filed the affidavit-in-reply, the result would have been the same, for no amount of "explanation" by him could possibly have made valid the order which is so patently unsustainable. The 1st respondent was, in the words of Lord Denning in *R. v. Paddington Valuation Officer*, (1965) 2 All E.R. 836, cited with approval in *H. R. Syiem v. P.S. Lulla*, 72 Bom.LR 534, "guilty of an error which goes to the very root of the determination, in that it has approached the case on an entirely wrong footing..." It was no determination at all. It was lack of co-ordination between hand and head.

9. In these circumstances, the order passed by the 1st respondent is manifestly invalid and demonstrably unjust. It is utterly unsustainable by any standard or

any point of views.

10. The only ground on which this petition was opposed by Mr. Dhanuka, the learned Counsel appearing on behalf of the respondents, was on the ground of limitation and laches. Mr. Dhanuka urged that though the 1st respondent's order issued on 12th June, 1969 was received by the petitioner's Bombay office on 23rd June, 1969, the petitioner did not file the appeal before the 2nd respondent till 2nd September, 1971. Mr. Dhanuka also pointed out that even after the order was despatched by the 3rd respondent on 27th January, 1973, the petitioner did not file this petition until 14th December, 1973 for which delay no explanation was given. Mr. Dhanuka urged that if instead of the petition, a suit had been filed by the petitioner either for a declaration that the impugned Order issued on 12th June, 1969 was bad or for refund of the amount claimed in the present petition, the suit would have been barred by the law of limitation and hence the petitioner should not be granted the reliefs prayed for in this petition which it could not have got by way of a suit. Mr. Dhanuka urged that if a triable question on limitation is raised, a writ petition would not lie.

11. Mr. Dhanuka relied on the decision in *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, where it was laid down that the utmost expedition is the sine qua non for such claims and that the party aggrieved must explain satisfactorily all semblance of delay. However, and this is important, it was also held that while no period could be indicated as to what may be regarded as the ultimate limit of action, each case would have to be considered on its own facts. Following the decision of the Supreme Court in *Moon Mills v. M. R. Meher*, 69 BomLR 594, a Division Bench of this Court held in *Jasmine Mills v. A. V. Venkateswaran*, 79 Bom.LR 438 that mere delay by itself is no bar to the entertaining or the granting the petition, unless it has caused prejudice to the opposite party.

12. In the matter before me, delay on the part of the petitioner is undeniable. However, no prejudice whatsoever has been caused to the respondents nor was it contended, and rightly so, that any prejudice has been caused. If at all, prejudice has been caused to the petitioner which was kept out of a large amount of money by reason of the patently unsustainable order passed by the 1st respondent after a gross delay of nearly 3 years. I have not heard it said or read it laid down that a manifestly erroneous, unjust and unsustainable order which has caused no prejudice to the side seeking to sustain it, should be perpetuated only on the ground of laches to the detriment of the party against whom it is passed. The respondents are least qualified to urge laches and limitation when the 1st respondent himself took nearly 3 years before passing his order and that too with utter non-application of mind.

13. While the appellate and the revisional authorities were correct in dismissing the petitioner's appeal and revision application on the ground of limitation (and they could have done nothing else), what cannot be lost sight of is that if the order of the 1st respondent is set aside, as it must, the orders passed by

respondents 2 and 3 do not survive and must also be set aside.

14. As done by the Madras High Court in Premraj and Ganpatraj and Co. (P) Ltd. (now known as Madras Electrical Conductors (P) Ltd. Vs. The Assistant Collector of Customs, Madras and Others, , the order of the 1st respondent being patently illegal and clearly unsustainable from any point of view, it is in the fitness of things that the appropriate writ do issue for the grant of refund to the petitioner of the proper amount.

15. On the question of merits, Mr. Dhanuka fairly stated that if his contention of limitation and laches did not fund favour with me, then the correct figure of drawback payable to the petitioner would be Rs. 45,197.70, which is acceptable to Mr. Zaiwalla.

16. In the result, the petition is allowed in terms of prayers (a) and (b), save and except that the sum of Rs. 54,308.50 in prayer (b) shall be read as Rs. 45,197.70 which shall be paid to the petitioner within 8 weeks from today. Rule is made absolute accordingly. Each party shall bear his own costs.